

RIGHTS RELATING TO PERSONALITY, FREEDOM OF THE PRESS AND PRIVATE INTERNATIONAL LAW: SOME COMMON LAW COMMENTS

1. INTRODUCTION

Common law systems protect so-called “rights relating to personality” (which is not a term of art in common law systems) in a variety of ways and through a variety of legal techniques amongst which are: defamation; malicious falsehood; invasion of privacy; the law relating to confidence; and the law relating to data protection. The scope of protection offered by these techniques (the first three of which involve the law of tort and the other two of which may involve equitable rights or tort and statute) may differ considerably as between different common law systems and, in the context of application to the press and other media, may be complicated by the impact of constitutional provisions¹ and/or human rights norms². Translated into the field of private international law, the issues may become increasingly complex, not least because of the increasingly global operations of traditional media and, of course, that most ubiquitous of creatures, the internet.³

This paper will deal with the impact of the law of defamation and the law relating to invasion of privacy on the freedom of the press and other media in the international context, principally from the standpoint of English law, though some consideration will be given to other common law systems. It treats selected issues and should not be

¹ The most obvious example is the First Amendment to the United States Constitution which has generated a vast amount of case-law and literature in this context.

² The most obvious example in the United Kingdom is the European Convention on Human Rights, Art 10. Since the implementation of the Convention in domestic law in the Human Rights Act 1998, this provision has made regular appearances in the case-law. For a notorious example see, in the context of defamation, *Reynolds v. Times Newspapers Ltd* [2000] 2 A.C. 115.

³ Consideration of the impact of the internet seems to have brought new life to American law reviews which are replete with articles on the matter, often carrying obscure, but catchy titles. For examples, in relation to the conflict of laws, see Beall, *The Scientological Defenestration of Choice-of Law Doctrines for Publication Torts on the Internet* 15 John Marshall Journal of Computer and Information Law 361 (1997); Swire, *Of Elephants, Mice and Privacy: International Choice of Law and the Internet* 32 Int'l Law. 991 (1998).

regarded as an exhaustive consideration of all of the exotica to which this aspect of private international law may give rise. It begins by providing some background to the issues, before proceeding to consider the traditional questions of jurisdiction, choice of law and recognition of judgments.

2. BACKGROUND

A. Defamation

London is often described as the “libel capital of the world”⁴ and, according to one authority, American journalists are prone to describe it as “a town named Sue”⁵. Such extravagant descriptions are not prompted directly by private international law considerations, but rather by the pro-claimant character of the substantive rules of the English domestic law of defamation designed to protect a person’s reputation.⁶ These characteristics, it has been said, attract “many wealthy foreign forum-shoppers in search of favourable verdicts that they would not obtain at home, or in the home countries of publishers whose newspapers and magazines have an international circulation.”⁷ Thus the English courts become a haven of refuge for those who are unable to claim against the relevant defendant in a court in the United States, or Europe, or some other country.⁸ And while it is unsurprising that English based publishers are not safe from the law of England, it is important to note that foreign publishers are at risk as well.⁹

⁴ See, e.g. Robertson and Nicol *Media Law* (4th ed., 2002), p. 70; Barendt *et al.*, *Libel and the Media* (1997), p. 16; Vick and Macpherson 36 Va. J. Int’l. L. 933, 934 (1996); Penzi 10 Temple Int’l & Comp. L. Q. 211 (1996); *Telnikoff v. Matusevitch*, 702 A. 2d 230, 250-251 (1996).

⁵ Robertson and Nicol, *ibid.*

⁶ English law divides defamation into libel and slander, the former being a communication in permanent form, the latter being a communication in non- permanent form. Most communications through the media are regarded as being in permanent form and thus give rise to claims in libel. Accordingly, slander will not be separately considered in this paper. Libel, exceptionally, may give rise to criminal liability but this is now rarely, if ever, invoked and is not considered in this paper. This paper does not consider the possible effect of the E-Commerce Directive on the private international law of defamation. For some thoughts on the position in England, which is problematic, see Law Commission, *Defamation and the Internet, A Preliminary Investigation, Scoping Study No. 2* (2002), paras. 4.37-4.49; Dicey and Morris, *The Conflict of Laws* (13th ed., 2000), *Fourth Supplement* (2004), pp. 458-460.

⁷ Robertson and Nicol, *supra* n.4, p.101.

⁸ See Fifer and Sachs 8 DePaul J. Art & Ent. Law 1, 4 (1997).

⁹ See *infra*.

So what are the features of English libel law that make it so attractive ? While this is not the place for a detailed discussion of substantive law the following may be briefly mentioned. First, liability is strict: there is no requirement on the claimant to prove fault. Secondly, the claimant is not required to prove the falsity of the statement: if the defendant alleges the statement is true, the burden lies on the defendant to prove that fact. Thirdly, libel is actionable without proof of special damage. Fourthly, each publication of a statement is a separate tort. Fifthly, unlike the position in the United States, there is no requirement that a claimant who is a public figure prove “actual malice” on the part of the publisher.¹⁰ Sixthly, defamation claims are among the few civil claims in England which can be tried by jury and until recently juries were prone to award large sums by way of damages. This has now been corrected by guidance from the Court of Appeal¹¹ to the effect that libel awards should not be so large as to deter investigative journalism, that juries should be given judicial guidance as to how to keep them in proportion, and that juries should be told of the level of damages awarded in personal injuries cases (which are generally much lower than the more exaggerated libel awards) since it is “offensive to public opinion...that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or insensate vegetable”¹². A reduction in the size of awards may reduce the financial

¹⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). “Actual malice” requires knowledge that the statement was false or reckless disregard of whether it was false or not: *ibid.*, at pp. 279-280. A “private figure” claimant must prove that the defendant was at least negligent in publishing a false statement: *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974).

¹¹ See *Rantzen v. Mirror Group Newspapers* [1994] Q.B. 670 (claimant, well-known television presenter, awarded £250,000 by jury: award reduced to £110,000); *John v. MGN Ltd.* [1997] Q.B. 586 (claimant, rock star, Elton John, awarded £350,000 by jury, in respect of invented story about his eating habits: award reduced to £75,000). Earlier very high awards included: £500,000 to Conservative politician and popular novelist, Jeffrey Archer in respect of allegations in the *Star* that he had paid £2,000 to a prostitute to leave the country, and who, subsequently, as Lord Archer of Weston-super-Mare was sentenced to 4 years imprisonment for fabricating evidence in support of his claim; a settlement of £ 1,000,000 in favour of Elton John against the *Sun* newspaper; a jury award of £ 600,000 to the wife of the “Yorkshire Ripper” against *Private Eye*, the satirical magazine, a sum described by the Court of Appeal as unreasonable and excessive (see *Sutcliffe v. Pressdram* [1991] 1 Q.B. 153); £ 1.5m awarded by a jury against Count Tolstoy in favour of Lord Aldington whom the former had accused of being a “war criminal” despite a direction by the judge that the jury “should not deal in Mickey Mouse money, just reeling of noughts because they sound good”, an award later described by the European Court of Human Rights as so disproportionate as to amount to a violation of Article 10 of the Convention (see *Tolstoy Miloslavsky v. United Kingdom* (1995) 20 E.H.R.R. 442).

¹² *John v. MGN Ltd.* [1997] Q.B. 586, 614.

incentive to litigating in London, though it may well be that wealthy claimants are more interested in vindicating their reputations than in obtaining compensation.¹³ A variety of “prominent” foreign residents have attempted to take advantage of these provisions so as to proceed against the English based media in cases which have raised no issues of private international law. These include: a claimant formerly responsible for the security services in Ghana;¹⁴ the elder son of Colonel Gaddafi;¹⁵ the ex-premier of the Republic of Ireland;¹⁶ the second of the three wives of the Emir of Qatar;¹⁷ Tom Cruise and Nicole Kidman;¹⁸ McDonald’s;¹⁹ the almost customary Russian “oligarch;”²⁰ a prominent Saudi Arabian dissident, resident in London;²¹ a

¹³ Particularly if the claimant is anxious to preserve a business reputation with a view to continuing success: *cf. Berezovsky v. Michaels* [2000] 1 W.L.R. 1004, 1010-1011 (H.L.). See also the *McDonald’s* litigation described in n. 19, *infra*. Defamation Act 1996, ss. 8-10 enables the court to dispose summarily of a claim without jury trial if it appears to the court that there is no defence to the claim which has a realistic prospect of success, and that there is no other reason why the claim should be tried, but under this procedure damages awarded may not exceed £ 10,000. For a case considering the application of these provisions in the context of an alleged press libel having an international dimension, see *HH Sheikha Mouza Al Misnad v. Azzaman Ltd.* [2003] EWHC 1783 (QB) (claimant sought summary disposal, resisted by defendant: claimant’s application refused).

¹⁴ *Tsikata v. Newspaper Publishing plc* [1995] E.M.L.R. 8 (claimant alleged to have masterminded abduction and murder of three Ghanaian High Court judges and a retired army officer).

¹⁵ *Gaddafi v. Telegraph Group Ltd.* [2000] E.M.L.R. 431 (allegation that claimant had attempted through henchmen to lure journalist responsible for article in Daily Telegraph to Libya with a view “to stringing him up from the nearest Tripoli lamp post”). See also *Gaddafi v. Telegraph Group Ltd.* (No. 2) [2000] WL 1675142.

¹⁶ *Reynolds v. Times Newspapers Ltd.* [2001] 2 A.C. 127 (allegation that claimant had lied to Parliament and deceived his coalition partner).

¹⁷ *HH Sheika Mouza Al Misnad v. Azzaman Ltd.* [2003] EWHC 1783 (QB) (allegation, *inter alia*, of abuse of power and interference in government affairs).

¹⁸ *Cruise v. Express Newspapers* [1999] Q.B. 931 (allegation that their marriage a sham; newspaper apologised and paid damages; one year later claimants announced their divorce).

¹⁹ See, e.g. *McDonald’s Corp. v. Steel* [1995] 3 All E.R. 615. In this case McDonald’s Corp., incorporated in Iowa, U.S.A. and its wholly owned U.K. subsidiary brought libel proceedings against an unemployed former postal worker and a part-time bar worker in respect of pamphlets alleging, *inter alia*, that McDonald’s was destroying rain forests, producing litter in cities and causing cancer, heart disease and food poisoning. After the longest civil trial in English legal history at the time (313 days) and numerous interlocutory applications and appeals the claimants were awarded £40,000 in damages which they have little hope of recovering. McDonald’s costs, which the company did not seek to recover from the defendants have been estimated to be in the region of \$10 million: see Nicholson 18 Wisconsin International Law Journal 1, 2 (2000) where the national proceedings are discussed. The European Court of Human Rights has declared the defendants’ claim against the U.K. to be admissible under Arts. 6 and 10 of the Convention, though, of course, this is without prejudging the merits of the claim: see *Steel and Morris v. United Kingdom* (6/4/2004, ref 00025274). See also the libel actions brought by the pharmaceutical company, Upjohn, in the mid 1990’s, discussed by Penzi, *supra*, n. 4.

²⁰ See *Loutchansky v. Times Newspapers Ltd.* [2001] WL 98035 (allegation that claimant involved in international criminal activities of a most serious kind). This litigation has given rise to a plethora of applications and appeals. For a selection of reported outcomes, see *Loutchansky (No. 1)* [2001] E.M.L.R. 876; *Loutchansky (No. 2)* [2001] E.M.L.R. 885; *Loutchansky (No. 1)* [2001] EWCA Civ. 536; [2002] Q.B. 321; *Loutchansky (No. 4)* [2001] E.M.L.R. 898; *Loutchansky (No. 5)* [2001] E.M.L.R. 955; *Loutchansky (No. 2)* [2001] EWCA Civ. 1805; [2002] Q.B. 1805.

²¹ *Al-Fagih v. H.H. Saudi Research & Marketing (U.K.) Ltd.* [2001] EWCA Civ. 1634; [2002] E.M.L.R. 215 (allegation that claimant had spread malicious rumours about another Saudi Arabian dissident and had said that the latter’s mother had procured women to have sexual intercourse with him

Bulgarian company with subsidiaries engaged in a wide range of activities such as banking, commodity trading and manufacturing in various parts of the world,²² two Australian actors in a popular Australian television series well known to an English audience;²³ and an Italian Prince.²⁴

Doubtless the claimants in these cases may have been justified in their attempts to vindicate their reputations in an English court against English based media defendants who can hardly complain of being subjected to English jurisdiction and English law, in respect of publications which principally circulate in England. But the incentive to pursue the claims is undoubtedly, in many of these cases, the balance struck by English libel law between the protection of reputation and freedom of expression, a balance which clearly leans towards protection of the former and against the protection of the latter interest²⁵.

This balance has also led (and this is of relevance from the standpoint of private international law) to foreign media defendants being sued for libel, by English and foreign based claimants, in the English courts. A sample of these cases is treated in more detail below but to set the context the following brief description may be helpful. In 1987 an English jury awarded to an English claimant £450,000 damages against a Greek newspaper and one of its journalists despite the fact that the paper was published in Greece and only 50 or so copies were sold in England.²⁶ Continuing

at his home). See also *Jameel v. Times Newspapers Ltd.* [2003] EWHC 2609 (QB) (allegation that claimant, a Saudi Arabian billionaire, was linked to Osama Bin Laden).

²² *Multigroup Bulgaria Holding AD v. Oxford Analytica Ltd.* [2001] E.M.L.R. 737 (allegation by specialist information and research organisation on-line that claimant had engaged in corruption under heading “Power of Nomenclatura Businesses in Bulgaria” and “Bulgaria: Red Conglomerates”).

²³ *Charleston v. News Group Newspapers Ltd.* [1995] 2 A.C. 65 (allegation under headline in *News of the World* (a Sunday tabloid) “Strewth! What’s Harold up to with our Madge” accompanied by a photograph which appeared to show the actors who played the parts of a respectable married couple in “Neighbours” engaging in perverse sexual activity, the photographs having actually been produced by makers of pornographic computer games by superimposing faces of the plaintiffs, without their knowledge or consent, on the bodies of others).

²⁴ *Ruspoli v. Associated Newspapers plc* (December 11, 1992, C.A.) (allegation that what claimant said after fracas in New York restaurant meant that claimant was “an arrogant snob who regards people who work for a living behind a bar as mere scum, and approves of violence being used against them”). *Cf. Yousoupoff v. MGM Pictures Ltd.* (1934) 50 T.L.R. 581 (allegation that claimant, a Russian Princess, had been raped by Rasputin).

²⁵ It is fair to say that many, if not most, of the cases referred to in the preceding notes established important points of the English substantive law of libel. See, in particular, *Reynolds v. Times Newspapers Ltd.*, *supra*, n. 16.

²⁶ See Douzinas *et al.* (1987) 137 *New Law Journal* 609 for an account of this case. The claimant was a former British naval intelligence officer and the offending article concerned his alleged activities as a

with the Greek theme, Andreas Papandreou, a former Prime Minister of Greece has sued Time Magazine, based in the United States, in London rather than in the United States or Greece.²⁷ More recently, the customary Russian “oligarch” has proceeded against the American publishers of Forbes Magazine in England.²⁸ And in the last couple of years the English courts have been peppered with the following matters: an action by the leader of a Tunisian political movement against the printer, editor and publisher of an Arabic language newspaper circulated in Arab countries and in Europe;²⁹ an action by an Egyptian company and a businessman, apparently resident in Paris and with joint Egyptian and French nationality against the Al Jazeera Satellite Channel, based in Qatar, and one of the Channel’s reporters;³⁰ an action by Harrods Ltd. (of department store fame) against Dow Jones, the American publishers of the Wall Street Journal, in respect of an article in the American edition of that newspaper which commented on a spoof (April fools’ joke) statement on the website of Mr Mohamed Al Fayed, the chairman of Harrods;³¹ an action by a bank incorporated in Saudi Arabia in connection with an article published in the Wall Street Journal Europe;³² an action by two prominent British businessmen and several companies

British intelligence agent in Greece during the period of the dictatorship between 1967 and 1974. See also (1987) 137 N.L.J. 795.

²⁷ See Vick and Macpherson, *supra*, n. 4, at p. 935. Had he sued in the United States he would undoubtedly have fallen foul of *New York Times Co. v. Sullivan*, *supra*, n. 16. It has not been possible to locate any further formal records of the Papandreou case. According to a short squib in The Independent of March 14, 1989 the suit was brought in London rather than elsewhere because the procedures are less time-consuming in London than elsewhere. According to a Reuters press release of July 30, 1993, on July 29, 1993 Mr Papandreou accepted undisclosed libel damages from Time in respect of an article implying he was a party to embezzlement, bribery and blackmail. According to his solicitor, the damages were “substantial”: *ibid.*

²⁸ *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004, discussed *infra*.

