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Libel tourism – a solution in sight?

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Introduction

"Libel tourism" is the name given to forum shopping in libel actions.[2] A "libel tourist" is a claimant who chooses an inappropriate forum in order to secure a better outcome. This may be because the substantive law is more favourable, because the procedure is more favourable or because the cost of defending is so great that many defendants will give in rather than fight.

The reason libel tourism is more objectionable than other forms of forum shopping is that libel proceedings involve a conflict between two important human rights: the right to defend one's reputation and the right of free speech. These rights have to be balanced, and countries do this according to their own scale of values. Some give greater protection to free speech, others to reputation. If the parties both live in a country which places a greater value on free speech, and the claimant brings the action in a country which puts more weight on the protection of reputation, the result will be unfair. By shifting the forum to the latter country, the claimant will have deprived the defendant of the right of free speech that would normally be enjoyed. Unless there is some objectively justifiable reason for the claimant's choice of forum – for example, the defendant expressly aimed the defamatory material there – the proceedings ought not to be allowed to go ahead.

The United States is a country which places a high value on free speech. This is enshrined in the US Constitution under the First Amendment. Although there are limits to what may be published, there is more freedom than in England[3] to say things that could be regarded as defamatory.[4] The Americans feel that political freedom and democracy require

1 This paper was written on the basis of the law as it stood in August 2011. Although introduced in Parliament some time ago, the Defamation Bill (which does not apply in Northern Ireland) has yet to become law.

2 The leading treatment of defamation in English conflict of laws is R Morse, "Rights relating to personality, freedom of the press and private international law: some common law comments" (2005) 58 *Current Legal Problems* 133. See also R Balin, L Handman and E Reid, "Libel tourism and the duke's manservant—American perspective" (2009) *EHR Law Review* 303; R Garnett and M Richardson, "Libel tourism or just redress? Reconciling the (English) right to reputation with the (American) right to free speech in cross-border libel cases" (2009) 5 *JPIL* 471. For an earlier study by the present author, see T C Hartley, "Libel tourism and conflict of laws" (2010) 59 *ICLQ* 25.

3 This article is written in terms of English law, but much of what is said will apply to Northern Ireland as well.

4 For a discussion of the differences between US and English law, and the historical context of the First Amendment, see *Telnikoff* v *Matusevitch* 347 Md 561; 702 A 2d 230 (Court of Appeals of Maryland, 1997).

a wide measure of free speech; the English recognise this, but consider that individuals need protection against the abuse by the press of its power. The result is that libel law is more favourable to the claimant in England, while the press enjoys greater freedom in the US. The pro-claimant bias of English law will be mitigated once the Defamation Bill is enacted; even then, however, England will remain an attractive forum for libel litigants. The jurisdictional problem will not disappear.

Examples

At this point, it would be desirable to give some examples.[5] In 2008, Rinat Akhmetov, a Ukrainian oligarch, sued a Ukrainian newspaper, the *Kyiv Post*, in England for libel after it published details of murky activities allegedly carried out by him. The newspaper was forced to print an apology. Though written in English, the *Kyiv Post* had only 100 subscribers in England. Emboldened by this success, Akhmetov then brought proceedings in England against a Ukrainian news internet site that did not even publish in English.[6] The owners of the site could not afford to defend the case and a default judgment for £50,000 was given against them in June 2008. In both these cases, there was no possible justification for bringing the proceedings in England: Ukraine was the appropriate forum.

English law and European Union law

We must now consider the interaction of English law and European Union (EU) law. Under the Brussels I Regulation[7] (the Regulation) as it stands at present,[8] jurisdiction in civil and commercial matters (including defamation) depends on EU law when the defendant is domiciled in an EU member state[9] and on national law when the defendant is domiciled outside the EU.[10] Consequently, EU law applies to jurisdiction in defamation actions against EU defendants, and English law to actions against other defendants. Although the most notorious cases have almost all been against non-EU defendants, we will have to give separate consideration to these two situations. There is also a proposal, put forward by the EU Commission, to extend EU jurisdiction to cover proceedings against all defendants, irrespective of domicile. If this is adopted, the English rules of jurisdiction will cease to apply.

The rule in the *Duke of Brunswick's* case

It is not possible to discuss libel tourism without coming to grips with the rule in the *Duke of Brunswick's* case.[11] Under this rule, which is a peculiarity of the law of libel in England and those countries that follow it,[12] a separate tort is committed each time the offending

5 See *The Economist*, 8 May 2008 and 8 January 2009.

6 The site is www.obozrevatel.com/. "Obozrevtel" means "Observer". The material is written in what seems to be Ukrainian and the site is still going strong (last visited in March 2011).

