

“Libel tourism” and private international law  
Trevor C Hartley

Reaction of Chr. Kohler

16. Juli 2009

Dear Trevor,

Thank you for your stimulating paper. It seems to me (and the reactions so far received tend to confirm this impression) that the uneasiness generated by libel tourism in England are due (a) to the cost of litigation in England (the Ehrenfeld example is striking) and (b) to the rules of English law on libel and libel litigation (burden of proof etc) rather than to the conflict rules.

As far as jurisdiction is concerned, I would be reluctant to modify Art. 5, 3° of the Brussels rules at present. I agree, though, that the application of the rule in Shevill may seem unsatisfactory in Internet cases. Still, it is far from certain whether the ECJ would stick to Shevill if presented with the question. It could be argued that a "virtual" publication, i.e. the simple possibility to access the defamatory statement, does not qualify as a "publication" for the purposes of Shevill and that additional elements have to be present to trigger Art. 5,3°. The Court could e.g. get some inspiration from Art 15 (1) (c) of Brussels I and require that the publication is "directed" to the Member State of the forum (which may e.g. not be the case if the statement is in a language not commonly understood in that State).

The Court is at present faced with two references from Austria (Cases C-144/09 and C-585/08) which ask whether an activity is "directed" to Austria (in the sense of Art 15 Bxl I) when the website of the German defendant is simply accessible in Austria. It may be interesting to see how the ECJ deals with these first Internet cases before envisaging an revision of Art. 5, 3°.

With best wishes  
Christian

30. Juli 2009

Dear Trevor,

Further to our exchange of e-mails on the above subject, I can add that the Tribunal de grande instance de Paris has, on July 16, referred to the ECJ the question under what conditions a court may exercise jurisdiction according to Art. 5,3° in a case on violation of "droits de la personnalité" following a publication of informations and photographs on the Internet (case C-278/09, Martinez ./ Société MGN Ltd). The Tribunal hereby suggests some of the conditions you mention in your paper.

The reference is (unfortunately) clearly inadmissible as it originates from a court of first instance (and Art. 267 of the ECT as amended by the Lisbon Treaty, mentioned by the referring court, is not yet in force). However, the reference will be published soon in the OJ, so the questions will circulate in all official languages.

I am confident, that a similar question (hopefully admissible) will be referred in a rather near future.

Best wishes

Christian

[Page d'accueil](#)

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Responsable de la page: [Bernadette Martin-Bosly](#)  
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