

“Libel tourism” and private international law Trevor C Hartley

Libel tourism is much in the news these days – so much so, that it is even the subject of a *Wikipedia* entry¹. It is defined in *Wikipedia* as a type of forum shopping in which a plaintiff chooses to bring a libel action in the jurisdiction thought most likely to give a favourable result. This invariably turns out to be England. At present, there is a media campaign, originating in the United States but echoed in England, claiming that libel tourism is undermining free speech². The purpose of this note is to consider whether these claims are justified. Only questions of private international law will be discussed.

The problem

We all believe in free speech. We also believe that people should be protected from defamation. There is a potential conflict between these two values and the law has to attempt some kind of balance. In some countries, the balance tilts in favour of free speech; in others, it tilts in favour of protecting reputation. England is one of the most extreme members of the latter category: English libel law is generally regarded as the most claimant-friendly in the world. Under it, the claimant has a *prima facie* case once he has established that the defendant has published a defamatory statement about him. He does not have to prove that the statement is false (though the defendant has a good defence if he can prove it is true) and he does not have to prove that the defendant acted out of malice. Damages can be high by international standards. No wonder that the rich and the famous come from the four corners of the globe to bring libel actions in England³.

The problem is that if English courts assume jurisdiction in too wide a range of cases (and if they apply English law, which they always do), countries that give more weight to free speech could legitimately complain that the English courts are undermining their freedoms. Our first task, therefore, is to examine the rules of jurisdiction in libel actions in order to ascertain whether they are too wide. Since there cannot be (and is not) any objection to actions being brought in England when the defendant is domiciled⁴ in England or in another part of the United Kingdom, we shall consider only the situation where he is domiciled outside the UK.

The jurisdictional rules

Where the defendant is domiciled in another Member State (or Lugano State⁵), the jurisdiction of the English courts is determined by EU law (the Brussels I Regulation)⁶. Where the defendant is not domiciled in any such a State, the present position is that English rules of jurisdiction apply (this may change when the Brussels I Regulation is revised). We consider each of these situations separately.

Defendant domiciled in a Member State. The leading case in EU law is *Shevill v. Presse Alliance SA*⁷. In this case, a claimant domiciled in England (together with her French employer) brought a libel action in England against a French newspaper. The newspaper, *France Soir*, sold approximately 200,000 copies in France; in England it sold something in the region of 250. There was no evidence that anyone who had read the article knew the claimant or her employer. The claimants, who limited their claim to damages for the copies sold in England, asserted that the English courts had jurisdiction under what is now Article 5(3) of the Brussels I Regulation⁸.

The European Court held that, in international libel cases in which jurisdiction is claimed under Article 5(3), the claimant may bring proceedings either in the courts for the place where the material is distributed or in the courts for the place where the publisher is “established”. This latter concept will generally coincide with domicile and need not concern us further. Where jurisdiction is based on distribution, the claim must be limited to damage flowing from the copies of the publication distributed in the territory of the forum.

A point of terminology. At this point, it is desirable to note a terminological difference that sometimes causes confusion. In English legal terminology, each time an item is communicated to another person, there is a “publication”. Each sale of a newspaper is a separate publication in English eyes; and each time a viewer watches a television programme there is also a “publication”. The place of publication is the place where this occurs. If a French newspaper sells even a single copy in England, there is publication in England (as well as in France); the same is true if a French radio station makes a broadcast that is heard in England. Lawyers from other countries usually use different terminology. They would say that the French newspaper was “published” in France and was merely “distributed” in England. Readers from other Member States should be aware of the fact that the word “publication” is used differently in England; English readers should understand that “distribution” or “communication” is used by Continental lawyers when the normal term under English law would be “publication”.

Defendant not domiciled in a Member State. At present, English rules of jurisdiction apply when the defendant is not domiciled in a Member State. Under these, jurisdiction may be obtained either by serving a writ on the defendant during his temporary presence in England (a ground of jurisdiction that almost never applies in libel cases) [9](#), or by serving it outside the jurisdiction under Section IV, Part 6, of the English Civil Procedure Rules (henceforth “CPR”) and Practice Direction 6B, rule 3(1) (9). This latter provision, which was derived from ECJ case-law [10](#), provides for jurisdiction where the claim is made in tort if either (a) damage was sustained within the jurisdiction, or (b) the damage sustained resulted from an act committed within the jurisdiction. As applied to libel, it gives jurisdiction only with regard to items distributed (published) in England. At least in principle, therefore, it is the same as EU law [11](#). This means that, to a large extent, the position is the same whether the defendant is domiciled in another EU State or outside the European Union.

Assessment

We are now in a position to assess whether criticisms concerning libel tourism are justified. At first sight, it might seem that there are not. English courts claim jurisdiction only when there is distribution (publication) of the offending material in England, and the remedy must be limited to harm resulting from that material. Who could complain about that?