7 Regulation 44/2001, OJ 2001, L 12/1.

8 There are plans to revise it.

9 The Lugano Convention applies when the defendant is domiciled in a non-EU state that is a party to that convention. At the present time, these latter states are Iceland, Norway and Switzerland. The Lugano Convention extends the system under the Brussels I Regulation to these other states, though there are a few minor alterations. In the following paragraphs, everything said about the EU applies to these three states as well.

10 For the meaning of "domicile" in this context, see the Civil Jurisdiction and Judgments Order 2001, SI 2001/3929, para. 9 (individuals) and the Brussels I Regulation, Article 60 (companies). This concept is not very different from residence. It is much more flexible than the traditional English concept of domicile.

11 *Duke of Brunswick* v *Harmer* (1849) 14 QB 185.

12 It does not apply in the United States, where a "single-publication" rule has been adopted.

material is communicated to another person.[13] Thus, if a million copies of a newspaper are distributed, the publishers of the newspaper will have committed a million torts if the newspaper contains defamatory material. It should also be said that in English law "publish" means "communicate"; so each time the offending material comes to the attention of another person, there is a separate publication. Continental lawyers do not use "publish" in this sense. As a result, confusion can ensue when these matters are discussed in an EU context. For this reason, it is better to say "distribute" or "communicate" rather than "publish" when discussing the law of libel.[14]

Although a separate tort is committed each time the material is communicated (published), claimants may, if they so wish, bring one action for all of them. However, although the claimant may do this, it is not obligatory. Consequently, the claimant is entitled to limit the claim to torts resulting from the communication of the material in England, and not to claim (in that action) for torts resulting from communication abroad. As we shall see below, this has the effect of emasculating the doctrine of *forum non conveniens*.

Jurisdiction

The basic principles of jurisdiction that apply to actions for defamation are similar under English and EU law. The two most important principles in this context are, first, what may be called "home-court" jurisdiction and, secondly, what may be called "claim-based" jurisdiction.

Under the principle of home-court jurisdiction, a defendant may be sued in the courts of his or her home country. Under EU law, this means the courts of the defendant's domicile;[15] under English law, it means in courts of the country in which the defendant is served with a claim form. However, since the United Kingdom is a member state of the EU, jurisdiction over persons domiciled in England (in all matters covered by the Brussels I Regulation) is governed by EU law; so it is only with regard to persons domiciled outside the EU that the English rule of jurisdiction based on service can apply.

Under the principle of claim-based jurisdiction, a court has jurisdiction if there is a reasonable relationship between the claim and the country of the forum. In the case of a claim in tort, both English[16] and EU law[17] agree that the rule is that a court has jurisdiction if the tort was committed in the country of the forum. In view of the rule in the *Duke of Brunswick's* case, this means that an English court will have jurisdiction over all torts resulting from communication to a person in England.

One can summarise the rules of jurisdiction in defamation as follows: where the defendant is domiciled in an EU country, an English court will have jurisdiction if the

13 One of the consequences of this rule is that the period of limitation runs afresh each time there is a new communication of the material. This application of the rule will be abolished by s. 6 of the Defamation Bill.

14 In the leading European case on the subject, *Shevill* v *Presse Alliance SA*, Case C-68/93, [1995] ECR I-415; [1995] 2 AC 18; [1995] 2 WLR 499; [1995] All ER (EC) 289, the Court of Justice of the European Union (CJEU, the new name for the ECJ) speaks of "distribution", rather than "publication".

15 Brussels I Regulation, Article 2(1).

16 Civil Procedure Rules r. 6.36 and Practice Direction 6B, para. 3.1(9).

17 Brussels I Regulation, Article 5(3). This uses the term "harmful event", which has been held by the CJEU to cover both the act which gives rise to the damage and the damage itself: *Bier* v *Mines de Potasse*, Case 21/76, [1976] ECR 1735. In the context of defamation, the damage consists of harm to the claimant's reputation. This occurs when defamatory material is communicated to another person. The place where the damage occurs is the place where the communication is received. In the case of a defamatory radio broadcast, for example, the act giving rise to the damage occurs in the place where the broadcast is transmitted; the damage occurs where the broadcast is received. The courts of both these countries have jurisdiction under EU law.

defendant is domiciled in England or if the material is communicated (published, in the English-law sense) to a person in England; where the defendant is not domiciled in the EU, it will have jurisdiction if the defendant is served with a claim form in England or if the material is communicated (published) in England.[18] Where jurisdiction is based on communication in England, it is limited to claims arising from that communication: claims cannot be brought on the basis of communication (publication) abroad. So the claimant must limit the claim to those torts: this applies under both EU and under English law.