²⁹ *Ghannouchi v. Houni Ltd.* [2002] EWHC 3070 (QB); [2003] EWHC 552 (QB) (allegation that claimant linked to Osama Bin Laden).

³⁰ *Lakah Group v. Al Jazeera Satellite Channel* [2002] EWHC 2500(QB); [2003] EWHC 1231(QB); [2003] EWHC 1297(QB) (allegation that corporate claimant had a corrupt relationship with Egyptian Ministry of Health and its Minister and that individual claimant had bribed people in Minister’s constituency to vote for him).

³¹ *Harrods Ltd v. Dow Jones & Co. Inc.* [2003] EWHC 1162 (QB) (under the heading “The Enron of Britain”, article stated “If Harrods, the British luxury retailer, ever goes public, investors would be wise to question its every disclosure” and claimed by Harrods that, through the link to Enron, article meant that if Harrods was to become a public company it would prove itself to be Britain’s Enron by deceiving and defrauding its investors on a huge scale). The article did not appear in the European edition of the Wall Street Journal. Dow Jones responded by bringing proceedings in a District Court in New York against Harrods and Mr Al Fayed seeking a declaratory judgment precluding the two last named from pursuing an action for defamation in England. Relief was denied and an appeal to the US Court of Appeals upheld the decision of the District Court. Rarely, if ever before, can an April fools’ joke have provoked such consequences and the whole incident seems ludicrous ! For further discussion, see *infra*.

³² *Al Rajhi Banking & Investment Corp. v. The Wall Street Journal Europe SPRL* [2003] EWHC 1358(QB); [2003] EWHC 1776(QB); [2004] EWHC 667 (QB) (allegations (broadly) that claimant

(some foreign) in which they had an interest, against Time Inc., the American publisher of the American and European editions of Fortune Magazine;³³ an action brought by Don King, the well-known American boxing promoter, against Lennox Lewis (British former heavyweight boxing champion of the world, mainly resident in the United States), a Nevada company and a New York attorney representing Lennox Lewis, in respect of two articles on “New York based” boxing websites;³⁴ and within the United Kingdom, an action brought by a well-known footballer, born in Northern Ireland, who plays for Celtic in Scotland,³⁵ against the publisher of the Scottish Daily Record in respect of an article in the latter newspaper³⁶.

These various cases testify to the attraction to “foreigners” of a London libel action and the consequent “downside” for the foreign media defendant. Before one gets too carried away, however, the story of Roman Polanski may provide a cautionary tale. As is well known, Roman Polanski, the celebrated film director, was married to Sharron Tate who was viciously murdered by Charles Manson and others in California in August, 1969. In early August, 1977, Mr Polanski pleaded guilty before a Californian court to a charge of unlawful sexual intercourse with a 13 year-old girl. Before he could be sentenced he fled from California on January 31, 1978 and passed through London on February 1, 1978, en route to France where he has lived ever since. Mr Polanski has dual Polish and French nationality and has not (apparently) visited either England or (unsurprisingly) the United States for 25 years. In July, 2002 an edition of Vanity Fair magazine carried an article which concerned the alleged behaviour of Mr Polanski in a New York restaurant after the death, but before the funeral, of his wife in 1969 and which, Mr Polanski claimed, was seriously defamatory of him. He commenced proceedings in England for libel against Conde

was, at the request of US authorities, being monitored by Saudi Arabian Central Bank as to its possible involvement in funding of terrorist activities). See also *Jameel v. Wall Street Journal Europe SPRL* [2003] EWHC 2945(QB); [2004] 2 All E.R. 92 (allegation of links to Osama Bin Laden).

³³ *Reuben v. Time Inc.* [2003] EWCA Civ. 6; [2003] EWHC 1430(QB) (allegations (broadly) of disreputable business practices).

³⁴ *King v. Lewis* [2004] EWHC 168(QB) (allegation that claimant, in calling the New York attorney a “shyster lawyer”, was anti-semitic). It appears that Mr King would have no cause of action under the law of New York: see [2004] EWHC 168(QB) at [36]-[37]. For further discussion see *infra*.

³⁵ The claimant formerly played for Leicester City in England and was found to have a reputation in England and Scotland.

³⁶ *Neil Lennon v. Scottish Daily Record and Sunday Mail Ltd.* [2004] EWHC 359(QB) (allegation that article recounting that police were to question all members of Celtic team squad after members of the team emerged from a nightclub in Newcastle, England, and chased a Daily Record photographer, robbing him of £12,000 worth of camera equipment, meant that claimant would have been understood to be one of the guilty players or probably one of those players).

Nast Publications Ltd³⁷, an English company which owns the title Vanity Fair. Vanity Fair is, however, an American magazine, edited and published in New York, and with a substantially larger circulation in the United States than in England.³⁸ It is also published in France.³⁹ Mr Polanski, obviously did not want to proceed in the United States where he apparently fell within the category of “outlaws” who are debarred from access to a court⁴⁰, and where, in any event, the substantive law would probably not support his claim⁴¹, and where he would, doubtless, be immediately arrested and sentenced for his crime were he to return to give evidence. He could not sue in France since the three-month period for bringing a claim had expired. Accordingly, he wished to sue in London and, of course, he was suing an English-based defendant, but he was not at all keen to go there to give evidence lest he be arrested there and extradited to the United States for the crime he had admitted to committing some 25 years ago. He therefore applied to the English court for his evidence to be given by video conference link from a hotel in Paris.⁴² This, of course, would be very convenient. He could bring his proceedings, be examined and cross-examined and have his day in court without coming to a country where the reputation he is seeking to vindicate is supposedly situated and in which he has not set foot for 25 years. This is not the place to discuss the reasoning leading to the conclusions of the court. Suffice it to say that the judge at first instance, exercising his discretion, granted the application. The Court of Appeal emphatically and unanimously allowed Conde Nast’s appeal. The detailed reasoning of the court need not concern us. It is sufficient to quote the following passage.

“This claimant is a fugitive offender, convicted of a serious offence for which he has yet to be sentenced. Anxious though he may be to nail what he says is the lie about his having sought (34 years ago) to exploit his tragically deceased wife’s name, such a libel action is ... a “volunteer action” (or “action of choice”) and, moreover, one

³⁷ *Polanski v. Conde Nast Publications Ltd.* [2003] EWCA Civ. 1573; [2004] 1 W.L.R. 387.

³⁸ *Ibid.* at [10].

³⁹ *Ibid.*

⁴⁰ *Ibid.* at [36].

⁴¹ Because of *New York Times Co. v. Sullivan*, *supra*, n. 16. See [2003] EWCA Civ. 1573; [2004] 1 W.L.R. 387 at [52].

⁴² Pursuant to CPR r. 32.3 which simply provides that the “court may allow a witness to give evidence through a video link or by other means”. It should be noted that Mr. Polanski, as a French national, could not be extradited from France to the United States: see [2003] EWCA Civ. 1573; [2004] 1 W.L.R. 387 at [10].

which could more appropriately have been brought in the United States where the principal publication took place or in France where the claimant lives. He is invoking this court's jurisdiction for his own benefit, not defending a claim brought against him. He should not be permitted to litigate on special terms. No libel action has ever yet been fought in this country in the claimant's absence (although in one action the claimant gave no evidence at all, and in another the claimant gave evidence by way of VCF as to damages). This is not the appropriate case for that unique distinction. Clearly the court's general policy should be to discourage litigants from escaping the normal processes of the law. The order made below to my mind overlooks and undermines that policy. If an order is properly to be made in favour of this claimant then it is difficult to imagine a case when it would not be.

Such a conclusion in my judgment does not involve treating the claimant as an outlaw, still less infringing his article 6 rights. In the first place he did not need to sue in the UK to vindicate his reputation but rather chose this jurisdiction, with which he has no natural affinity, for his own reasons. Secondly, however, and altogether more importantly, he is not being denied access to the court here. The "very essence" of his right is not impaired. He can and should attend to give evidence before the jury in the usual way. Access to justice is, as...[counsel]...puts it, only a Eurostar journey away. He can then have his "day in court". It is to my mind legitimate and proportionate to make his right of access conditional upon such attendance. The court is not refusing to hear him as sometimes it may refuse to hear a contemnor. Nor is his claim being rejected on some basis akin to the *ex turpi causa* doctrine. These suggested analogies are simply not apposite."⁴³

The effect of this is that the claimant could not pursue his libel claim at all if he was not prepared to attend court to give live evidence in the usual way.⁴⁴ This would seem to be an eminently reasonable conclusion. The indulgence shown by English law to libel claimants does not, at the present time, extend to an indulgence not to turn up at court ! The qualification, "at the present time", must, however, be stressed. The Court of Appeal refused Mr Polanski leave to appeal to the House of Lords. But on February

⁴³ [2003] EWCA Civ. 1573; [2004] 1 W.L.R. 387 at [47]-[48].

⁴⁴ The court also held that the claimant's written statements could not be put before the jury: *ibid.* at [23]-[25].

23, 2004, the House itself granted him leave to appeal.⁴⁵ At the time of writing the appeal had not been heard, but its outcome is awaited with interest.

B. Invasion of Privacy

In contrast to the position with regard to libel, England is not so likely to be looked on as a forum of choice when it comes to claims for invasion of privacy. This is because English law does not recognise an “overarching all-embracing”⁴⁶ right of privacy which, as such, can be protected by a civil action.⁴⁷ Nonetheless, protection of various aspects of privacy may be achieved through other causes of action and as has been recently pointed out this is “a fast developing area of the law”⁴⁸ in England and in other common law jurisdictions, and is influenced in England, in particular, by the implementation of the European Convention on Human Rights in the Human Rights Act 1998.⁴⁹ Thus, for example, an action for breach of confidence may lie in a situation where the press misuse “private information”.⁵⁰ One such case which could have private international law implications is the saga (or soap opera) of Michael Douglas, Catherine Zeta-Jones and Hello ! magazine which is discussed below.⁵¹

In Europe, a forum of choice for invasion of privacy is likely to be France.⁵² The advantages of this jurisdiction were claimed by the reclusive Barclay brothers to proceed against the publishers of the English Sunday newspaper, The Observer, and

⁴⁵ [2004] 1 W.L.R. 922.

⁴⁶ *Campbell v. MGN Ltd.* [2004] UKHL 22; [2004] 2 All E.R. 995 at [11].

⁴⁷ *Wainwright v. Home Office* [2003] UKHL 53; [2003] 3 W.L.R. 1137; *Campbell v. MGN Ltd.*, *supra*, n.46.

⁴⁸ *Campbell v. MGN Ltd.*, *supra*, n. 46 at [11].

⁴⁹ Protection of the right to privacy is well-known in the United States. For an account of the position in England, see Phillipson (2003) 66 M.L.R. 726. A readable account by a lawyer turned journalist will be found in Rozenberg, *Privacy and the Press* (2004).

⁵⁰ *Campbell v. MGN Ltd.*, *supra*, n. 46 (Daily Mirror misused private information by publishing photographs and information relating to English “supermodel”, Naomi Campbell’s attendance at meetings of Narcotics Anonymous).

⁵¹ *Infra*. See *Douglas v. Hello! Ltd. (No. 2)* [2003] EWCA Civ. 139; [2003] E.M.L.R. 585.

⁵² See Fifer and Sachs, *supra*, n. 8.

the author of an article in that newspaper which concerned them.⁵³ The brothers, who jealously guard their privacy, were at the time found to be domiciled in the United Kingdom⁵⁴. The court of first instance held that the French court lacked jurisdiction under Article 5(3) of the Brussels Convention since there was insufficient evidence of the distribution of the offending newspaper in France and the claimants had not stated the reasons why they were known in France or provided any explanation of the nature of the interests which they had in France which had been affected by the publication. The Cour d'Appel took a different view. It held that in the case of an invasion of privacy and infringement of the right to one's image by the press, the place in which the damage is suffered is the place where the publication is distributed. There was evidence which established that The Observer was sold systematically in France, particularly in Paris, Lyon and Marseille. The newspaper also featured in the list of titles distributed by les Nouvelles Messageries de la Presse Parisienne and Transports Presse accompanied by its price in French francs. The totality of these factors made it possible to draw the conclusion that the particular edition of The Observer was available for sale in France, and in particular in Paris. Additionally, it mattered little, for the purposes of determining jurisdiction, whether or not the claimants were known in France although that factor would be material to the substance of the claim.

This was not the first time that an English newspaper had been sued in the French courts for invasion of privacy. In 1986 The Mail on Sunday had carried two articles written by its gossip columnist which concerned an unidentified 14 year-old prince.⁵⁵ The articles, apparently, gave details of his schooling and information about his father also, naturally enough, a prince. The report of the case does not reveal any argument about jurisdiction, but presumably son and father were able to bring the action against the publishers of the newspaper and the author of the article in the French courts because the paper was available in France, though it does not appear that the princes had any connection with France and, one suspects, The Mail on Sunday did not have a

⁵³ *David Rowlat Barclay v. John Sweeney* [1999] I.L.Pr. 288 (Cour d'Appel, Paris). A published picture of the brothers also formed part of the complaint. See also *Sola v. La Tribune de Geneve* [2000] I.L.Pr. 795 (Cour d'Appel, Paris (defamation)).

⁵⁴ Although they were resident in Monaco. In 1993 they bought Brecqhou one of the Channel Islands where they are now said to be based, for the doubtless bargain price of £2.3 million. Ironically, they once owned a stake in the notorious tabloid, The National Enquirer, and have been subject to much recent publicity in consequence of a bid to buy the Telegraph newspaper group for some £660 million.

⁵⁵ Rozenberg, *supra*, n. 49, at p.230, points out that the only expatriate European prince born in 1972, the relevant year was the Italian Prince Emanuele Filiberto of Savoy, son of Prince Vittorio Emanuele.

wide circulation in France, at least in 1986. The action was a conspicuous success with the little prince being awarded 50,00 francs and the big prince (and his wife) the same amount against the publishers of the paper and the author of the articles.⁵⁶

It appears to have been thought that the German law of privacy was less protective of an individual than its French counterpart. This did not, however, prevent the German Chancellor, Gerhard Schroder, from taking on The Mail on Sunday in the German courts in respect of an article linking him, in the romantic sense, with a well-known German television interviewer. A court in Hamburg granted an injunction forbidding the publishers from reporting on aspects of the Chancellor's private life even though that week's edition of the newspaper was not distributed in Germany, but rather was a story which the German press picked up from The Mail on Sunday. A spokesman for the court acknowledged that the injunction applied only in Germany, though the Hamburg court order stipulated that the publishers would face a penalty of 250,000 euros if the allegations were repeated.⁵⁷ The incident merely served to increase The Mail on Sunday's already rampant Europhobia ! Had the Chancellor sued in England, the more natural forum, he would have to allege libel which would not be established if the allegations were proved to be true or breach of confidence (misuse, possibly, of private information) with an effective admission that the claims were true.

The German press has, it is well known, been vigorously pursued by Princess Caroline of Monaco with claims for violation of her privacy, often resulting from photographs taken in France but published not in France (where publication would be unlawful) but in Germany.⁵⁸ In the most recent bout of litigation, the Federal Constitutional Court recognised a right to restrain publication of photographs taken in a typically private place including a secluded table in the corner of a restaurant. However, she had to tolerate, as a "figure of contemporary society *par excellence*" the publication of photographs in which she appeared in a public place even if they

⁵⁶ *Societe Mail Newspapers plc v. Prince X*, Cass. Civ. 23 October 1990, Bull. Civ. No. 222. An English translation of this case can be found at www.ucl.ac.uk/laws/global_law.

⁵⁷ This account is largely based on material contained in articles in The Guardian on January 18 and 20, 2003. See also Rozenberg, *supra*, n. 49, at p.232.