Forum non conveniens

Forum non conveniens refers to the discretionary power of a court to stay proceedings over which it has jurisdiction, if it considers that a foreign court would be a more appropriate forum. *Forum non conveniens* is not permitted where the court derives its jurisdiction from EU law;[19] so it applies only to proceedings against defendants not domiciled in the EU. Even here, however, it fails to work effectively in defamation cases because of the rule in the *Duke of Brunswick's* case. The reason is that if the claimant restricts the claim to those torts resulting from communication in England, the question before the court in deciding questions of *forum non conveniens* will be whether a claim *regarding communication (publication)* in England should be heard in England. If the question is put in this form, the answer is bound to be that it should be heard in England. The court cannot consider which court is best suited to consider the claim with regard to publication in general. This point was made by Lord Steyn in *Berezovsky*:[20]

> [Counsel] said that when the court, having been satisfied that it has jurisdiction, has to decide under Order 11 whether England is the most appropriate forum "the correct approach is to treat the entire publication – whether by international newspaper circulation, trans-border or satellite broadcast or Internet posting – *as if* it gives rise to one cause of action and to ask whether it has been clearly proved that t*his action* is best tried in England." If counsel was submitting that in respect of trans-national libels the court exercising its discretion must consider the global picture, his proposition would be uncontroversial. Counsel was, however, advancing a more ambitious proposition. He submitted that in respect of trans-national libels the principles enunciated by the House in the *Spiliada* case . . . should be recast to proceed on assumption that there is in truth one cause of action.

This "more ambitious" proposition was rejected by Lord Steyn. This rejection is the reason *forum non conveniens* fails to put a stop to libel tourism.

The result is that, under the present law,[21] *forum non conveniens* has little effect on libel tourism: where jurisdiction depends on EU law, it does not apply; where jurisdiction depends on English law, it is rendered ineffective by the rule in the *Duke of Brunswick's* case. The only exception is that if the claimant is completely unknown in England – if he or she

18 For EU law, see *Shevill* v *Presse Alliance SA*, Case C-68/93, [1995] ECR I-415; [1995] 2 AC 18; [1995] 2 WLR 499; [1995] All ER (EC) 289. In *Shevill*, the CJEU held that, in addition to the courts of the country in which the material is communicated, the courts of the country in which the publisher is "established" also have jurisdiction under Article 5(3). It is not entirely clear what "established" means; in any event, this ground of jurisdiction is of little importance in practice since it will usually coincide with the place of the publisher's domicile.

19 *Owusu* v *Jackson*, Case C-281/02, [2005] ECR I-1383; [2005] QB 801; [2005] 2 WLR 942; [2005] 2 All ER (Comm) 577; [2005] 1 Lloyd's Rep 452 (CJEU.)

20 *Berezovsky* v *Michaels* [2000] 1 WLR 1004, p. 1012 (HL). This passage was quoted by the Court of Appeal in *King* v *Lewis* [2004] EWCA 1329, para. 28. *King* v *Lewis* was itself a prime example of libel tourism.

21 For the position under the Defamation Bill, see below.

has no reputation there – the proceedings will be stayed.[22] However, libel claimants are usually international businesspersons or celebrities: if they do not have a great deal of money they will not be able to bring proceedings in England. Such people can usually claim to be known in England. In the case of businesspersons, they would merely have to show that they had business interests in England. So the claim will usually be heard.

The traditional argument

The argument in favour of the status quo (the position prior to the enactment of the Defamation Bill) is that if the claimant has a reputation in England, he or she should be entitled to defend it there. The flaw in this argument is that, in most cases, any remedy granted for communication (publication) in England will necessarily and inescapably impact on the right to communicate (publish) in other countries. This can be shown by taking as examples different forms of publication.

First, let us consider newspapers and news magazines. Leading newspapers from all over the world – for example, *El País* (Spain), *Le Monde* (France), the *New York Times* (USA), as well as German, Russian, Japanese and Turkish newspapers – are widely available in England. It would be unrealistic to expect them to stop distribution in England because of English libel laws, nor could one expect them to withhold publication of a particular edition in England just because it contained an article that might infringe English libel law: that would probably constitute a breach of the distribution agreement with the English seller; in any event, it would be too burdensome. It would be even more unrealistic to expect them to produce a special expurgated edition just for the British market. The same applies to foreign news magazines. Moreover, England would be a much less desirable place to live in if foreign newspapers and news magazines were not available here. We (the English) would be the losers if this happened.

The same is true with regard to printed books. Internet booksellers like Amazon are usually willing to send books worldwide. It would be unrealistic to expect them to restrict sales of particular books in particular countries because of the libel laws in force there. If the publishers requested them to do this, they would probably refuse to carry the book at all. So a foreign publisher can only avoid publication (distribution) in England by restricting sales elsewhere.

Similar arguments apply to internet publication. Where an item is put on the internet, it is regarded by English and Commonwealth courts as being communicated (published) everywhere that it can be downloaded.[23] In practice, it is not reasonably possible to block availability in one particular country. So a ban on publication in England means a ban or publication everywhere. Moreover, all major newspapers, magazines and TV networks have an internet edition, available from their websites; so even if material does not reach England by other means, it will come over the internet. Even words spoken at an academic or scientific conference are likely to be published on the internet.

The consequence is that, except in the case of marginal and unimportant forms of publication, any restriction on communication (publication) in England imposed by a court in a libel judgment will also constitute a restriction on communication in the world as a whole. This is true even if, in the case of an injunction, the injunction is limited to publication in England: it is often not commercially possible to stop publication in England

22 Under a different principle, the court might strike out the proceedings for abuse of process if publication in England was minimal: *Jameel (Yousef)* v *Dow Jones & Co. Inc.* [2005] QB 946; [2005] 2 WLR 1614 (CA).

23 *King* v *Lewis* [2004] EWCA Civ 1329 (CA); *Dow Jones & Co. Inc.* v *Gutnick* (2003) 210 CLR 575; 77 ALJR 255; 194 ALR 433 (High Court of Australia).

without also restricting it in other countries. This is why the traditional argument breaks down: it is not possible to isolate publication in one country from that in the world as a whole. The only solution is to balance the defence of reputation (worldwide) with the right to free speech (worldwide).

Assume, for example, that one American makes a statement about a second American in an American newspaper – perhaps the *New York Times* – which is on sale in England. If the second American sues for libel in England, and the English courts decide to hear the case, the effect will be that the limits of free speech and freedom of the press in the United States will be subject to determination by the courts of England. This cannot be right.

Choice of law

So far, we have been considering the problem from the point of view of jurisdiction. The reason is that in practice English courts never apply foreign law to defamation. Choice of law in defamation is outside the scope of the Rome II Regulation[24] and the Private International Law (Miscellaneous Provisions) Act 1995.[25] So the common law applies. The common law rule is the so-called "double-actionability" rule, originally laid down in *Phillips* v *Eyre*[26] and refined in *Boys* v *Chaplin*.[27] Under this, a tort committed in a foreign country is actionable in England if, and only if, it is actionable under the foreign law (it must be civilly actionable: it is not enough if it is a criminal offence) and it is actionable as a tort under English law.[28] Where the tort is committed in England, on the other hand, English law alone will be applied.[29]

At least as regards the core issue of whether the statement is defamatory, it would not be practical to apply foreign law, since what is regarded as defamatory depends on the attitudes and values current in a given society at a given time. A judge or jury from one country would find it difficult to apply the attitudes and values of a foreign country. Although the EU Commission is still trying to find an acceptable choice-of-law rule for defamation, it is doubtful whether this will ever be possible. For this reason, a solution must be found on the basis of jurisdiction.

The problem

Assume that a person living in a foreign country (the defendant) publishes material concerning another person (the claimant) who lives in the same country or in a third country (not England). Assume that there is no remedy under the law of the claimant's country or the defendant's country. The claimant sues in England, where there may be a remedy. If the material is published on the internet, or in a newspaper, magazine, book or TV programme, it will almost certainly be regarded by English courts as having been communicated (published) in England. So jurisdiction in defamation will be established as long as the claimant limits the claim to torts resulting from communication (publication) in England; *forum non conveniens* will not pose any obstacle, provided the claimant has a reputation in England.