⁵⁸ See Bundesgerichtshof, BGHZ 128, 1 November 15, 1994; Bundesgerichtshof, December 5, 1995, NJW 1996, 984; Bundesgerichtshof, December 12, 1995, NJW 1996, 985 (claimant her 8 year old son); Bundesgerichtshof, December 19, 1995, NJW 1996, 1128; Bundesgerichtshof, June 29, 1999 (claimant her current husband, Prince Ernst August of Hanover); Bundesverfassungsgerichts, December 15, 1999. English translations of these cases can be found on the website referred to in n. 56.

were photographs of scenes from her daily life (e.g. shopping) and not photographs showing her exercising her public functions. The public, so it was said, had a legitimate interest in knowing where the princess was staying and how she behaved in public.⁵⁹ The princess duly took Germany to the European Court of Human Rights, which, on June 24, 2004, found in her favour on the latter point.⁶⁰ Put very briefly, the court held that on the latter point her privacy was not adequately protected. Such limited protection recognised by the German court might be appropriate for politicians but did not go far enough for individuals like the princess who did not hold any public office. Photographs of her going about her daily activities fell within the sphere of her private life and publication of them did not contribute to any debate of general interest to society. Writing in *The Times* newspaper, two experienced practitioners had this to say “The case makes clear that famous people have the right to be left alone, even when they are in public places. Before publishing photographs of celebrities doing their shopping the press must ask: what legitimate purpose does publication serve? A convincing answer may be hard to find. It is difficult to imagine a case where such pictures could be said to contribute to a debate on matters of public concern”.⁶¹

To the extent that this decision may bring about a change in German law so as to draw it towards the standards prevailing in French law, it may have the effect of making Germany a more attractive jurisdiction for at least some classes of privacy cases. And for jurisdictions such as England, that afford relatively little protection, it might provide a warning that its law is not up to standard.

In none of the cases referred to above has foreign law been regarded of relevance to the substance of the claim and for the most part it is quite clear that the claimant chooses a particular forum because that forum will apply its own law. In England, this is so even where the media defendant is foreign and the substantial volume of the publication occurs abroad: provided there is publication in England, English law will be applied, at least in respect of the English publication, and the claimant or defendant need not rely or may not be able to rely in some circumstances on a foreign law. This

⁵⁹ Bundesverfassungsgerichts, December 15, 1999 (see preceding note).

⁶⁰ *Von Hannover v. Germany* (Application no. 59320/00) (June 24, 2004).

⁶¹ Heather Rogers and Hugh Tomlinson, *The Times*, June 29, 2004. See also Tomlinson and Thomson (2004) 154 N.L.J. 1040.

means that the principal private international law issue which tends to arise in the English case law is that of the jurisdiction of the English court, an issue which is elaborated below. To understand that issue a preliminary point concerned with choice of law needs a mention.

3. CHOICE OF LAW: A PRELIMINARY POINT

Part III of the Private International Law (Miscellaneous Provisions) Act 1995 (hereafter “the Act”) generally places the English choice of law rules in tort on a statutory footing.⁶² However, the new choice of law rules contained in the Act do not apply to claims for defamation⁶³ as defined in the Act⁶⁴. The Bill on which the Act was based contained no provision excluding defamation claims from the scope of the Act. Earlier recommendations from the Law Commission had taken account of such matters by recommending that where a statement was published abroad and was simultaneously or previously published in the United Kingdom, the applicable law should be that of the relevant part of the United Kingdom.⁶⁵ This, so it was said, was intended to give effect to the public interest in free speech and in the proper functioning of public institutions: to protect that public interest it was not desirable that those who made statements in the United Kingdom should have their freedom of expression limited by the application of foreign law.⁶⁶ Concerns such as these and particularly the effect on freedom of the press, led to the preservation of the common

⁶² The principal rules are found in ss. 11 and 12 of the Act. S. 11 broadly establishes application of the law of the country in which the tort is committed or is to be taken to have been committed, as a general rule. S. 12 establishes a rule of displacement whereby if it appears, in all the circumstances, from a comparison of the significance of the factors which connect the tort with the country whose law is applicable under the general rule and the significance of the factors which connect the tort with another country, that it is substantially more appropriate for the applicable law to be the law of the other country, the general rule is displaced and the applicable law is the law of the other country.

⁶³ Ss. 9(3), 10, 13.

⁶⁴ S. 13(2).

⁶⁵ Law Com. No. 193 (1990), para. 3.33.

⁶⁶ *Ibid.*, para. 3.31.

law choice of law rules for defamation and related claims.⁶⁷ Those common law rules consist of the general rule of double actionability which is subject to a somewhat ill-defined exception which may permit sole application of the law of the forum or the sole application of the law of the country in which the tort is committed or (possibly) the law of some third country.⁶⁸ Retention of that part of the general rule that requires that the act done in a foreign country be actionable as a tort by English domestic law preserves the barrier of the law of the forum so as, at least as a general rule, to prevent foreign liabilities in defamation and related claims being enforceable in English courts unless the events giving rise to those liabilities give rise to an actionable claim by English domestic law.⁶⁹ Retention of the common law preserved a further common law rule, which may not strictly be a conflict rule, to the effect that once it had been determined that a tort had been committed in England only English law applied and foreign law was entirely irrelevant.⁷⁰ This means that where a libel is found to have been committed in England, English libel law is exclusively applicable.⁷¹

The upshot of all this is that a combination of the pro-claimant character of English libel law, the choice of law rules applicable to defamation and the rules concerning the jurisdiction of English courts which are applied in this context mean that the application of a foreign substantive law and, possibly, though this needs further consideration, a foreign law concerning invasion of privacy, is likely to be rare. Indeed, there appear to be only three reported cases where the choice of law rules for foreign torts have been seriously considered in the context of defamation.⁷²

It is now proposed to consider specific jurisdictional issues raised in the case-law.

⁶⁷ Ss. 9(3), 10, 13. This was probably the most controversial feature in the passage of the Bill and was vigorously trumpeted by the very powerful press lobby: see Morse (1996) 45 I.C.L.Q. 888, 891-893.

⁶⁸ See *infra*.

⁶⁹ See the debate on the Bill at H.L. Deb., March 1, 1995, cols. 19-22.

⁷⁰ S. 14(2) of the Act: see *Szalatnay-Stacho v. Fink* [1947] K.B. 1 (a defamation case); *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391.

⁷¹ *Szalatnay-Stacho v. Fink* preceding note. Whether invasion of privacy is excluded from the Act by s. 13, as a defamation or related claim is controversial: see *infra*.

⁷² *Machado v. Fontes* [1897] 2 Q.B. 231, overruled in *Boys v. Chaplin* [1971] A.C. 356; *Church of Scientology of California v. Commissioner of Police* (1976) 120 S.J. 690; *University of Glasgow v. The Economist* [1997] E.M.L.R. 495; cf. *Szalatnay-Stacho v. Fink*, *supra*, n. 70. More litigation was generated in Australia when the double actionability rule was accepted in that country (see Handford (1983) 32 I.C.L.Q. 452) which is no longer the case: see *John Pfeiffer Pty. Ltd. v. Rogerson* (2000) 203 C.L.R. 503; *Regie National des Usines Renault S.A. v. Zhang* (2003) 210 C.L.R. 491; and in the context of defamation the important case of *Dow Jones & Co. Inc. v. Gutnick* [2002] H.C.A. 56; (2003) 210 C.L.R. 575.

4. SPECIFIC JURISDICTIONAL ISSUES

Leaving to one side jurisdictional issues which arise under the Brussels and Lugano Conventions and the Council Regulation, assuming an English court does not have jurisdiction over a foreign media defendant because it is “present” in England by virtue of doing business at a place of business in England⁷³, jurisdiction will depend, in a defamation case on the exercise by the court of its power to give permission for process to be served on the defendant abroad pursuant to CPR r. 6.20(8). First, it must be shown that the damage was sustained in England or that the damage sustained resulted from an act committed in England. Secondly, it must be shown by the claimant that England is the forum conveniens.⁷⁴ Application of this rule is not without difficulty in the field of libel.

A. “A gentleman of no occupation”

In 1936 Mr Kroch, who described himself as a “gentleman of no occupation”, brought actions against the publishers of a Belgian and a French newspaper in respect of libel. He sought permission to serve, on those publishers, what was then called a writ, out of

⁷³ See Companies Act 1985, ss. 690A-695 and Sched. 21A; CPR, Part 6: see *Harrods Ltd. v. Dow Jones & Co. Inc.* [2003] EWHC 1162(QB); *Reuben v. Time Inc.* [2003] EWHC 1430(QB); *Lakah Group v. Al Jazeera Satellite Channel* [2003] EWHC 1231(QB).

⁷⁴ Applying the principles established by the house of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.* [1987] 1 A.C. 460 to the effect that the “basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, *i.e.* in which the case may be tried more suitably for the interests of all the parties and the ends of justice”. In CPR cases the burden lies on the claimant to show that England is the more appropriate forum. Where the claimant invokes the English jurisdiction as of right and the defendant pleads forum non conveniens the burden is on the defendant to show that there is another forum which is clearly or distinctly more appropriate than the English forum. And see *Schapira v. Ahronson* [1998] I.L.Pr. 587.

the jurisdiction, under the then equivalent of the CPR which required that there be a “tort committed” in England. Since the newspapers were distributed in England, undoubtedly a tort had been committed there but the circulation there was miniscule in comparison with the circulation in Belgium and France. Nonetheless, the Court of Appeal declined to give permission for service abroad.⁷⁵ This was not so much because the circulation of the papers in England was small, but because there was no evidence that Mr Kroch had any reputation in, or, indeed any associations with England at all. As Slessor L.J. put it:

“He states that he is a gentleman of no occupation. A gentleman of no occupation, I think, if I remember my Blackstone rightly, means a person of certain means who can support the port and countenance of a gentleman, but does not necessarily mean he has any associates in this country.”

Further affidavit evidence on behalf of one of the defendants stated that Mr Kroch “has no permanent address in this country. The address given by him in the writ...is a place where he occupies one furnished room. He is an alien, having a domicile in Germany, and he is in this country only temporarily for the purpose of launching this and similar litigation.” There was no evidence that Mr Kroch knew anyone in England or had any interest in England. The latter proposition might be thought to ignore the potential monetary benefit to Mr Kroch which might have been afforded by English libel law had the court been prepared to take jurisdiction. *Kroch* offers an early example of cold comfort to forum shoppers in the libel game.⁷⁶

B. “It’s as if Lucky Luciano were chairman of the board of Chrysler”⁷⁷

In an edition published on December 30, 1996, Forbes magazine contained an article the subject matter of which concerned two prominent Russian businessmen, Mr Boris Berezovsky⁷⁸ and Mr Nikolai Glouchkov⁷⁹. The article, which contained, amongst

⁷⁵ *Kroch v. Rossell et Cie.* [1937] 1 All E.R. 725.

⁷⁶ Slessor L.J. stated that he had dealt with the case at some length “because I think it is right that this foreign gentleman should know that his rights have been fully considered by the court, and his claim rejected upon a real consideration of the facts and sufficient reasons”. !

⁷⁷ See *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004, 1017, *per* Lord Nolan.

⁷⁸ Mr Berezovsky, at the time, had extensive interests in Russian businesses, including cars, oil, media and finance. Also a politician, in October 1996 he became Deputy Secretary of the Security Council of

other things, the words quoted above alleged that Mr Berezovsky was in fact a leader of organised crime in Russia and that Mr Glouchkov was one of his criminal associates. Forbes is an influential American fortnightly business magazine which principally circulates in the United States. The circulation figures of the issue in question were as follows: United States and Canada, 785,710; England and Wales, 1,915; Russia, 13. There was an agreed estimate that the particular issue of Forbes would have been seen by about 6,000 readers in England. Both men decided to sue the defendants, respectively the editor of the magazine and its publisher, Forbes Inc, in England rather than in Russia or the United States⁸⁰ and to this end they applied for permission to serve their writs out of the jurisdiction under the then equivalent to CPR, r 6.20(8)⁸¹. The judge at first instance refused permission, holding that the plaintiffs' connections with the jurisdiction were tenuous and that they had failed to establish that England was the most appropriate jurisdiction for the trial. The Court of Appeal⁸² admitted new evidence to the effect that the offending article was well known to executives of financial institutions and had deterred them from entering into or continuing London-based negotiations with companies with which the plaintiffs were associated. That court held that the judge had failed to take account of authority to the effect that, prima facie, England was the appropriate forum for the trial of any substantial complaint arising out of the English circulation of a foreign publication.⁸³ It then held that since both plaintiffs' connections with England were in fact significant they had a substantial complaint such as gave them a strong prima facie case for trial in England and since their connections with the United States were slight⁸⁴ and a trial in Russia⁸⁵, though the place of their strongest connection, would

the Russian Federation, a senior post in the Russian Government, a post from which he was dismissed by President Yeltsin in November 1997. The case is concerned with his career as at 1996, but subsequently he was appointed Secretary of the Commonwealth of Independent States (by Yeltsin). In 1999 he was elected to the State Duma but after pressure from President Putin's authorities he left Russia, having earlier had a major falling out with Putin and settled in England and France. In 2002 Russia sought his extradition from England on embezzlement charges but was granted political asylum in England in September 2003.

⁷⁹ In December 1996, Mr Glouchkov was First Deputy Manager of Aeroflot, the Russian international airline. By 2000 he was Managing Director of Aeroflot.

⁸⁰ A claim in the United States would almost certainly have failed on First Amendment grounds.

⁸¹ RSC Ord. 11, r 1(1)(f) which was virtually identical to CPR, r. 6.20(8).

⁸² [1999] I.L.Pr. 358.

⁸³ *The Albaforth* [1984] 2 Lloyd's Rep. 91; *Schapira v. Ahronson* [1999] E.M.L.R. 735. See also Case C-68/93 *Shevill v. Presse Alliance S.A.* [1995] E.C.R. I-415.

⁸⁴ E.g. some newscuttings in a handful of newspapers referring to Mr Berezovsky and a newspaper article suggesting that Aeroflot was preparing to sell shares on the U.S. market. It was also said that an American jury was less well equipped than an English jury to assess the impact of an article in England and the appropriate measures of damages having regard to the extent of the damage caused to each

nevertheless be unsuitable, England was the appropriate place for the trial of the action. By a majority of 3-2 the House of Lords affirmed the decision of the Court of Appeal⁸⁶. The plaintiffs had confined their claims for damages to the publication of Forbes within the jurisdiction through distribution of copies of the magazine and through publication on the internet.⁸⁷ This, first, seems to shift the focus on to publication in England rather than on to the totality of publication as a whole. Secondly, a well established principle of English libel law has it that each publication is a separate tort⁸⁸ and this seems to translate to the level of private international law in the form of a principle permitting the bringing of an action in England in respect of publication there.⁸⁹ Thirdly, there is, therefore, no “global cause of action”⁹⁰ or, if this is really different, “one cause of action” arising out of a multi-national libel which should be incorporated into the *Spiliada* principles for the exercise of discretion⁹¹. If the latter concept was adopted it would usually favour trial in the home courts of the foreign publisher because the bulk of the publication would take place there. Counsel for Forbes argued that it was artificial for the plaintiffs to confine their claim to publication in England, but the House had no sympathy with the argument which was said to be contrary to a rule established in an elderly case to the effect that a plaintiff who seeks leave to serve out of the jurisdiction is guilty of an abuse if he seeks to include in the same action matters occurring elsewhere⁹². Fourthly, all the constituent elements of the tort occurred in England. Fifthly, the distribution in England of the defamatory material was significant. Sixthly, the plaintiffs had significant connections

plaintiff in England. The court explicitly rejected the juridical disadvantage referred to in n. 80 as affecting the issue at all.

⁸⁵ A Russian court would be ill-equipped to make an assessment of damage suffered in England. The trial judge had also required the defendants to give certain undertakings if trial was to take place in Russia. The fact that he had found it necessary to do that indicated that Russia was an unsuitable forum.

⁸⁶ [2000] 1 W.L.R. 1004. The dissenters, Lords Hoffmann and Lord Hope, thought that it was not possible to say that the first instance judge had erred in law. There is much to be said for this view.

⁸⁷ *Ibid.* at p.1008. In fact the majority did not find it necessary to deal with the internet issue: *ibid.* at p.1015.

⁸⁸ *Duke of Brunswick v. Harmer* (1849) 14 Q.B. 185.

⁸⁹ See critical comment by Briggs (2000) 71 B.Y.I.L. 440.

⁹⁰ [2000] 1 W.L.R. 1004, 1011. The approach taken in the United States in the Uniform Single Publication Act which provides in respect of a single publication only one action for damages is maintainable (see also Restatement of the Law of Torts, Second, s. 577A and Prosser (1953) 51 Michigan L. Rev. 959) was explicitly rejected by the Court of Appeal, a rejection endorsed by the majority of the House. It was said that the notion of a global tort was also inconsistent with the *Shevill* case, *supra*, n. 83.

⁹¹ [2000] 1 W.L.R. 1004, 1012.