To make the problem more concrete, assume that a website owned by a locally based organisation in the imaginary state of Ruritania publishes an item asserting that a Ruritanian

24 Regulation 864/2007, OJ 2007, L199/40, Article 1(2)(g).

25 Ss 9(3), 10 and 13.

26 (1870) LR 6 QB 1 (Exchequer Chamber).

27 [1971] AC 356; [1969] 3 WLR 322; [1969] 2 All ER 1085 (HL).

28 Sir Lawrence Collins (ed. with specialist editors), *Dicey, Morris and Collins: The conflict of laws* 14th edn (London: Sweet & Maxwell 2006) (hereinafter *Dicey, Morris & Collins*), r. 235, pp. 1957 et seq.

29 *Dicey, Morris & Collins*, p. 1960, text to, and cases cited in, note 2.

businessman bribed an official in Ruritania to avoid prosecution. The businessman, though not widely known in England, does business there and has a circle of business associates. He sues the website owner in England. Under current English law (prior to the enactment of the Defamation Bill), the English courts will assume jurisdiction. Any challenge on the basis of *forum non conveniens* will fail.

In this situation, the defendant will be faced with a choice. It can do nothing and allow a default judgment to be given, or it can accept that the limits of free speech in Ruritania are to be determined by an English court applying English law. If it decides to defend the case on the merits, it will be in for a nasty shock if it contacts a firm of London solicitors specialising in libel law. Since it is resident abroad, it will probably be told that the firm will not take on the case unless it provides a guarantee that its fees will be paid. This may be for as much as £100,000.[30] Many defendants cannot find this kind of money. So the defendant may have to admit defeat and accept the terms offered by the claimant (a withdrawal of the assertion, coupled perhaps with damages) or allow the case to go by default and hope that the resulting judgment will not be enforced in its home country. This is not a happy state of affairs and has caused resentment in foreign countries.

Reaction in the United States

One such country is the United States, where legislation has been adopted in a number of states to prohibit the enforcement of foreign libel judgments, unless the result would have been the same under the First Amendment. The first such Act was passed by the New York State Legislature. This is rather provocatively entitled "The Libel Terrorism (*sic*) Protection Act".[31] It amends the New York legislation for the recognition of foreign judgments to provide that a foreign defamation judgment will not be recognised unless the defamation law applied by the foreign court provided at least as much protection for free speech as would be provided by the constitutions of the United States and New York. The legislation also confers jurisdiction on the New York courts to hear actions brought by New York residents (and certain other persons) for declaratory judgments[32] against persons who have obtained defamation judgments against them in foreign countries. Similar legislation has been adopted in other states.[33]

30 See *The Economist*, 8 January 2009, "Are English courts stifling free speech around the world?" where the initial outlay is said to be $200,000, rising to over $1m if the case is strongly contested. According to research conducted in Oxford, the average costs of libel proceedings in England are 140 times higher than the European average: Centre for Socio-Legal Studies, University of Oxford, *A Comparative Study of Costs in Defamation Proceedings Across Europe* (University of Oxford, December 2008), p. 3 (see further at para. 146 in the *MGN* case, below). In *MGN Limited (Daily Mirror)* v *United Kingdom* (ECtHR, 18 January 2011), the European Court of Human Rights held that the costs in the *Naomi Campbell* case – over £1m was claimed (a sum subsequently reduced in a settlement) while the damages were only £3500 – were excessive and constituted a breach of the defendant's freedom of expression under Article 10 of the European Convention on Human Rights. See, however, D Howarth, "The cost of libel actions: a sceptical note" (2011) *CLJ* 397, where it is said that too little is known for it to be possible to assert that costs in libel actions in England are too high. The methodology of the Oxford study (above) is also criticised. However, this uncertainty is itself a powerful deterrent for defendants, who may be unwilling to risk financial ruin in order to defend their right to publish what they believe to be the truth.

31 Laws of New York, 2008, Chapter 66.

32 Including a declaration that the defamation judgment will not be recognised in New York.

33 See California Statutes, 2009, Chapter 579 (amending ss 1716 and 1717 of the California Code of Civil Procedure); Utah, 78B-5-320 to 322 of the Utah Code Annotated 1953 (2010); Laws of Maryland, 2010, Chapter 658 (House Bill 193); Florida Statutes, 2009, ss 55.605 (2)(h); 55.6055; Illinois, 735 Ill. Comp. Stat. 5/12-621 (B)(7) (2009); 735 Ill. Comp. Stat. 5/2-209 (B-5) (2009), enacted August 2008.

Where the state legislatures led, Congress followed. In 2010, President Obama signed into law the SPEECH Act,[34] which bars the enforcement of foreign libel judgments unless the defendant would still have been liable under the First Amendment. Unusually, this measure was passed unanimously in both Houses of Congress, something which shows the strength of feeling on the matter.

The Act contains a congressional finding which reads as follows:

(1) The freedom of speech and the press is enshrined in the first amendment to the Constitution, and is necessary to promote the vigorous dialogue necessary to shape public policy in a representative democracy.

(2) Some persons are obstructing the free expression rights of United States authors and publishers, and in turn chilling the first amendment to the Constitution of the United States interest of the citizenry in receiving information on matters of importance, by seeking out foreign jurisdictions that do not provide the full extent of free-speech protections to authors and publishers that are available in the United States, and suing a United States author or publisher in that foreign jurisdiction.[35]

(3) These foreign defamation lawsuits not only suppress the free speech rights of the defendants to the suit, but inhibit other written speech that might otherwise have been written or published but for the fear of a foreign lawsuit.

(4) The threat of the libel laws of some foreign countries is so dramatic that the United Nations Human Rights Committee examined the issue and indicated that in some instances the law of libel has served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work. The advent of the internet and the international distribution of foreign media also create the danger that one country's unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest.

(5) Governments and courts of foreign countries scattered around the world have failed to curtail this practice of permitting libel lawsuits against United States persons within their courts, and foreign libel judgments inconsistent with United States first amendment protections are increasingly common.

Although Congress was too polite to say so expressly, this measure was principally aimed at the United Kingdom.

Like the state statutes, the SPEECH Act was enacted in response to the *Ehrenfeld* case. Rachel Ehrenfeld was an Israeli-American who wrote books on terrorism. In one of her books, she claimed that Khalid Mahfouz, an eminent Saudi businessman, was responsible for financing international terrorism. The book was published in the US. It seems that it was not marketed in the United Kingdom: Ehrenfeld claimed that neither she nor her publisher, an American firm, had ever taken steps to make it available there. However, a number of

34 Its official title is the Securing the Protection of our Enduring and Established Constitutional Heritage Act 2010.

35 This paragraph does not read easily. The phrases "free expression" and "first amendment to the Constitution of the United States" are phrasal or compound adjectives. The relevant nouns are respectively "rights" and "interest". The paragraph would have read better if hyphens had been used: "Some persons are obstructing the free-expression rights of United States authors and publishers, and in turn chilling the first-amendment-to-the-Constitution-of-the-United-States interest of the citizenry in receiving information on matters of importance".

copies were sold in England – the English judgment mentioned 23 – and the first chapter was available on an American website which could be accessed in England.[36]

Mahfouz and his two sons brought proceedings in England for libel against Ehrenfeld and her publisher. Jurisdiction was based on communication (publication) in England. Ehrenfeld did not defend – she said she did not have the financial resources to do so – and a default judgment was obtained. A declaration of falsity was made, and the claimants (Mahfouz and his two sons) were granted damages of £10,000 each. Ehrenfeld was also ordered to pay costs. The total sum awarded is said to have been $250,000.[37] In addition, an injunction was issued requiring Ehrenfeld and her publisher not to publish the material in England.

Ehrenfeld then brought proceedings in a federal court in New York (SDNY) for a declaration that, under federal and New York law, Mahfouz could not prevail on a libel claim against her based upon the statements at issue in the English action and that the English default judgment was unenforceable in the United States. Mahfouz claimed that the American courts lacked jurisdiction to hear the case. This claim was upheld by the New York Court of Appeals, to which the matter was referred by the Second Circuit: Mahfouz lacked sufficient contacts with New York to justify the assertion of jurisdiction.[38]

Mahfouz does not appear to have taken steps to enforce the judgment in the United States. Nevertheless, Ehrenfeld then began a political campaign, which was supported by media interests. The SPEECH Act and the state statutes were the fruit of this campaign.

Despite its great symbolic importance, the concrete effects of the SPEECH Act are probably not significant: even before any of the legislation was adopted, foreign libel judgments would probably have been unenforceable in the United States for reasons of public policy (unless the result would have been the same under the First Amendment).[39]

A fair balance

Although libel tourism is wrong, one should not go to the opposite extreme of preventing a claimant from bringing proceedings in a legitimate forum. Nor should one accept the view, championed by some American commentators, that the First Amendment should apply throughout the world, at least where the defendant is American: foreign courts with an acceptable basis of jurisdiction should be entitled to apply their *lex fori*, just as American courts do. As was said at the beginning of this article, a fair balance must be struck between the right to protect one's reputation and the right of free speech. This should apply with regard to jurisdiction as well as substantive law.