⁹² *Ibid.* at p. 1013. The case concerned is *Diamond v. Sutton* (1866) L.R. 1 Ex. 130.

with, and reputations to protect, in England⁹³. And, where that was the case, it would, seventhly, be consistent with *Spiliada* principles to regard England, as the place of the tort, as the natural forum for the trial. According to Lord Steyn, in “such cases it is not unfair that the foreign publisher should be sued here”⁹⁴.

The following comments may be made. First, it would appear that where the claimant sues a foreign publisher in England under the CPR the English court only has jurisdiction over the English publication and any foreign publications cannot be relied on. This would seem to be a rule of law rather than a matter of pleading, although this is not entirely clear⁹⁵, and in effect produces an outcome consistent with that reached by the European Court in *Shevill*. Secondly, to justify an assertion of jurisdiction, a claimant must have significant connections with England and the volume of publication in England must be significant, though what is significant for these purposes is a matter of appreciation. Thirdly, a claimant appears to be claiming for damage to “English” reputation and it follows from this that he must have a reputation in England to protect. “Location” of reputation in this manner may be thought by some to be rather fanciful. As Lord Hoffmann put it,

“the notion that Mr Berezovsky, a man of enormous wealth, wants to sue in England in order to secure the most precise determination of the damages appropriate to compensate him for being lowered in the esteem of persons in this country who have heard of him is something which would be taken seriously only by a lawyer...The common sense of the matter is that he wants the verdict of an English court that he has been acquitted of the allegations in the article, for use wherever in the world his business may take him. He does not want to sue in the United States because he considers that *New York Times v. Sullivan* (1964) 476 U.S. 254 makes it too likely that he will lose. He does not want to sue in Russia for the unusual reason that other people might think it was too likely that he would win. He says that success in the Russian courts would not be adequate to vindicate his reputation because it might be attributed to his corrupt influence over the Russian judiciary...The plaintiffs are forum shoppers in the most literal sense. They have weighed up the advantages to them of the various jurisdictions that might be available and decided that England is

⁹³ Unlike the plaintiff in *Kroch v. Rossell et Cie.*, *supra*, n. 75.

⁹⁴ [2000] 1 W.L.R. 1004, 1013.

⁹⁵ See *ibid.*, at p.1008, 1016, 1017-1018, 1032.

the best place in which to vindicate their international reputations. They want English law, English judicial integrity and the international publicity which would attend success in an English libel action.”⁹⁶

Fourthly, although *Berezovsky* is a case on jurisdiction, it is implicit, if not explicit, that once a court takes jurisdiction under the CPR, then it will apply English law and foreign law will be irrelevant.⁹⁷ Fifthly, it seems to follow from this that the double actionability rule applicable to foreign publications can only become relevant in cases where the English court has direct (as opposed to “long-arm”) jurisdiction over the defendant.⁹⁸ And even here, it is, presumably, open to the claimant to limit his claim to any accompanying English publication, if such there be and such there will usually be.⁹⁹ The outcome of all this is that most libel actions properly brought in the English courts will be governed by the pro-claimant libel law of England.

C. “A shyster lawyer”

In early 2004, a libel action was commenced in the English court by Don King against Lennox Lewis, Lion Promotions LLC and Judd Burstein. The first named is a well known American boxing promoter, normally resident in the United States. The second named is the British former world heavy weight boxing champion, also mainly resident in the United States. The third named is a Nevada based boxing promotion company. And the fourth named is a New York attorney, normally resident in New York, who is representing Lennox Lewis and his company in litigation then pending in New York. The allegations were said to be contained in two articles published on

⁹⁶ [2000] 1 W.L.R. 1004, 1023-1024.

⁹⁷ And see the material in n. 70, *supra*. The *Berezovsky* litigation proceeded on the basis of English law: see *Berezovsky v. Forbes Inc.* [2001] EWCA Civ. 1251; [2001] E.M.L.R. 45. In a press release dated March 6, 2003, the claimants’ law firm Carter-Ruck (according to *The Times* “Britain’s most feared firm of libel lawyers”) announced a settlement in which Forbes accepted, in a statement read in the High Court, that the allegations were false, gave an undertaking not to repeat them and agreed to place a correction notice on its website: see <http://www.carter-ruck.com/recent/work/berezovsky-06mar03.html>. A press report indicates that the claimant was awarded no damages or costs: see *The Sunday Times*, July 11, 2004, p. 7. On July 9, 2004, the author of the article, Paul Klebnikov, an American-born journalist who was editor of the Russian edition of *Forbes* was shot dead, allegedly by a contract killer, outside his Moscow office. The Russian edition, set up in April, 2004, had caused a stir in its May edition by publishing a list of Russia’s richest people, claiming that there were more dollar billionaires in Moscow than in any other city in the world: see *The Sunday Times*, *ibid.*; *The Times*, July 10, 2004, p. 23; *The Independent*, July 10, 2004, p. 26.

⁹⁸ See *University of Glasgow v. The Economist* [1997] E.M.L.R. 495.

⁹⁹ *Cf. Church of Scientology of California v. Commissioner of Police* (1976) 120 S.J. 690.

boxing websites¹⁰⁰ one of which was written by Mr Burstein and the other of which, written by someone else, contained an interview with Mr Burstein in which the latter had alleged (as he had done in his own article) that Don King had called him a “shyster lawyer” which indicated that Don King was anti-semitic. Mr King sought permission to serve process on the defendants outside the jurisdiction pursuant to CPR, r. 6.20(8) (for present purposes it is enough to consider the application as against Mr Burnstein, the author of the offending articles). In this connection Eady J. began by considering “a number of well known principles”¹⁰¹ put forward on behalf of the claimant.

First, it has long been recognised that publication is regarded as taking place where the defamatory words are published in the sense of being heard or read.¹⁰² In relation to internet posting, by analogy with the latter rule, the common law *currently* regards publication of an internet posting as taking place when and where it is downloaded. For this proposition, the learned judge cited two English authorities, *Godfrey v. Demon Internet Ltd.*¹⁰³ and *Loutchansky v. Times Newspapers Ltd. (Nos. 4 and 5)*¹⁰⁴ though neither of these cases squarely raised the issue in the context of the conflict of laws.¹⁰⁵ He also referred to the decision of the High Court of Australia in *Gutnick v. Dow Jones Inc.*¹⁰⁶ where the point was extensively analysed by the court which came down in favour of the place of downloading rather than the place of uploading, a view which tends to favour claimants over media defendants, and an outcome which has, predictably, been greeted by the media with a cacophony of protest.¹⁰⁷ Eady J. does not refer to his earlier decision in *Harrods Ltd. v. Dow Jones Inc.*¹⁰⁸ in which he appeared to favour the same view¹⁰⁹. It may be that this question will receive more detailed consideration in future decisions. Secondly, Eady J. emphasised that English

¹⁰⁰ For the sites, see www.boxingtalk.com and www.fightnews.com.

¹⁰¹ *King v. Lewis* [2004] EWHC 168(QB) at [14].

¹⁰² *Ibid.*, at [15]. See *Bata v. Bata* (1948) W.N. 366.

¹⁰³ [2001] Q.B. 201.

¹⁰⁴ [2001] EWCA Civ. 783; [2002] Q.B. 783 at [58].

¹⁰⁵ The judge did not refer to the fact that the majority judgment in *Berezovsky* had left the point open: see *supra*, n. 87.

¹⁰⁶ [2002] HCA 56; (2003) 210 C.L.R. 575, discussed *infra*.

¹⁰⁷ See e.g. House of Lords, European Union Committee, *The Rome II Regulation. Report with Evidence*, HL Paper 66, p. 55, (letter from Times Newspapers Ltd.).

¹⁰⁸ [2003] EWHC 1162(QB), discussed *infra*.

¹⁰⁹ *Ibid.*, at [36].

law does not recognise a “single publication” doctrine.¹¹⁰ Thirdly, English law recognises in the context of defamation generally that damage is presumed.¹¹¹ Fourthly, the claimant was not permitted to complain (and did not do so) of publication of the defamatory words outside England.¹¹² Strictly speaking it follows, therefore, that he can only be compensated for injury to his reputation suffered in England. Fifthly, the claimant is entitled to rely on what might be described as a general presumption that the natural forum in which to try the dispute is that of the jurisdiction where the tort is committed, as a weighty circumstance.¹¹³ Sixthly, the law regards it as giving a significant dimension to a case if the relevant claimant has a reputation to protect specifically in England not least because in such a case the English courts would appear to be the natural forum for achieving vindication and assessing compensation.¹¹⁴

Eady J. then went on to assess these principles in the light of the available evidence and concluded that permission for service out should be granted. That evidence disclosed that Don King had a substantial reputation in England as evidenced in frequent appearances on television, radio and other media and participation in advertisements on BBC television for the BBC’s coverage of the F.A. Cup (a football competition!). Indeed there was evidence to the effect that he was the best known or at the very least one of the best known figures in boxing. He had a considerable financial and business connection with England having promoted several fights there or fights in other countries involving British boxers which had generated tens of millions of dollars. He had many friends and associates there, including members of the Jewish community before whom he was anxious to vindicate his reputation¹¹⁵. Various witnesses gave evidence that the boxing websites involved are frequently accessed by fight fans in England and further it appeared that once news is placed on those websites it rapidly goes around the boxing community by means of telephone calls, word of mouth or by the information being forwarded on computers. In short these allegations against Don King became common knowledge in the boxing community very shortly after they were placed on the websites.

¹¹⁰ *Shevill v. Presse Alliance SA* [1996] A.C. 959; *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004.

¹¹¹ *Shevill, ibid.*

¹¹² *Diamond v. Sutton* (1866) L.R. 1 Ex. 130; *Berezovsky v. Michaels, supra.*

¹¹³ *Berezovsky, ibid.*; see also *The Albaforth* [1984] 2 Lloyd’s Rep. 91.

¹¹⁴ [2004] EWHC 168(QB) at [20].

¹¹⁵ *Cf. Chada & Osicom Technologies Inc. v. Dow Jones & Co. Inc.* [1999] I.L.Pr. 829.

This is an action by an American-based claimant against American-based defendants and it was recognised that it could not be successfully mounted in New York where Don King would be regarded as a public figure.¹¹⁶ In effect, therefore, the only place in which he could vindicate his reputation was England and given the publicity that will attach to any successful judgment he may receive, then in reality he is seeking to vindicate his reputation world wide. It is of limited comfort to know that there was evidence that the websites were accessed here because, presumably, they would be accessed by fight fans in many other parts of the world as well and it may well be that should he secure a successful English judgment that fact would be posted on those very websites. Only on a charitable view, was Don King not forum shopping, in the sense that there was no alternative forum in which he could successfully shop.¹¹⁷ Nonetheless, the case demonstrates the pulling power of English substantive libel law¹¹⁸ buttressed by the readiness of English courts to assert long-arm jurisdiction over foreign defendants in respect of claimants (usually the rich or famous or both) who can demonstrate possession of an “English” reputation.

D. “Loof Lirpa”

Reasonable people might view some libel actions commenced in England as singularly lacking in merit. On March 31, 2002, Harrods, the London luxury department store issued a press release announcing a plan by its Chairman, Mr Al Fayed, to “float” Harrods which indicated that anyone interested should contact Loof Lirpa at Harrods. The latter expression is, of course, “April fool” spelt backwards and the press release was designed as a joke, no doubt to achieve publicity. The release was picked up by The Wall Street Journal, which published an article about it under the headline “The Enron of Britain”. To cut a long story short, Harrods took the view that likening its business to Enron was defamatory and commenced proceedings against Dow Jones, the publisher of the Journal, in the English courts. Harrods’

¹¹⁶ [2004] EWHC 168(QB) at [36]-[37].

¹¹⁷ But *cf.* the point made at n. 80, *supra*.

¹¹⁸ Counsel for the defendant had argued that the double actionability rule should apply on the basis that the relevant acts of the defendants took place in the United States. This was not accepted: see [2004] EWHC 168(QB) at[41].

solicitor apparently accused the Journal of a “sense of humour failure”¹¹⁹. A spokeswoman for the Journal described its piece as “humorous comment on the bogus press release...It is plainly light hearted commentary”¹²⁰. Reasonable people might think that in the light of these comments further action would be superfluous and, indeed, even absurd. Nonetheless, Eady J. was called into action again to determine whether the English court had jurisdiction.¹²¹ Having found that the defendant did not have a place of business in England, the learned judge had to determine whether permission for process to be served out of the jurisdiction under CPR r. 6.20(8) should be granted.

By now the reader may not be surprised to learn that permission was granted. In customary fashion, Harrods limited its claim to publication in England.¹²² The offending article was not contained in the European edition of The Wall Street Journal but in the American edition. The evidence was that only 10 copies of that edition are sent to subscribers in England, making the likely number of readers in England, as the judge so aptly put it, “rather small”.¹²³ The article was also published in the online edition but the evidence disclosed a very small number of hits on the article published on the web.¹²⁴ Despite this, of course, there was publication in England concerning an English trading company with a substantial reputation in England which it was seeking to vindicate. The judge was not aware of any actual damage suffered by the claimant, but that matters not on the issue of publication since under English libel law damage is presumed.¹²⁵ *Kroch*¹²⁶ mattered not since Kroch had no real connection with England in contrast with Harrods whose quintessential connections are with

¹¹⁹ The Independent on Sunday, June 6, 2002, p. 6. According to press reports, the Harrods press release or Mr Al Fayed’s website (it is not clear which) even said that a Harrods store would be floated on a canal boat and not the London Stock exchange!: see The Guardian, February 18, 2004, p. 19.

¹²⁰ *Ibid.* As the judge in the American litigation put it: “At this point the lawyers entered. Promptly the face of comedy began to furrow and its smile to curl into what often becomes tragedy’s first sour frowns and snarls: incipient litigation.” See *Dow Jones & Co. Inc. v. Harrods Ltd. and Al Fayed*, 237 F.Supp. 394 (S.D.N.Y., 2002) referred to, *infra*.

¹²¹ *Harrods Ltd. v. Dow Jones & Co. Inc.* [2003] EWHC 1162(QB).

¹²² *Ibid.*, at [5].

¹²³ *Ibid.*, at [4]. The Journal has a national circulation within the United States of approximately 1.8 million: *ibid.*

¹²⁴ *Ibid.* A press report put the number of hits at 12: see The Guardian, February 18, 2004, p.19.

¹²⁵ He pointed out, however, that even if the claimant succeeded on liability, the damages recoverable might be nominal or very modest: *ibid.*, at [39]

¹²⁶ [1937] 1 All E.R. 725, discussed *supra*.

England, although it is also a “world famous store”¹²⁷. What was the point asked the judge, in the light of the technical nature of the publications, of allowing such litigation to go ahead involving, no doubt, considerable inconvenience and expense to parties outside England when it might be thought that the claimant had little to gain?¹²⁸ After all, any English judgment would be unlikely to be enforced in the United States.

Plenty of point apparently. The point was vindication of reputation, recognised as perhaps the main public policy consideration underlying the law of defamation and reflected as a legitimate consideration under Article 10(2) of the Human Rights Convention.¹²⁹ For the claimant it was said that the defendant would not be put to inconvenience or expense since all the defendant would have to do is to acknowledge that it was not intending to draw a genuine analogy with Enron and had no basis for doing so. This option, suspected Eady J., would be “unacceptable” to “American citizens” since it “would equate to ‘prior’ or ‘previous’ restraint”¹³⁰. “There is the impasse”, he continued, “The claimant wishes to pursue the action in order to demonstrate, as an objective matter of truth, and for the record, that the imputations reflected in its pleaded meanings are unjustified. It may be over-sensitive, but I believe as a matter of English law, and for that matter public policy, it is entitled to do so”¹³¹. And, finally, said the judge “I also take the view that these English publications relating to an English corporation, however limited and technical, are most conveniently dealt with in an English court. As a matter of fact, that seems to coincide with the view of the learned judge in the District Court in New York”¹³².

In fact, Dow Jones had beaten Harrods to the litigational starting blocks. For after skirmishes by correspondence with Harrods, Dow Jones commenced proceedings in the District Court in New York against Harrods (and its Chairman, who was not a party to the English proceedings) five days before Harrods commenced its English proceedings. The New York proceedings requested the District Court to exercise its

¹²⁷ So described in the press release which started this sorry saga: see [2003] EWHC 1162(QB) at [1]. Perhaps Harrods was seeking to vindicate its world wide reputation?

¹²⁸ *Ibid.*, at [40].

¹²⁹ *Ibid.*, at [41].

¹³⁰ *Ibid.*, at [42].

¹³¹ *Ibid.*

¹³² *Ibid.*, at [43].

jurisdiction under the Declaratory Judgment Act seeking a judgment that would declare any libel claim based on the article to be insufficient as a matter of (United States) law on the ground that the article contained no provably false statements of fact and represented only protected expressions of opinion and that Harrods could not prove that Dow Jones acted with actual malice or gross irresponsibility in publishing it. Moreover, by reason of the running costs it would continue to incur, and the perceived threat of restrictions on its continued publication of the article, Dow Jones requested an injunction barring Harrods and Mr Al Fayed from pursuing the English action or related litigation against Dow Jones in any other forum in the world.¹³³

District Judge Marrero commenced his judgment with commendable irony: “To the question ‘What is in a joke?’, this lawsuit gives a decidedly wooden answer: a federal case”¹³⁴. Some 48 pages later, the learned judge concluded, for reasons which are not central to this paper, that Dow Jones’ action should be dismissed. Undeterred, Dow Jones appealed to the Circuit Court of Appeals for the Second Circuit, which in a commendably short opinion of a page and a half, dismissed the appeal.¹³⁵

So Harrods was free to go ahead with the English action, did so¹³⁶, and lost¹³⁷. According to press reports (there is no official information which has been discovered) a jury at the High Court threw out the claim and the judge ordered Harrods to pay £40,000 towards Dow Jones legal costs, which were expected to be about £200,000.¹³⁸ The Chairman of Harrods issued a statement in which he is reported to have said. “I was not concerned with winning damages in this case; I simply wanted the Wall Street Journal to accept its comparison was unwarranted and to apologise to me and to Harrods. It seems that the Wall Street Journal does not have the simple good manners to do this.”¹³⁹ The newspaper was reported as saying that it was “delighted” to have won the case but is said to have added that the legal battle

¹³³ *Dow Jones & Co. Inc. v. Harrods Ltd. and Al Fayed*, 237 F.Supp. 394 (S.D.N.Y. 2002), at p. 403.

¹³⁴ *Ibid.* at p. 399. As he points out in a footnote it is a dispute over “the exchange of not just one but two jokes, at least one of which arises from an April Fool’s gag played in a foreign country, and which then raises the stakes to entail international consequences implicating the protection of speech under the First Amendment of the United States Constitution”: *ibid.* To be fair, the judge conceded that the issues before the District Court did give rise to several serious legal questions.

¹³⁵ *Dow Jones & Co. Inc. v. Harrods Ltd. and Al Fayed*, 346 F. 3d 357 (2nd cir., 2003).

¹³⁶ The Times, February 17, 2004, p. 4.

¹³⁷ The Times, February 18, 2004, p. 10; The Guardian, February 18, 2004, p. 19.

¹³⁸ The Guardian, *ibid.*

¹³⁹ *Ibid.*

was a waste of time and effort. “It seems ridiculous that Harrods, which could not sue in the US, has taken the time of an English court on an article with the most tenuous connection imaginable to England and with absolutely no evidence of any actual loss.”¹⁴⁰ No mention was made by the newspaper of the proceedings which Dow Jones had earlier instituted in the United States and of the unsuccessful appeal therefrom.

Everything to be learnt from this story is, it is suggested, sufficiently revealed by the telling of it.

E. Paparazzi, privacy and private international law

Some segments of the press and their devoted readers have an almost lurid obsession with royalty and celebrity. An important tool of the trade, in this regard is the paparazzi, armed with a very long-lense camera who is engaged to take pictures of “unsuspecting” royals and celebrities in sensitive, hum-drum, or even compromising situations. The activities of these characters provide some of the backdrop to the French and German privacy cases referred to above and have also provided factual scenarios in which the proper approach to privacy in English law has been considered.¹⁴¹ The purpose here is to consider one such piece of English litigation which raised, though not perhaps as the major issue, a question of private international law.

One of the very many issues which arose in the litigation between Michael Douglas, Catherine Zeta-Jones and others, on the one hand, and Hello ! Ltd and others, on the other hand, was whether one Philip Ramey was subject to the jurisdiction of the English court.¹⁴² The litigation concerned the publication of photographs of the wedding of Mr Douglas and Ms Zeta-Jones (which took place in New York) in Hello ! magazine, a “celebrity magazine” edited in London, printed in Spain and published

¹⁴⁰ *Ibid.*

¹⁴¹ One such case is a leading case: see *Campbell v. MGN Ltd.*, *supra*, n. 46.

¹⁴² *Douglas v. Hello ! Ltd. (No. 2)* [2003] EWCA Civ. 1139; [2003] E.M.L.R. 585. There are 10 reported *Douglas* decisions on various points.

in the United Kingdom.¹⁴³ Hello ! Ltd, an English company, was the distributor of the magazine and was the subsidiary of Hola SA, a Spanish company, which was the publisher of the magazine. Mr Ramey was a paparazzo photographer and photographic agent based in California,¹⁴⁴ who appeared to have been commissioned by Hello ! to obtain photographs of the wedding, despite the strict security surrounding the event and an agreement between the claimants and the publisher of another English celebrity magazine OK ! that the latter should have the exclusive right to take and publish photographs of the event. Mr Ramey had not, apparently, taken the photographs himself, but they had reached him via another paparazzo who had gained unauthorised access to the wedding and who had surreptitiously snapped the glittering couple¹⁴⁵. The latter paparazzo had probably been put up to this by Mr Ramey.¹⁴⁶ The photographs were then transmitted digitally by Mr Ramey from New York to Hello ! Ltd in London and from there to Hola SA in Spain. Six of the photographs were used in a “spoiler” edition of Hello ! which was printed in Spain, flown to London and sold there.

Various claims were made against the various defendants but only two of them need concern us here namely a claim in tort for invasion of the right of privacy and a claim for equitable relief for breach of the duty of confidentiality. In relation to the former claim it was alleged that Mr Ramey was, along with the other defendants, a joint tortfeasor. In relation to the latter claim, it was alleged that he had “conspired with” the other defendants to bring about the equitable wrong. In the context of leave to serve process out of the jurisdiction, the privacy claim fell within CPR r. 6.20(8) which is referred to above. The breach of confidence claim fell within CPR r. 6.20 (15) which enables permission to be granted if “a claim is made for restitution where the defendant’s alleged liability arises out of acts committed within the jurisdiction”. The initial ex parte application was granted by a judge and proceedings were served on Mr Ramey in California. He then sought to have service set aside on the grounds

¹⁴³ There is a Spanish version of the publication (Hola !) and a French version (Oh La !). In the U.K. the magazine is bought by an average of some 456,000 people a week leading to an estimated readership of 2.2 million people per week: see *Douglas v. Hello ! Ltd (No. 3)* [2003] EWHC 786(Ch); [2003] 3 All E.R. 996 at [11]. This decision sets out fully the factual background to the case.

¹⁴⁴ He is, apparently, a most distinguished practitioner of his profession. As Lindsay J. put it, “Mr Ramey...has a reputation of being able to get in where others were unlikely to be able to”: *ibid.*, at [8].

¹⁴⁵ This paparazzo is said to have been Mr Rupert Thorpe (*ibid.* at [66], [71]), who is the son of the former leader of the Liberal Party in the U.K., Mr Jeremy Thorpe.

¹⁴⁶ *Ibid.*, at [71].

(a) that there were no reasonable prospects of the claimants succeeding in their claim against him (b) that the claimants had failed to make full and frank disclosure in the earlier application and (c) that the forum conveniens for the dispute was New York. This application was rejected by a Master whereupon Mr Ramey appealed to a judge, Laddie J., but only, interestingly enough, on ground (a), thereby conceding the forum conveniens issue in favour of the English court.¹⁴⁷

It is well established that permission to serve out of the jurisdiction will only be given when the claimant can demonstrate “a good arguable case” or a “serious question to be tried”.¹⁴⁸ Thus in effect, Laddie J. had to make a preliminary determination of law to the level of this standard and this included the question of applicable law and for these purposes invasion of privacy was treated as a tort.¹⁴⁹ Privacy and breach of confidence were treated together. Laddie J. concluded that there was no reasonable prospect of either of these claims (or any other claim) against Mr Ramey succeeding and set service applied. His decision was reversed by the Court of Appeal for reasons which merit closer examination.¹⁵⁰ First, although it was not open to Mr Ramey to argue the point, the court emphasised that there was the necessary jurisdictional link with England to satisfy either CPR r 6.20(8) or 6.20(15). The essential act complained about which had invaded the rights of and harmed the claimants (at least Mr Douglas and Ms Zeta-Jones) had been publication of the photographs, and this occurred in England, and analogy was expressly drawn with libel.¹⁵¹ It mattered not, for jurisdictional purposes, that there might well have been an earlier breach of the duty of confidentiality or invasion of the right of privacy when the photographs were first taken in New York, nor that such earlier wrongs may have been governed by the law of New York. For choice of law purposes, it was argued on behalf of Mr Ramey that the only possible wrongdoing (breach of confidence and invasion of privacy) was committed in New York where the photographs were taken. There was expert evidence before the court that there would be no liability under New York law

¹⁴⁷ [2002] EWHC 2560(Ch); 2002 WL 31599704.

¹⁴⁸ *Seaconsar Far East Ltd. v. Bank Markazi* [1994] 1 A.C. 438.

¹⁴⁹ Although ultimately it was decided that there was no such tort and in this respect the court proceeded on the basis of breach of confidence.

¹⁵⁰ *Douglas v. Hello ! Ltd. (No. 2)* [2003] EWCA Civ. 139; [2003] E.M.L.R. 585.

¹⁵¹ *Ibid.*, at [33], citing *Berezovsky and The Albaforth* [1984] 2 Lloyd’s Rep. 91. The court pointed out that it had not been argued whether England was the natural forum, though the implication in para. [33] of the judgment, particularly because of the analogy with libel, is that it was.

because that law extends protection from liability in favour of “newsworthy publications” which would cover the unauthorised photographs even if they were obtained by means of a trespass or other such wrongs.¹⁵² This argument was rejected. First the “newsworthiness” protection, the court understood from the expert evidence, applied only to publication in the State of New York.¹⁵³ Secondly and more importantly, the court thought it to be well arguable that the claimants were entitled to rely on publication in England as the essence of their complaint so that there was a good case that New York law was irrelevant to the alleged causes of action. There was a good case that the law thereby applicable to the tort was English law either under section 11(1)¹⁵⁴ or 11 (2)(c)¹⁵⁵ of the Private International Law (Miscellaneous Provisions) Act 1995.¹⁵⁶ Equally, there was a good case that the law applicable to the right in restitution for breach of the duty of confidentiality was English law on the basis of Dicey and Morris, Rule 200(2)(c) which provides that the proper law in such circumstances is “the law of the country where the enrichment occurs”.¹⁵⁷

Service on Mr Ramey in California therefore stood, but it was not possible to include him in the trial of the other five defendants.¹⁵⁸ At that trial, it was said that the claimants intended to move against him at a later date¹⁵⁹ but it is not known whether such a move has been actually made.

Although ultimately it was decided that English law did not recognise a claim for invasion of privacy, as opposed to one for breach of confidence,¹⁶⁰ the following comments may be made on the contribution of this case to the present debate, though bearing in mind that the court was only considering whether there was a good arguable case, one should beware of drawing dogmatic conclusions. First the drawing

¹⁵² *Ibid.*, at [41].

¹⁵³ *Ibid.*

¹⁵⁴ Which provides that “the general rule is that the law applicable to issues in tort is the law of the country in which the events constituting the tort occur”.

¹⁵⁵ Which provides that where the elements constituting the tort occur in different countries, the law applicable under the general rule in a case other than personal injury, death or damage to property is to be taken to be “the law of the country in which the most significant element or elements of those events occurred”.

¹⁵⁶ [2003] EWCA Civ. 139; [2003] E.M.L.R. 641 at [41].

¹⁵⁷ *Ibid.* See *Dicey and Morris on the Conflict of Laws* (13th ed., 2000), paras. 34-032-34-041, hereafter *Dicey and Morris*.

¹⁵⁸ *Ibid.*, at [7].

¹⁵⁹ *Douglas v. Hello ! Ltd (No. 3)* [2003] EWHC 786(Ch); [2003] 3 All E.R. 996 at [5].

¹⁶⁰ *Ibid.*, at [229].

of the analogy with libel suggests that in the case of liability arising out of publication, an English court may well be likely to assume jurisdiction under the CPR where publication takes place in England. Secondly, however, whereas in libel cases the English court treats English law as applicable without any choice of law analysis, in the two forms of liability here under discussion, application of choice of law rules is necessary to determine whether English law is the applicable law. This, however, makes little practical difference, since if there is publication in England English law will normally be the applicable law and if it is not, the court may well decline jurisdiction. The position in relation to breach of confidence and invasion of privacy claims is thus very similar to claims for libel so that a claimant will be able to rely on English law and there is little that a media defendant can do to protect itself by reference to foreign law. Thirdly, it would appear that in so far as English law recognises, or in the future comes to recognise, claims for invasion of privacy, then for choice of law purposes, where those claims involve complaints arising out of publication they fall within the provisions of Part III of the Private International Law (Miscellaneous Provisions) Act 1995 and are not excluded from that Act as defamation and related claims. This is surely right since the respective interests protected by these liabilities are entirely different, at least in common law systems.¹⁶¹ Fourthly, while the limited protection given to privacy rights by English law does not threaten foreign media defendants in the same way as does English libel law, such defendants might become embroiled, nonetheless, in long and expensive jurisdictional battles.

F. Conclusion

The foregoing indicates that it is not entirely without justification to call London “a town named Sue”. Indeed the cases referred to in Section 2 of this paper which have been brought in the past few years suggests that what some call “libel tourism”¹⁶² is on the increase. Several of these cases involve actions brought by rich Saudi Arabians anxious to defend themselves against allegations that they have links with terrorism,

¹⁶¹ See *Dicey and Morris*, para. 35-123.

¹⁶² See *The Guardian*, March 31, 2004, p. 4.

Al Quaida, or Osama bin Laden.¹⁶³ Earlier this year it was reported that The Mail on Sunday had agreed to pay substantial damages to a Saudi Arabian businessman, Sheikh Khalid bin Mafouz, over an article which suggested that he was the brother-in-law of bin Laden and helped to fund terrorism. The same report stated that the Sheikh is pursuing other libel actions against the French author, Jean Charles Brisard, and the firms running his website.¹⁶⁴ And although the English media may be fair game, foreign media defendants are at risk as well. The approach taken to jurisdiction and applicable law in *Berezovsky*, *King*, and *Harrods*, discussed above suggests that private international law rules will not protect foreign media defendants where there is publication in England unless the subject of the publication has no reputation there, which is unlikely to be the case in relation to the type of claimant who brings these actions.

It is not only the press which is at risk. On March 31, 2004, The Guardian carried an article which stated that Random House, the American publishing firm, had suppressed the publication in the United Kingdom, by Secker and Warburg, its subsidiary, of the book by the American writer Craig Unger entitled *House of Bush, House of Saud*. The book focuses in part on Sheikh Khalid bin Mahfouz (above) and possible Texas business links between the Bush “circle” and the families of the Sheikh and other rich Saudi Arabians. Random House said it could not afford the risk of being sued for libel. Its Deputy-Chairman described English libel law as “ludicrous” and pointed out that a libel action was immensely time consuming and potentially hugely expensive - “vastly more than the publisher could hope to earn from the book”.¹⁶⁵ On July 3, 2004, it was announced that a small independent

¹⁶³ See nn. 21,29, 32.

¹⁶⁴ The Guardian, January 14, 2004, p. 10.