If the claimant sues the defendant in the latter's country (the country in which he or she is resident or domiciled),[40] the defendant can hardly complain about libel tourism. Likewise, claimants should have a right to defend their reputation in their own country, provided that the material is communicated (published) there.

If these two propositions are accepted, we are left with the situation in which the action is brought in a country in which neither party is resident or domiciled. This is quintessential

36 ABCNews.com.

37 A Specter and J Lieberman, "Foreign courts take aim at our free speech", *Wall Street Journal*, 14 July 2008.

38 *Ehrenfeld* v *Mahfouz* 9 NY 3d 501; 881 NE 2d 830; 851 NYS 2d 381 (2007).

39 *Telnikoff* v *Matusevitch* 347 Md 561; 702 A 2d 230 (Court of Appeals of Maryland, 1997). Although this judgment was based on the law of Maryland, the position would probably have been the same in other states.

40 In this paper, "domicile" is used in the sense in which it applies for the purpose of jurisdiction under the Brussels I Regulation. See n. 10, above.

libel-tourism territory, though even here the action should be permitted if the defendant specifically targeted that country.[41]

If the claimant is allowed to sue in his or her own country, in the defendant's country, or in a country that has been specially targeted, the claimant's interests will be protected. Anything more should be regarded as illegitimate and not allowed.

The solution – English law

As far as jurisdiction under English law is concerned,[42] the problem will be solved once the Defamation Bill becomes law. The provision dealing with jurisdiction is cl. 7(2), which reads:

> A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.

Two points should be made: although this contains a test reminiscent of *forum non conveniens*, it is clearly stated that it is a rule of jurisdiction; secondly, it does not say that England and Wales must be the most appropriate place to hear the claimant's claim – it says that it must be the most appropriate place (of all the places in which the statement complained of has been published) in which to bring an action in respect of the statement.[43] This will solve the problem created by the rule in the *Duke of Brunswick's* case. Once the Bill is enacted, the "more ambitious" proposition rejected by Lord Steyn in *Berezovsky*[44] will become the law.[45]

To show how the new provision changes the law, we can give an example based on the facts of the Court of Appeal's decision in *King* v *Lewis*.[46] The claimant, Don King, was a boxing promoter. He was a US citizen, resident in the United States. There were three defendants. One was a British citizen, but all were resident in the United States. The alleged libel was a statement on a California-based website devoted to boxing. The statement was that King was anti-Semitic. The context of this statement appears to have had nothing to do with England. However, King, who had promoted a number of boxing matches in England and was well known in boxing circles there, sued in England. The action was challenged on the ground of *forum non conveniens*, but the Court of Appeal held that since he clearly had a reputation in England, he should be entitled to protect it there.

As it would have been difficult in practice to communicate the material in the US (and the rest of the world) without also communicating it in England, the effect of the judgment was that the right of US residents to put material about another US resident on the internet in the US would be judged by an English court applying English law: free speech for US residents in the United States would be governed by English law.

Under cl. 7(2), on the other hand, the question would not be whether England was the appropriate forum for the claimant's claim, but whether, of all the places in which the statement had been published (in effect, the whole world), England was clearly the most

41 As to what might constitute "targeting", see paras (b) and (c) of the proposed draft for an EU rule on jurisdiction in defamation put forward below ("The solution – EU law").

42 The Bill will apply only to England and Wales: it will not apply in Northern Ireland.

43 Cl. 9 gives a wide definition to "statement".

44 See n. 20 above.

45 The only improvement to cl. 7 which might be suggested is that it should be made clear (as is done in cl. 6, the provision dealing with limitation of actions) that a statement that is substantially the same as the statement complained of should be regarded as the same statement.

46 [2004] EWCA Civ 1329.

appropriate place in which to bring an action in respect of the statement. There can be little doubt that the answer would be negative: the United States was more appropriate.

The solution – EU law

Clause 7(2) does not apply where the defendant is domiciled in the United Kingdom, another member state of the EU, or a contracting party to the Lugano Convention.[47] This is because EU law applies in these situations. Moreover, if – as proposed by the EU Commission[48] – the scope of the Regulation is widened to apply irrespective of domicile, cl. 7(2) will be deprived of effect. So it is essential to deal with the problem in the revised Brussels I Regulation.