¹⁶⁵ The Guardian, March 31, 2004, p. 4. See Robertson and Nicol, *supra*, n. 4, pp. 76-79, stating that in 2001 a contested two week defamation trial, including all the applications which would precede it could easily cost each side £750,000, and the loser would have to pay 75% of the winner’s costs, on top of damages which might amount to six figures. Doubtless libel tourism contributes to the financial health of specialist solicitors and the defamation bar. Costs for the media defendant may be very high indeed if the claimant has a “no win, no fee” arrangement with his lawyers. Should the claimant win, the lawyers are allowed to “uplift” their fees and the losing defendant may be liable to pay these fees as costs, it being the general rule in England that the loser pays the winner’s costs. It is worth noting that the French Cour de Cassation has refused to enforce an English order for costs against a French claimant who brought defamation proceedings in England against Times Newspapers Ltd. on the ground that the amount of costs (£20, 078, excluding VAT, with interest) was set at a disproportionately high level which presented an obstacle to the French claimant’s access to justice, contrary to Art. 6(1) of the European Convention on Human Rights: *Pordea v. Times Newspapers Ltd.* [2000] I.L.Pr. 763.

publisher would take on the book and publication is due at the end of July. The head of this publishing house studied law at Oxford and Leiden !¹⁶⁶

5. ENFORCEMENT OF JUDGMENTS

As is pointed out above some libel claimants may be content to get a judgment in their favour from the English court so as to vindicate their reputation and are less concerned about increasing their existing wealth by being able to enforce an award of damages. This is particularly relevant when the media defendant is based in the United States where, as pointed out in *Berezovsky* and *Harrods*, English libel judgments are unlikely to be enforced. Not all claimants may, however, feel that way. It may therefore be helpful to consider briefly at this point two cases where attempts were made to enforce English libel judgments in the United States.¹⁶⁷

A. *Bachchan v. India Abroad Publications Inc.*¹⁶⁸

The plaintiff, an Indian national, resident in England or Switzerland, obtained an English judgment against the defendant, the New York operator of a news service which transmitted reports only to a news service in India. The allegedly libellous story was written by a reporter in London and wired by the defendant to the news service in India which sent it to Indian newspapers. It was reported in two Indian newspapers, copies of which were distributed in the United Kingdom. The story was also reported in an issue of *India Abroad*, the defendant's New York newspaper. An edition of *India Abroad* was printed and distributed in the United Kingdom by the defendant's English subsidiary. The wire service story which was transmitted by the defendant stated that

¹⁶⁶ The Guardian, July 3, 2004, p. 38.

¹⁶⁷ For discussion of the issue see Walters 16 Fordham Int'l L.J. 895 (1992-1993); Sanders 19 N.C. J Int'l L. & Com. Reg. 515 (1993-1994); Maltby 94 Columbia L. Rev. 1978 (1994); Devgun (1994) 23 Anglo-Am L. Rev. 195; Stern 60 Brooklyn L.Rev. 999 (1994-1995); Kyu Ho Youm 16 Hastings Comm. & Ent. L.J. 235 (1994); (2000) 49 I.C.L.Q. 131. Compare *Yahoo ! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (D.C. Cal., 2001).

¹⁶⁸ *Bachchan v. India Abroad Publications Inc.*, 54 Misc. 2d 228, 585 N.Y.S. 2d 661 (Sup. Ct., 1992).

Dagens Nyjeter, a Swedish daily newspaper, had reported that the Swiss authorities had frozen an account belonging to the plaintiff to which money was transferred from a coded account into which “commissions” paid by Bofors were deposited. Bofors was a Swedish arms company which some time before had been charged with paying kickbacks to obtain a large arms contract with the Indian government. The plaintiff’s name had previously been mentioned in connection with this scandal in a variety of Indian and other publications.

The plaintiff brought the English action against Dagens Nyjeter and the defendant. The former settled the claim against it by paying a sum of money and issuing an apology. The jury awarded damages of £40,000 against the American India Abroad defendant and it was this judgment that the plaintiff sought to enforce in New York under the New York Civil Practice Law and Rules which recognise foreign country money judgments.¹⁶⁹

The defendant argued that the English judgment infringed the constitutional protections of the First Amendment and the New York Constitution and that the judgment was contrary to the public policy of New York which was a ground for refusing enforcement under the New York Rules.¹⁷⁰ As to the latter argument the public policy exception, on the words of the statute appears to be discretionary.¹⁷¹ Judge Shirley Fingerhood held, however that where a foreign judgment is repugnant to a policy embodied in both state and federal constitutions, the “refusal to recognise the judgment should be, and is deemed to be, ‘constitutionally mandatory’”.¹⁷² English libel law offended American constitutional standards in at least two fatal respects. First, it placed the burden of proving justification on the defendant rather than placing the burden of proving falsity on the plaintiff as required under United States’ law.¹⁷³ Secondly, English law was based on strict liability, whereas under

¹⁶⁹ Implementing The Uniform Foreign Country Money Judgments Recognition Act.

¹⁷⁰ These provide, *inter alia*, that a foreign country money judgment “need not” be recognised if the cause of action on which it is based is repugnant to the public policy of New York.

¹⁷¹ See preceding note where the words are “need not” rather than “must not”.

¹⁷² 585 N.Y.S. 2d 661, 662 (1992).

¹⁷³ See *Philadelphia Newspapers Inc. v. Hepps*, 475 U.S. 767 (1986).

United States' law even a "private figure" plaintiff is required to prove that the publisher was negligent.¹⁷⁴

Accordingly the court declined to enforce the English judgment.

B. *Telnikoff v. Matusevitch*¹⁷⁵

After protracted litigation in London,¹⁷⁶ the plaintiff obtained a judgment against the defendant in respect of a libel which was allegedly contained in an article and an exchange of letters, published in *The Daily Telegraph*, which was said to accuse the plaintiff, *inter alia*, of racism and anti-semiticism. Eventually, he obtained a judgment against the defendant in the English proceedings, which he sought to enforce in the United States. After complicated manoeuvrings¹⁷⁷, the case ended up in the Maryland Court of Appeals which decided, by a majority, that the judgment should not be enforced.¹⁷⁸

At the time of the English proceedings, both plaintiff and defendant were Russian émigrés living in England, the publication complained of concerned the hiring practices of the B.B.C.'s Russian Service and no media defendant was involved in the case. Subsequent to those proceedings, the defendant had re-located to Maryland and hence the Maryland enforcement proceedings. The question which was put to the court was not framed in First Amendment terms but, rather, as follows. "Would recognition of Telnikoff's foreign judgment be repugnant to the public policy of

¹⁷⁴ *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974). The court found it unnecessary to address the question of whether the plaintiff was a public figure falling within the *New York Times v. Sullivan* requirement of actual malice.

¹⁷⁵ 37 Md. 561, 702 A. 2d 230 (1997).

¹⁷⁶ See *Telnikoff v. Matusevitch* [1992] 2 A.C. 952.

¹⁷⁷ See *Matusevitch v. Telnikoff*, 877 F.Supp. 1 (D.C. Cir., 1995); 159 F. 3d 636 (D.C.Cir., 1998).

¹⁷⁸ *Supra*, n. 175.

Maryland ?”¹⁷⁹ The court nonetheless took the view that the First Amendment and the freedom of the press clause of the Maryland Constitution¹⁸⁰ ought to be taken into account in the determination of the content of public policy. After a lengthy historical review of the history of the development of libel law in England and the United States, the court focused on the features of English libel law that had been referred to in *Bachchan* as indicating that enforcement would be inimical to the public policy of the State, including, also, in the “list of defects”, the absence of a public figure defence¹⁸¹.

Judge Chasanow delivered a vigorous dissent. Since some may think that his criticism of the majority view makes good sense, this opinion is worth some quotation. Judge Chasanow accepted the correctness of *Bachchan*, but did not regard the instant case as a freedom of the press case as no media defendant was involved. He continued: “There is another public policy that should also be considered by this Court. That public policy, recognised by our legislature when it adopted the Uniform Foreign Money Judgments Recognition Act is to give broad and uniform recognition to foreign judgments. The Act gives our courts discretion to subordinate our State’s public policy. Our interest in international goodwill, comity, and res judicata fostered by recognition of foreign judgments must be weighed against our minimum interest in giving the benefit of our local libel public policy to residents of another country who defame foreign public figures in foreign publications and who have no reasonable expectation that they will be protected by the Maryland Constitution. Unless there is some United States interest that should be protected, there is no good reason to offend a friendly nation like England by refusing to recognise a purely local libel judgment for a purely local defamation. In the instant case, there is no United States interest that might necessitate non-recognition or non-enforcement of the English defamation judgment.”¹⁸²

¹⁷⁹ 702 A. 2d 230, 236 (1996).

¹⁸⁰ Article 40 of the Maryland Declaration of Rights (“the liberty of the press ought to be observed”: “every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for abuse of that privilege”).

¹⁸¹ The court concluded that Telnikoff was a public figure. The court applied the public policy exception under the Uniform Foreign Money Judgments Recognition Act, as implemented in Maryland.

¹⁸² 702 A. 2d 230, 257 (1996).

And he concludes (perhaps somewhat extravagantly):

“The Court does little or no analysis of the global public policy considerations and seems inclined to make Maryland libel law applicable to the rest of the world by providing a safe haven for foreign libel judgment debtors.”¹⁸³

6. CHOICE OF LAW AND THE FIRST AMENDMENT

There are some early cases where American courts were prepared, in principle, to apply the defamation law of a foreign country as *lex loci delicti*.¹⁸⁴ However these cases are no longer reliable guides, first because of the increasing constitutionalisation of defamation law through the First Amendment as a result of *New York Times v. Sullivan* and subsequent cases and, secondly, because of the considerable changes in the choice of law principles applied by American courts. The latter principles have become increasingly more flexible and have enabled courts to incorporate First Amendment protection into choice of law analysis where a potentially applicable law is that of a foreign country which does not provide that protection.

A variety of approaches to choice of law in defamation may be taken in the United States.¹⁸⁵ For present purposes, it must suffice to refer to the approach taken by the Restatement Second of Conflict of Laws of 1971. Section 149 provides as follows: “In an action for defamation the local law of the state where the publication occurs determines the rights and liabilities of the parties, except as stated in [section] 150, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in [section] 6 to the occurrence and the parties, in which event the local law of the other state will be applied.”

Section 150 (which was written prior to the advent of the internet) deals with multistate defamation and provides as follows:

¹⁸³ *Ibid.*, at p. 260.

¹⁸⁴ See e. g. *Philp v. Macri*, 261 F. 2d 945 (9th cir., 1958); *Gallegos v. Union-Tribune Publishing Co.*, 195 Cal. App. 2d 791, 16 Cal Rptr. 185 (1961); *Bakhshandeh v. American Cyanamid Co.*, 211 F. Supp. 803 (S.D.N.Y., 1962).

¹⁸⁵ See e. g. Note 77 Harvard L.Rev 1463 (1963-1964); Rose 30 Hastings L.J. 1515 (1978-1979); Pielemeier 133 U. Pa. L.Rev. 381 (1984-1985); Burnstein 29 Vanderbilt J. of Transnational Law 75 (1996).

“(1) The rights and liabilities that arise from defamatory matter in any one edition of a book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture or similar aggregate communication are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in [section] 6.

(2) When a natural person claims that he has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the person was domiciled at the time, if the matter complained of was published in that state.

(3) When a corporation, or other legal person, claims that it has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the corporation, or other legal person, had its principal place of business at the time, if the matter complained of was published in that state.”¹⁸⁶

The principles stated in section 6 include the following: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relative policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied.

In *DeRoburt v. Gannett Co. Inc.*¹⁸⁷ the plaintiff, the splendidly named Hammer DeRoburt, founding President of the Republic of Nauru, brought a libel action in the District Court of Hawaii against the defendants, Gannett Co. Inc., one of the largest newspaper publishers in the United States, and one of its subsidiaries, Guam

¹⁸⁶ Privacy is dealt with in sections 152 and 153. Section 152 provides that the local law of the state where the invasion occurred determines the rights and liabilities of the parties, except as stated in [section] 153, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in [section] 6 to the occurrence and the parties in which event the local law of the other state will be applied. Section 153, dealing with multistate invasion of privacy provides that the “rights and liabilities that arise from matter that invades a plaintiff’s right of privacy and is contained in any one book or newspaper, or any one broadcast over radio or television, exhibition of a motion picture, or similar aggregate communication are determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the occurrence and the parties under the principles stated in [section] 6. This will usually be the state where the plaintiff was domiciled at the time if the matter complained of was published in that state.”

¹⁸⁷ 83 F.R.D. 574 (D. Hawaii, 1979).

Publications Inc., in respect of an article printed in the Pacific Daily News. Gannett was a Delaware corporation with its principal place of business in New York. Guam Publications was incorporated in Hawaii and had its principal place of business in Guam. The plaintiff claimed that the offending article accused him of committing serious crimes under the law of Nauru and of interfering in the internal political affairs of the Marshall Islands in violation of accepted standards of international diplomacy and relations. He sought compensatory damages of \$1.5 million and punitive damages of \$6 million. An initial question arose as to the applicable law, since the Supreme Court of Hawaii had not enunciated a choice of law rule for defamation cases. Accordingly the court had to apply the choice of law rule it thought most likely that the Hawaii Supreme Court would adopt.¹⁸⁸

The plaintiff argued that the law of Nauru applied on the basis of the *lex loci delicti* principle which pointed to Nauru, since the greatest harm occurred there, at least with respect to publication which took place there. On the basis of the same principle, the defendant argued for the law of Guam because Guam was the place where publication, the last act necessary to cause liability, occurred. The defamation law of Nauru was based on English common law principles which would not include First Amendment protection for the defendant. In contrast, the law of Guam would include such protection. The court took the view that Hawaii would probably not adopt the *lex loci* principle which was rapidly going out of fashion in the United States at the time. Instead it was thought that Hawaii would adopt some form of interest-oriented choice of law analysis and seized upon two of the principles set out in section 6. The first of these was the relevant policies of the forum. A fundamental policy of the forum (and of Guam) was the protection afforded by the First Amendment. With that exception, the court concluded that the policies underlying laws of defamation in Hawaii, Guam and Nauru did not appear to conflict:

“The libel laws of the respective states represent a common commitment to protecting the reputations of their citizenries. Hence, application of the libel law of Nauru together with the First Amendment safeguards of *New York Times v. Sullivan* and its

¹⁸⁸ A federal court sitting in diversity jurisdiction must apply the choice of law rule of the state in which it sits: *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

progeny would provide a satisfactory accommodation of the relevant policies of this forum.”¹⁸⁹

Secondly, as to the expectations of the parties, the defendants could “expect” the protection of the First Amendment but they could not “expect”, in other respects, the application of the law of Hawaii or Guam. Application, apart from the First Amendment, of the law of Nauru, was also supported by section 150 of the Second Restatement in that the plaintiff had suffered the greatest harm to his reputation there and was domiciled there.¹⁹⁰

The conclusion reached by the court was that the law of Nauru should be applied to the extent that it was consistent with the First Amendment.

One suspects, however, that once First Amendment protection is injected into the choice of law question in this fashion, there will be very little of Nauru defamation law that will be left to apply. The plaintiff was undoubtedly a public figure and the critical question would therefore be whether he could establish actual malice within the meaning of *New York Times v. Sullivan* and subsequent cases. As the court put it in a later case “given the extensive modifications resulting from the imposition of first amendment safeguards, under *DeRoburt*, the (first amendment) exceptions swallow up the (foreign law) rule and the functional equivalent of American defamation law is applied”¹⁹¹.

The court which rendered the previous statement adopted a rather more sophisticated approach to the issue than did the court in *DeRoburt*. In *Desai v. Hersh* Morarji Desai, a former Indian Prime Minister who had held many governmental posts in India, brought a defamation action against Seymour Hersh, the author of *The Price of Power: Kissinger in the Nixon White House*, claiming that allegations that he, while

¹⁸⁹ 83 F.R.D. 574, 580 (1979).

¹⁹⁰ Citing Restatement Second, section 150, comment e.

¹⁹¹ *Desai v. Hersh*, 719 F. Supp. 670, 679 (N.D. Ill., 1989). The truth of this is (perhaps unintentionally) recognised in a statement in *Ellis v. Time Inc.* 1997 WL 863267 (D.D.C., 1997), at p. 13: “The Court finds that applying English libel standards would violate the First Amendment’s protection of free speech... United States courts must apply rules of law consistent with the Constitution, regardless of where the alleged wrong occurs. Principles of international comity do not dictate otherwise: it is the choice not the duty of the United States to acknowledge the laws of another nation... When it is contrary to its policy or prejudicial to its interests, the United States must not apply foreign law... This Court will not apply English libel law...”. After protracted litigation which went on until 1988, the plaintiff’s claim was dismissed: see 859 F. 2d 714 (9th cir., 1988).

an official in the government of India, had sold Indian state secrets to the C.I.A., were defamatory.¹⁹² The book was published in the United States, and to that extent, clearly fell within First Amendment protection, but the plaintiff also relied on the defamation law of India where, because Indian law derives from English law, no such protection would be available.

In this case the court adopted a technique somewhat different to that adopted in *DeRoburt*. It did not focus on traditional choice of law analysis, but rather posed the question as “in what circumstances should the First Amendment be given extraterritorial application”.¹⁹³ The answer to this question was neither “always” nor “never”. A balance had to be struck. The rule ultimately adopted was stated as follows.

“In cases where the plaintiff is a public official or figure and thus heightened first amendment protections, including the ‘actual malice’ standard, apply to domestic publication, these same protections will apply to extraterritorial publication of the same speech where the speech is a matter of public concern and the publisher has not intentionally published the speech in the foreign country in a manner consistent with the intention to abandon first amendment protections.”¹⁹⁴

It is likely that the “public concern” aspect of this rule is likely to be satisfied in most cases of truly transnational libel.¹⁹⁵ When a publisher will be taken to have intended to abandon First Amendment protection may be more difficult to judge, though the court gave some examples. Thus intentional publication in a foreign country which is substantial in comparison with domestic publication will indicate an intention to abandon,¹⁹⁶ though it is not made clear why this should be the case if there is other evidence indicating an absence of such an intention. Perhaps reference to intention here is unfortunate and a better question to ask may be whether in the light of the

¹⁹² *Desai v. Hersh*, 719 F. Supp. 670 (N.D. Ill., 1989).

¹⁹³ In Europe the analogy can be drawn with mandatory rules of the law of the forum and the question of when the application of such rules is mandatory.

¹⁹⁴ 719 F. Supp. 670, 680-681 (1989). It is possible to construe this rule as a unilateral conflict rule.

¹⁹⁵ Though that is not likely to be the case, e.g. where the defendant publishes only in India and a copy is taken back to the United States by a tourist so that the speech is perhaps of no, or only minimum, public concern to the American public: see *ibid.*, at p. 676. Allegations that an Indian public official sold Indian state secrets to the C.I.A. even if only published in India might be of more than minimum public concern to Americans.

¹⁹⁶ *Ibid.*, at p.680.

quantity of publication in the foreign country, it is reasonable to extend the protection of the Constitution to it. The court also suggested that where substantial publication resulted from the act of a third party only the third party will be taken to have abandoned protection and the author will retain protection even when the third party acts according to a contract with the author.¹⁹⁷ The court rejected the notion that principles of agency might be applied to third party republication so as to avoid the “chilling” effect that would result from “fear of sale of the speech to a third party who would, unbeknownst to the author and domestic publisher, introduce the speech into a foreign country”¹⁹⁸. According to the court, “avoiding this chilling effect justifies limiting potential liability under foreign defamation law to the actual person or entity responsible for foreign publication, even where the foreign distribution was a certainty.”¹⁹⁹ In the latter type of case the plaintiff may still recover under foreign law in the foreign court against the actual person or entity responsible for the foreign publication.²⁰⁰

In the instant case the court held that Seymour Hersh’s book was a matter of public concern, but was unable to answer the question of abandonment and required the parties to produce evidence of Indian publication. It was held that the First Amendment would not apply in respect of the Indian publication if the plaintiff was able to establish that Hersh intentionally republished the book in India with a view to exploiting the Indian market.²⁰¹

Whilst the approach in *Desai* is capable of being interpreted to give less expansive effect to the First Amendment than that of *DeRoburt* the vagaries surrounding the definition of intentional abandonment of protection make it very difficult to predict that the former decision will actually have that effect, given the almost umbilical cord which binds the First Amendment and American courts. Foreign claimants are perhaps unlikely to have any more success in suing in United States courts in respect of publications in a foreign country where First Amendment protection does not apply

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*, at p. 679. It is not clear what the final outcome on the particular issue was, although a jury appears to have delivered a verdict in favour of Hersh: see 954 F. 2d 1408 (7th cir., 1992), cert. denied 506 U.S. 895 (1992).

than they will have in enforcing, in the United States, judgments emanating from courts in countries whose law does not supply such protection.

7. CHOICE OF LAW IN ENGLAND

It has been argued above that foreign law may well not be relied upon in an English court, in a libel action, where a statement published abroad is also published in England, which will normally be the case, since the practice in such cases is for the claimant to limit his claim to the English publication. This means that the English rules for the choice of law are likely to be of minimum impact. Nonetheless it is obviously appropriate to draw attention to them.

It will be recalled from the discussion above that defamation and related claims were excluded from the scope of the new choice of law rules introduced by the Private International Law (Miscellaneous Provisions) Act 1995 and that that Act preserved the common law choice of law rules (basically the rule of double actionability, subject to limited exceptions) for such claims.²⁰² Before considering the common law rules it is necessary to say a few words about the scope of the exclusion.

A. Meaning of “defamation and related claims”²⁰³

These are defined in the Act as any claim under the law of England for libel or slander or for slander of title, slander of goods or other malicious falsehood,²⁰⁴ any claim under the law of Scotland for verbal injury,²⁰⁵ and any claim arising under the law of any other country corresponding to or otherwise in the nature of any of the foregoing claims.²⁰⁶

²⁰² See 1995 Act, ss. 9(3), 10 and 13.

²⁰³ For discussion, see *Dicey and Morris*, paras. 35-122-35123; Cheshire and North, *Private International Law* (13th ed., 1999), pp. 654-656.

²⁰⁴ 1995 Act, s. 13(2)(a).

²⁰⁵ *Ibid.*

²⁰⁶ 1995 Act, s. 13(2)(b).

The exclusion which thus comes about would seem to be limited to statements or representations which have the legal effects associated with the aforementioned liabilities. It would not exclude liabilities arising (even from statements) which would constitute, say, an invasion of privacy under a foreign applicable law.²⁰⁷ It is less clear (and this may be important in press cases) whether a true statement about a person which a foreign law regards as actionable (e.g. a true statement about a foreign politician which because it causes him a “loss of self-esteem” is actionable under a foreign law) is excluded from the Act.²⁰⁸ Such a claim may be regarded in a foreign law as distinct from a defamation claim and thus as not corresponding to such a claim for the purposes of the Act. It is, however, suggested that whether a claim under the law of a foreign country corresponds to or is otherwise in the nature of a defamation claim is to be decided on the basis of the forum’s view, rather than on the basis of the view taken by the foreign law. In one sense, it could be said that liability based on a true statement can never correspond to a defamation claim, as understood in English law, since the essence of that liability is an *untrue* statement. If this is right, then such a claim would fall within the choice of law rules contained in the Act and to avoid applying such a rule which, one may surmise, would not commend itself to an English court, it would be necessary to resort to public policy, or to regard the rule as an unenforceable penal or other public law.²⁰⁹ Comments from the Lord Chancellor in the debates on the Bill probably tend to favour exclusion so that foreign rules of this nature would fall foul of the first branch of the double actionability rule.

B. The Choice of Law Rule

The generally accepted formulation of the double actionability choice of law rule is that stated in Dicey and Morris, Rule 205, to the following effect:

“(2) As a general rule, an act done in a foreign country which is alleged to give rise to a [defamation claim] is actionable as such in England, only if it is both

- (a) actionable as such according to English law (or in other words is an act which, if done in England, would give rise to such a claim) and

²⁰⁷ See *Douglas v. Hello ! Ltd. (No. 2)* [2003] EWCA Civ. 139; [2003] E.M.L.R. 555, discussed *supra*.

²⁰⁸ See the debates on the Bill on which the Act is based: H.L. Deb. December 6, 1994, col. 838 and March 1, 1995, col. 20.

²⁰⁹ 1995 Act, s. 14(3)(a).

(b) actionable according to the law of the foreign country where it was done.
(3) By way of exception to clause (2) of this Rule, a particular issue between the parties which arises in a defamation claim may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.”²¹⁰

For the purpose of clause (2) of this Rule “act done in a foreign country” refers to the country in which the defamatory statement is published.²¹¹ This approach creates no practical difficulty where the statement is published only in one country.²¹² Where publication occurs in several countries, each publication may, potentially, give rise to a fresh cause of action and the law of each country in which publication takes place may become relevant.²¹³ It seems, as discussed further below, that it is open to the claimant to limit the claim to one such place if he or she so wishes. In the case of a publication on the internet, it seems that the current wisdom (which may well be revisited by the courts) is that the place of publication is the country in which the material is downloaded.²¹⁴

It will be noted that this choice of law rule consists of a general rule, the rule of double actionability and an exception which enables the general rule to be displaced. Case law has established that the general rule may be displaced in favour of the sole application of the law of the forum, i.e. English law,²¹⁵ or in favour of the sole application of the law of the place where the act complained of was done²¹⁶. It has never been decided whether both parts of the general rule may be displaced in favour of the application of the law of a third country, for example, in a defamation case, the law of the country in which the claimant’s reputation is principally located, where this country is neither England nor the law of the country of publication. It seems clear,

²¹⁰ For approval, see e.g. *Red Sea Insurance Co. Ltd. v. Bouygues S.A.* [1995] 1 A.C. 190 (P.C. (not a defamation case)). For detailed discussion including issues falling outside the scope of this paper see *Dicey and Morris*, paras. 35-120-35-149; *Cheshire and North*, pp. 654-660.

²¹¹ *Bata v. Bata* [1948] W.N. 366; *Church of Scientology of California v. Commissioner of Police* (1976) 120 S.J. 690.

²¹² See *Church of Scientology of California v. Commissioner of Police*, *supra*.

²¹³ Cf. *University of Glasgow v. The Economist* [1997] E.M.L.R. 495, discussed *infra*; *Cawley v. Australian Consolidated Press Ltd.* [1981] 1 N.S.W.L.R. 225; *Carleton v. Freedom Publishing Co. Pty. Ltd.* (1982) 45 A.C.T.R. 1.

²¹⁴ See *King v. Lewis* [2004] EWHC 168(QB), discussed *supra*.

²¹⁵ See *Dicey and Morris*, paras. 35-130-35-135. See, in the context of defamation, *Church of Scientology of California v. Commissioner of Police*, *supra*.

²¹⁶ *Red Sea Insurance Co. Ltd. v. Bouygues S.A.* [1995] 1 A.C. 190 (P.C.).

however, that the exception will only be invoked in what are found to be exceptional cases.²¹⁷

As has been pointed out above, the choice of law rule does not apply to a libel committed in England.²¹⁸

C. Application of the choice of law rule in defamation cases

The first branch of the general rule states a requirement that the events giving rise to a defamation claim occurring in a foreign country must be actionable as defamation in English law, i.e. those events if they occurred in England would give rise to a claim in defamation. This means, for example, that the defendant may rely on any defence which is available in English law, even if that defence is not available under the law of the foreign country.²¹⁹ It also means that, at least initially, the claimant has the benefit of pro-claimant English defamation law. The second branch of the general rule requires that it be established that the act gives rise to a defamation claim or a claim corresponding to such a claim under the law of the foreign country.²²⁰ This claim must be based on a civil liability and it is insufficient that the foreign country's law would only impose criminal liability on the defendant.²²¹ Application of this principle means of course, that the defendant may rely on any defence available under the law of the foreign country in which publication takes place. It is this principle which precludes publication of material in the United States concerning, for example, a public figure, from being sued upon in England unless there is also publication in England and the claimant, as pointed out above, limits the claim to the English publication.

²¹⁷ *Boys v. Chaplin* [1971] A.C. 356, 391-392; *Red Sea Insurance Co. Ltd. v. Bouygues S.A.* [1995] 1 A.C. 190 (P.C.).

²¹⁸ *Szalatnay-Stacho v. Fink* [1947] K.B. 1; see also *Metal und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.* [1990] Q.B. 391.

²¹⁹ *Cf. Cawley v. Australian Consolidated Press Ltd.* [1981] 1 N.S.W.L.R. 225

²²⁰ As to the burden of proof, see *infra*.

²²¹ A notorious case which held that criminal liability was sufficient, *Machado v. Fontes* [1897] 2 Q.B. 231, was overruled in *Boys v. Chaplin* [1971] A.C. 356. The interpretation in *Machado v. Fontes* meant, in effect that if only criminal liability existed under the foreign law, the merits of the case would be determined exclusively by English defamation law. It would seem to be sufficient that a claim under foreign law gives rise to civil *and* criminal liability.

A further issue with application of the general rule relates to the substantive law which the court will apply to determine the outcome of the case since it is clear that the court cannot apply both English law and the law of the foreign country of publication on this matter. Although the answer is not entirely clear and although the issue has never been considered in the context of defamation, the position would seem to be as follows. If the two branches of the general rule are satisfied in the sense that there is a correlation between the substantive rights in relation to the particular claim existing under English law and the law of the foreign country of publication, English law will apply to the extent that it is congruent with the rights available under the foreign law.²²² English defamation law is thus the dominant substantive law.

The exception in clause (3) of Rule 205 has been applied in a libel case to avoid application of the law of the place of publication and to secure the sole application of English law. Although not a press case, *Church of Scientology of California v. Commissioner of Police*²²³ gives a flavour as to how the exception might operate in this context. Four English police officers, acting under the control of an English Commissioner of Police published in Germany to the Criminal Police Authority of Germany a report about the activities of the plaintiff, an organisation resident in England. The Court of Appeal held that it was arguable that the Commissioner of Police was vicariously liable under German law for the publication by his officers as was also undoubtedly the case under English law. But the court also held that even if this was not the case, the plaintiff could rely on the exception to the general rule since it was arguable that the matter was most closely connected with English law. The factors which pointed to this connection were that plaintiff and defendant were both resident in England, the alleged libel related to the English activities of the plaintiff and the question was whether the defendant was vicariously liable for alleged publication of libels by the English police officers under his command. It will be noted that in this case the alleged foreign publication was in a single country and there was no publication to the German Police Authority in England and hence no tort actually committed in England. Invocation of the exception in favour of English law might be much more difficult to secure if publication takes place in several foreign countries by the media, since the connections with England in such a case may be

²²² *Dicey and Morris*, para. 35-129.

²²³ (1976) 120 S.J. 690.

much less obvious. Although there is no case which establishes this in the context of libel, it would seem that in an appropriate case, the exception could be applied to avoid the law of England and to secure the sole application of the law of the country of publication.²²⁴ Such a case is likely to be rare.

D. Allegation and proof of law of country of publication

One further matter may usefully be mentioned as illustrating the burden on a media defendant which may be created by the approach of English law to liabilities arising out of foreign publication.²²⁵

In *University of Glasgow v. The Economist*²²⁶ the plaintiffs brought proceedings for libel against the English based defendant in respect of publication of a book. The original statement of claim complained of the publication of the book in England. The plaintiffs sought permission to amend the statement of claim to complain of publication in a number of other countries including states in Australia, provinces in Canada and states in the United States of America, numbering some 40 jurisdictions in all. The proposed amendment alleged that the publication in those countries of the words complained of was actionable by the law of those countries. No particulars of foreign law were given and the plaintiffs relied on the supposed English law presumption that the laws of the foreign countries concerned were the same as English law. The defendants argued that this was not a proper plea, but Popplewell J. held that it was.

²²⁴ Cf. *Red Sea Insurance Co. Ltd. v. Bouygues S.A.* [1995] 1 A.C. 190. It has never been decided in any context whether both branches of the general rule may be displaced in favour of the law of a third country. *Dicey and Morris*, para. 35-135 supports this possibility.

²²⁵ For more detailed discussion of this issue, see *Dicey and Morris*, paras. 35-139-35-141; Fentiman *Foreign Law in English Courts* (1998), pp. 97-106, 143-146.

²²⁶ [1997] E.M.L.R. 495.

“All the plaintiff has to do is say that the tort is actionable in another country. He may, if he so wishes, affirmatively set out what the law in that foreign country is in order to support that plea. If he chooses to do so of course he must prove the facts and matters on which he relies. But he does not have to, because until and unless foreign law is shown to be different by proper evidence the court will assume English law applies and apply it...[T]he plaintiff need only set out that it is actionable by the law of the foreign country and then say there is the presumption. If he chooses to do that, it is then for the defendant to raise the issue that the foreign law is different from English law.”²²⁷

The effect of this is that unless the claimant sets out what the law of the foreign country is as part of his affirmative case, the burden will lie on the defendant to show that the foreign law is different from English law. It was pointed out some years ago that

“the plaintiff can use this right as a daunting tactical ploy against the defendants by simply asserting, so it seems, that the foreign law is presumed to be the same as English law and leaving it to the defendants to incur the considerable costs of proving the contrary.”²²⁸

A defendant may well be persuaded to settle a case on more advantageous terms than would otherwise be the case rather than incur these costs.²²⁹

8. CHOICE OF LAW IN OTHER COMMON LAW SYSTEMS: SOME BRIEF REMARKS

This section offers some brief remarks on the position, as regards choice of law, in Australia and Canada.²³⁰ Each of these countries has abandoned the common law

²²⁷ *Ibid.*, at p. 502. See also *Kuwait Oil Tanker Co. SAK v. Al Bader* [2002] 2 All E.R. (Comm.) 271, 335-336. For discussion of this issue in relation to the exception, see *Dicey and Morris*, paras. 35-140-35-141.