There appear to be three ways in which this might be done. The first possibility would be to have a provision in the revised Regulation permitting member states to adopt their own jurisdictional requirements (in addition to those laid down in the Regulation) in the case of defamation. This might read:

> In order to curb abuse, Member States may impose additional jurisdictional limits on the right to bring claims in their courts arising out of violations of privacy and rights relating to personality including defamation.[49]

If adopted, this would allow cl. 7(2) of the Defamation Bill to apply even in situations governed by the Regulation. This would mean that libel tourism would be curbed in England in all situations. Such a result would be highly satisfactory from the English point of view; unfortunately, however, it might be regarded as going contrary to the EU policy of uniformity.

The second possibility would be to include a provision in the revised Regulation to the effect that the extension of the scope of the Regulation to cover defendants domiciled outside the EU would not apply in the case of defamation. This would mean that libel tourism would be curbed in England where the defendant was domiciled outside the EU (and the states that are parties to the Lugano Convention), but not where the defendant was domiciled within these states.

The third possibility would be to have an EU rule on libel tourism. This might look like the following:

> Except for Article 2(1), no provision of this Regulation conferring jurisdiction on the courts of a Member State shall apply to claims arising out of violations of privacy and rights relating to personality including defamation, unless, in addition to the requirements of the provision in question, either—
>
> (a) the claimant is domiciled in the country of the forum; or
>
> (b) the defendant deliberately took special steps to target the country of the forum so that the material was communicated there to a greater extent than would otherwise be the case; or
>
> (c) the material in question was communicated to a greater extent in the country of the forum than in any other country of the world.

Article 2(1) of the Regulation is the provision granting jurisdiction to the courts of the member state in which the defendant is domiciled. This would not be affected by the proposed amendment. The result of the proposal would, therefore, be to restrict libel proceedings to the courts of the defendant's domicile, to the courts of the claimant's

47 Cl. 7(1).

48 For the Commission proposal, see COM(2010) 748/3, 14/12/2010, para. 3.1.2 (p. 9).

49 The phrase "violations of privacy and rights relating to personality including defamation" is the formula used in the Rome II Regulation to exclude defamation: see Regulation 864/2007, OJ 2007, L199/40, Article 1(2)(g).

domicile (provided the other requirements of jurisdiction were satisfied) and the courts of a member state which was targeted (provided again that the other jurisdictional requirements were satisfied). Paragraph (b) gives a subjective definition of targeting, while paragraph (c) contains an objective definition. If adopted, this would curb libel tourism in all circumstances.

Conclusions

Once the Defamation Bill becomes law, the problem of libel tourism will be solved with regard to proceedings in England in so far as the matter lies within the jurisdiction of the United Kingdom. However, a solution will also have to be found at the EU level. Until this is done, the problem will remain.

Postscript

After the above was written, the CJEU gave judgment in the *eDate Advertising* case.[50] This concerned cross-border privacy injunctions against EU defendants in internet cases, but will also apply to internet libel actions. The court confirmed that, in internet cases, material is to be regarded as distributed (published) wherever it is or has been "accessible". This would allow the claimant to sue wherever the material can be downloaded – in practice, in any member state – but only for damage suffered in that member state. Secondly, it established a new head of jurisdiction (also derived from Article 5(3) of the Brussels I Regulation) which is available (so far) only in online libel or privacy cases. Under this, the claimant may bring proceedings (for the totality of the damage) in the member state in which the centre of the claimant's interests is located. This will normally correspond to the claimant's domicile or habitual residence, though it will be flexible enough to take account of his or her commercial and professional activities. However, in all proceedings regarding online publication (both libel and privacy), the publisher must not be subject to "stricter requirements" than apply under the law of the member state in which it is established. This rule, which is based on the Electronic Commerce Directive,[51] will give the publisher a significant level of protection. However, it applies only if the publisher is established in another EU state.

The judgment constitutes a significant advance. However, it is unfortunate that the CJEU did not abolish the rule that proceedings can be brought in any member state in which the online material is accessible: this ground of jurisdiction is open to abuse and, in view of the new ground, unnecessary.

50 Joined Cases C-509/09 and C-161/10 (25 October 2011, Grand Chamber).

51 Directive 2000/31/EC, OJ 2000 L 178, p. 1.