²²⁸ Neill, *Report of the Supreme Court Procedure Committee on Practice and Procedure in Defamation* (1991). See Fentiman, *supra*, n. 225, at pp. 144-145.

²²⁹ Though it is possible that if the defendant wins the case on the merits he may be able to recover these costs, as part of his total costs, from the claimant.

double actionability rule, derived from English law, for all types of case.²³¹ The replacement rule involves, very generally speaking, reference to the *lex loci delicti*. The effects and scope of the change are still being worked out.

A. *Dow Jones & Co. Inc. v. Gutnick*²³²

This case is generally well known. Once again the hapless Dow Jones was the “fall-guy”, this time in respect of its on-line edition of Barron’s magazine (Barron’s Online) which the plaintiff claimed contained an article which was defamatory of him.²³³ The offending material was uploaded on to the defendants’ server in New Jersey, U.S.A. The material could be accessed by subscribers in many, if not most jurisdictions in the world. One such jurisdiction was the Australian State of Victoria, where resided the plaintiff, Joseph Gutnick. The plaintiff had his business headquarters in Victoria. Although he conducted business outside Australia, including in the United States and made significant contributions to charities in the United States and Israel, much of his business and social life was focused in Victoria. There were more than 500,000 subscribers to Barron’s Online, of whom approximately 1,700 were in Australia. The Australian High Court, affirming the decision of the

²³⁰ Aspects of the position as regards choice of law and judgment enforcement in the United States are considered above. It may be noted in passing that English publishers and authors have been subject to defamation proceedings in Ireland in connection with published material concerning events in Northern Ireland: see *Ewins v. Carlton U.K. Television* [1997] I.L.R.M. 223; *Hunter v. Duckworth & Co. Ltd. and Louis Blom-Cooper* [2000] I.L.Pr. 229. According to Robertson and Nicol, *supra*, n. 4, at p. 103, Irish defamation law is “antediluvian”. See also the evidence of the Legal Manager of The Times To the European Union Committee of the House of Lords considering Rome II, “Dublin is regarded as the only other jurisdiction where you get a better crack of the whip than London: H.L. Paper 66, Evidence, p. 37.

²³¹ For Australia, see *John Pfeiffer Pty. Ltd. v. Rogerson* (2000) 202 C.L.R. 503; *Regie Nationale des Usines v. Zhang* (2003) 210 C.L.R. 491; *Dow Jones & Co. Inc. v. Gutnick* (2003) 210 C.L.R. 575 (all decisions of the High Court of Australia). For Canada, see *Tolofson v. Jensen* (1994) 129 D.L.R. (4th) 289 (a decision of the Supreme Court of Canada). The versions of the English common law rule formerly applied in these countries were not identical with each other or identical with the English approach.

²³² See preceding note. For discussion, see Rolph (2002) 24 Sydney L. Rev. 263; Fitzgerald (2003) 27 Melbourne L. Rev. 982; Kohl (2003) 52 I.C.L.Q. 1049. See also *Macquarie Bank Ltd. v. Berg* [1999] NSWSC 526; Kohl (2000) 22 Sydney L. Rev. 119.

²³³ Several foreign media organisations were given leave to intervene in these proceedings, including: Guardian Newspapers Ltd.; New York Times Co.; Reuters Group Plc; Time Inc.; Tribune Co.; The Washington Post Co.; Yahoo ! Inc.; and the Internet Industry Association.

Supreme Court of Victoria, held that the Victorian court had jurisdiction to deal with the plaintiff's claim under the Victorian rules for "long-arm" jurisdiction, on the basis that a tort had been committed in Victoria. The High Court also held that the applicable law was the law of Victoria. The judgments of the court merit the closest attention, but the following points must suffice.

The policy underlying the defamation law of the Australian States is similar to that of English law and does not extend the protection to speech that is found in the United States. Although the plaintiff could have sued the defendant in the United States any proceedings there would no doubt have been met by the First Amendment. The defendants' argued that the applicable law should be regarded as that of the jurisdiction in which the material was uploaded which would point to the law of New Jersey. Any other solution would expose the defendant to the possibility of suits in any country where the material was capable of being accessed and to the prospects of being found liable under the laws of these respective countries.²³⁴ This argument, essentially supporting application of the law of the publisher's "home state" was rejected, in favour of the place of downloading as elaborated in the majority judgment in the following passage:

"In defamation, the same considerations that require rejection of locating the tort by reference only to the publisher's conduct lead to the conclusion that, ordinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principal focus of defamation, not any quality of the defendant's conduct. In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that damage may be done. Ordinarily then, that will be the place where the tort of defamation is committed."²³⁵

²³⁴ The court rejected a single publication rule: *ibid.*, at pp. 601-605.

²³⁵ *Ibid.*, at pp. 606-607.

The above is reminiscent of the references to publication and location of reputation in English case law. More generally, there is similarity with the English approach in that the plaintiff confined his claim to the damage he alleged was caused to his reputation in Victoria as a consequence of the publication that occurred in that state. And the majority continued, in terms reminiscent of *Berezovsky*: “It is his reputation in that State, and only that State, which he seeks to vindicate”.²³⁶

So what of the defendant who may be exposed to actions in countries all over the world under the laws of countries all over the world ? The majority had (some) words of comfort:

“the spectre which Dow Jones sought to conjure up in the present appeal, of a publisher forced to consider every article it publishes on the World Wide Web against the defamation laws of every country from Afghanistan to Zimbabwe is seen to be unreal when it is recalled that in all except the most unusual of cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person may resort.”²³⁷

To put it slightly differently, Dow Jones must have known that Gutnick lived primarily in Victoria, that he had a Victorian reputation and that its publication could be accessed in Victoria. The broader argument, that of exposure to the world, is serious overkill. It would seem unlikely that Gutnick would seek to drag poor old Dow Jones before the courts or laws of Afghanistan or Zimbabwe or even those of any country in between, except those of the relevant Australian state, to wit Victoria. And Dow Jones was bound to know that New Jersey, U.S.A. was out of the equation because of the First Amendment.

It is perhaps the latter thoughts which prompted the somewhat more robust response of Callinan J who concluded his judgment with the following.

“I agree with the respondents submission that what the appellant seeks to do, is to impose upon Australian residents for the purposes of this and many other cases, an American legal hegemony in relation to Internet publications. The consequence, if the appellant’s submission were to be accepted would be to confer upon one country, and one notably more benevolent to the commercial and other media than this one, an

²³⁶ *Ibid.*, at p. 608.

²³⁷ *Ibid.*, at p.609.

effective domain over the law of defamation, to the financial advantage of publishers in the United States, and the serious disadvantage of those unfortunate enough to be reputationally damaged outside the United States. A further consequence might be to place publishers in this country at a disadvantage to commercial publishers in the United States.”²³⁸

In other words the Empire strikes back and rejects what is, in effect, an attempt by American media defendants to export the First Amendment.

B. Canada

Although the principle of the *lex loci delicti* has been accepted in Canadian law, its application has been considered in only a small number of cases mainly in the context of jurisdiction.²³⁹

Those who have punished themselves by reading this piece thus far will note that *Olde v. Capital Publishing Ltd. Partnership*²⁴⁰ has a familiar ring to it. American defendants had published an unflattering article about the individual and corporate plaintiff in its magazine, some of the issues of which were sold in Ontario, but the majority of which were sold in several other jurisdictions. The individual plaintiff had some connection (but not much) with Ontario, in the form of a holiday home there, a current wife who hailed from there and former business dealings there. He was, however, an American citizen whose principal business dealings were in the United States and whose principal residence was in the Cayman Islands. The corporate plaintiff was an American corporation whose business was conducted in the United

²³⁸ *Ibid.*, at pp. 653-654. Although the website in *Gutnick* was a subscription site no distinction is drawn in the judgments between subscription and non-subscription sites.

²³⁹ *Olde v. Capital Publishing Ltd. Partnership* 1996 CarswellOnt 2959, affd. 1998 CarswellOnt 179; *Direct Energy Marketing Ltd. v. Hillson* [1999] 12 W.W.R. 408 (not a press case); [2000] I.L.Pr. 102; *Trizec Properties Inc. v. Citigroup Global Markets Inc.* 2004 CarswellOnt 420 (not a press case); *Bangoura v. Washington Post* (2004) 235 D.L.R. (4th) 564. For a case concerned with non-recognition of a Texas libel judgment in British Columbia on the ground that the Texas court lacked jurisdiction, see *Braintech Inc. v. Kostiuk* (1999) 171 D.L.R. (4th) 46 (not a press case). For a discussion of defamation issues in the light of the change in the law, see Martin (1997) 31 U.B.C. L. Rev. 127. For discussion in the context of the law before it was changed, see Castel (1990) 28 Osgoode Hall L.J. 153. And for two leading cases decided before the change, see *Jenner v. Sun Oil Co.* [1952] 2 D.L.R. 526; *Pindling v. National Broadcasting Corp.* (1984) 14 D.L.R. (4th) 391.

²⁴⁰ 1996 CarswellOnt 2959, affd. 1998 CarswellOnt 179.

States. The plaintiffs claimed Can\$ 2 million for libel arising out of the article which related, principally, to the business methods they employed in the United States. The issue was whether the Ontario court had jurisdiction under the Ontario long-arm statute (tort committed in Ontario or damage suffered in Ontario) and on forum non conveniens grounds.²⁴¹ It was pretty clear that the plaintiffs would have no claim in the United States because of the First Amendment.²⁴²

Refreshingly, the court declined jurisdiction. While hinting that a tort might have been committed in Ontario through publication there, the matter of the case had no real and substantial connections with Ontario at all, not least because the plaintiff “did not have his vocation in life here in Ontario. He lives here two months of the year. He does not have his place of business in here in Ontario. His corporation has no connection whatever with Ontario”²⁴³. The court also proffered the view that “in cases involving magazines sold in a number of jurisdictions, it would make good sense at least in cases such as this where a very small number of the publications were sold in Canada, to name the place where the majority of the sales took place as the one where the action should be tried, *under the law thereof*.”²⁴⁴

This decision was upheld by the Ontario Court of Appeal.²⁴⁵ The Ontario court, at least, is prepared to send a forum-shopper packing even if it means that the forum-shopper will end up with nowhere to bring a successful claim.

The Ontario court has considered the question of jurisdiction in a defamation claim more recently in *Bangoura v. Washington Post*²⁴⁶. The plaintiff had worked in a senior capacity for the United Nations before settling in Canada and acquiring Canadian citizenship. At the time of the dispute he had lived in Ontario for two years and worked in that province. The articles he complained of, which related to his work for the United Nations, appeared on the website of the Washington Post and were also to be found in the hard copy version of the newspaper. The Washington Post is

²⁴¹ The judgment, which also concerns a constitutional point, is not very clear as to what the precise jurisdictional rule was in issue.

²⁴² 1996 CarswellOnt 2949, para. 4.

²⁴³ *Ibid.*, para. 11.

²⁴⁴ *Ibid.*, para. 15 (emphasis added).

²⁴⁵ 1998 CarswellOnt 179.

²⁴⁶ (2004) D.L.R. (4th) 564.

operated by the Washington Post Co., a diversified media company incorporated in Delaware, with its head office in Washington, District of Columbia. The plaintiff sought to sue the Post and three of its journalists in Ontario and the question was whether the Ontario court had jurisdiction.

According to the defendants the Post had office space in Ontario which was used for the purpose of gathering news, but there was no wholesale distribution of the newspaper in Ontario or anywhere else in Canada. The only recipients of the Post in Ontario at the time of the publications complained of were agreed to be seven paid subscribers. At the time of the publication, the plaintiff was not in Ontario but he had no connections whatsoever with the United States. It would appear to be likely that if he brought a libel action in Washington, D.C., it would fall foul of the First Amendment.

Applying the relevant principles, the court held that both the District of Columbia and Ontario were appropriate fora. In a judgment which is not of the greatest clarity the court appeared to approve of *Gutnick* and found that the fact that an Ontario judgment might not be recognised in the United States (though “an unfortunate expression of a lack of comity”²⁴⁷) was not to be determinative of jurisdiction. It then reached a conclusion, which will doubtless send shivers down the spines of newspaper proprietors, that “the Post is a newspaper with an international profile, and its writers influence viewpoints throughout the English speaking world. I would be surprised if it were not insured for damages for libel or defamation anywhere in the world, and if it is not then it should be”²⁴⁸. And on the question of applicable law, which is relevant in the jurisdictional inquiry, it could not reach a conclusion but said, instead, that if the *lex loci delicti* was based on publication the applicable law was that of the District of Columbia, whereas if it was based on damage and where reputation was affected the applicable law was the law of Ontario.²⁴⁹ Accordingly since it could not be established that one forum was more appropriate than the other, the plaintiff’s choice of the Ontario forum should prevail.²⁵⁰

²⁴⁷ *Ibid.*, at para.22.

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*, at para. 29.

²⁵⁰ *Ibid.*

It would be unwise to read too much into these two cases since each appears to be tentative and uncertain. They show, however, a pattern seen elsewhere in which a claimant is anxious to bring defamation proceedings in a jurisdiction which might, unlike the case with the United States, uphold the claim on the merits.²⁵¹

The cases do not resolve the question of where the tort of defamation is to be regarded as committed for choice of law purposes²⁵² and this issue is likely to require further judicial attention. In the leading case of *Tolofson v. Jensen*²⁵³, which was not concerned with defamation, La Forest J. in the merest of obiter dictum said that in the case of a multistate libel “the tort of libel should be held to take place where its effects are felt”²⁵⁴. It is possible that this points to the place where the claimant’s reputation is located, an outcome which is consistent with the two Ontario cases described above. But it is also likely to be necessary that the offending material be published, at least to some extent, in that state as well.

9. “IT IS A PAIN IN THE NECK”

When the European Union Committee of the House of Lords considered the proposal that is Rome II, there was a very interesting discussion between leading in-house media lawyers, who gave evidence to the Committee and the members of the Committee,²⁵⁵ which picks up many of the tensions highlighted in this paper. Thus, for Mr Brett when The Times had been sued in England, he had only once come

²⁵¹ Apparently Canadian libel law is similar to English libel law: *ibid.*, at para. 22. The same pattern emerges in *Trizec Properties Inc. v. Citigroup Markets Inc.* 2004 CarswellOnt 420.

²⁵² In the case referred to in the preceding note, which was also concerned with jurisdiction, it was said, at para. 70 that the applicable law is the law of the jurisdiction where the publication was received and accessed though the decision also seems to require, for jurisdictional purposes (see para. 72), damage to reputation in that state.

²⁵³ (1994) 120 D.L.R. (4th) 289.

²⁵⁴ *Ibid.*, at p. 299.

²⁵⁵ See H.L. Paper 66, Evidence, pp. 36-37. The witnesses were Mr Alastair Brett, Legal Manager, Times Newspapers Ltd.; Ms Santha Rasaiah, Political, Editorial and Regulatory Affairs Director, The Newspaper Society; Ms Clare Hoban, Head of Public and Legal affairs, Periodical Publishers Association; Mr Glenn Del Medico, Head of Programme Legal Advice, BBC.

across a case in which it had been asserted that a foreign law might be applicable.²⁵⁶ This perhaps reflects the media's favour of a country of origin choice of law rule (as opposed to what is proposed in Rome II). Such a rule is certain and, of course, is cheaper to comply with since the publisher need only take legal advice on the system in which it is established. Such a rule may also be practical, since the mechanics of daily newspaper production may make it impossible to seek legal advice as to the laws of all the countries into which the newspaper may find its way. For Mr Brett, being sued in a foreign country under foreign law was a "pain in the neck" as illustrated by a complicated claim for invasion of privacy brought against The Times in France, where although small awards of damages may be given, the defendant will run up costs. Mr Del Medico advised that the BBC was susceptible to actions all over the world.²⁵⁷ And now there is the internet which is the real problem in the view of Mr Brett who, as the legal face of The Times, a leading newspaper in the town called Sue, can have the last word:

"we only send hard copies within the EU and only a small number so the likelihood of it doing any serious damage is very remote, but the internet is an different animal altogether. We are used to living with liability where we send newspapers. If we flog newspapers in Northern Ireland and Dublin and everywhere else we are going to get sued- we know that and it is a reality of life- but what is really complicated now is if we are suddenly going to get sued in Serbia or another jurisdiction because somebody says 'I was able to access you out there'"²⁵⁸

Robin Morse

A town named Sue

July 23, 2004

²⁵⁶ *Ibid.*, pp. 36-38. This was the *Loutchansky* litigation, *supra*, n. 20.

²⁵⁷ *Ibid.*, p. 41.

²⁵⁸ *Ibid.*, p. 43.