Unfortunately things are not so simple. The first problem concerns the concept of “distribution” (publication). English courts take the view that material on the Internet is distributed (published) in England whenever it can be downloaded in England. Since all material on the Internet can normally be downloaded anywhere, this means that all material on the Internet is regarded as being distributed (published) in England [12](#). Almost all major newspapers, news magazines, news agencies and TV networks have an Internet edition, available from their websites [13](#). This means that, in the case of newspaper and TV reports, as well as other Internet material, the requirement of distribution (publication) in England is meaningless. Moreover, most printed books are available from Internet suppliers, such as Amazon [14](#). They too can be regarded as distributed (published) everywhere. For these reasons, it is fair to say that the requirement of distribution (publication) in England no longer constitutes a significant safeguard against exorbitant jurisdiction.

Thus, for example, if one American resident puts material on the Internet that allegedly libels another American resident, the latter may sue for libel in England, at least if he has a reputation in England [15](#). This latter requirement will be satisfied if he does business in England since he can say that his business activities would be adversely affected by the alleged libel [16](#).

This might still not be regarded as a problem since, under both EC and English law, the remedy must be limited to damages resulting from distribution in England. The problem is that it is not possible in practice to limit the scope of the remedy so that it does not have an impact on publication in other countries. In the realm of information, the world is one unit: individual countries cannot be isolated from the rest.

The case of *Bin Mahfouz v. Ehrenfeld* [17](#) provides an example. Rachel Ehrenfeld was an Israeli-American who wrote books on terrorism. In one of her books, she claimed that Khalid Mahfouz, an eminent Saudi businessman, was responsible for financing international terrorism. The book was published in the US. It seems that it was not marketed in the United Kingdom: Ehrenfeld claimed that she and her publisher, an American firm, had never taken any steps to make it available there. However, a number of copies were sold via the Internet in England – the judgment mentioned 23 – and the first chapter was available on an American website which could be accessed in England [18](#).

Mahfouz and his two sons brought proceedings in England for libel against Ehrenfeld and her publisher. Jurisdiction was based on distribution (publication) in England. Ehrenfeld did not defend – she claimed she did not have the financial resources to do so – and a default judgment was obtained. A declaration of falsity was made, and the claimants (Mahfouz and his two sons) were granted damages of £10,000 each. Ehrenfeld was also ordered to pay costs. The total sum is said to have been almost £115,000 (over €135,000). In addition, an injunction was issued requiring Ehrenfeld and her publisher not to publish the material in England.

Since the damages awarded – for the distribution of just 23 copies of the book – were far greater than the likely profits from publication worldwide, the effect of the award, if known in advance, would have been to deter the author from publishing at all. Moreover, the defendants were ordered not to publish (distribute) the material in England. This injunction would have required the material not to be put on the Internet and hard copies not to be sold through on-line booksellers like Amazon. This would have had a severe impact on marketing in other countries [19](#). For these reasons, a remedy granted for publication in England will almost always have an impact on freedom to publish in other countries. The requirement that the remedy be limited to compensation for distribution in England is virtually meaningless.

Although the *Ehrenfeld* case resulted in legal proceedings (undefended though they were), many cases do not get that far. Defendants give in at the mere threat of a law suit. It has been said that wealthy businessmen in East European countries, including some EU Member States, have found the threat of libel proceedings in England to be an effective means of securing the removal from websites in their countries of material that reveals corrupt activities on their part [20](#). If proceedings were brought, the defendants would be unable to defend themselves because they could not afford the huge fees charged by London lawyers. So they have no option but to back down.

Conclusion

One can conclude from this that libel tourism is a genuine problem. The present rules of jurisdiction are too wide. This applies to the *Shevill* rule, as well as to the rules under English law.

What to do?

A way must be found to confine jurisdiction in libel actions to situations in which the country of the forum has a genuine interest in hearing the proceedings. This would require alterations both to the current EU law and to the current English law. We shall consider only the former. Although most of the cases decided so far have concerned defendants domiciled in the United States, change in EU law is also necessary in order to protect persons domiciled in other Member States. Moreover, if the scope of the Brussels I Regulation is extended to include jurisdiction over persons domiciled outside the European Union, such a change would be even more necessary.

Since there is no problem with jurisdiction on the basis of the domicile of the defendant, no change needs to be made to Article 2(1) of the Brussels I Regulation. The problem lies with Article 5(3). The rule in *Shevill* should be retained, but further restrictions are needed. The question to ask is: in what circumstances is it justified to base jurisdiction on distribution, given the facts pointed out above?

The first situation, it is suggested, is where the action is brought in the country of domicile of the claimant. If the material is distributed in England *and* the claimant is domiciled there, there should be no objection if the English courts take jurisdiction to grant a remedy limited (in so far as this means anything) to the distribution in England. After all, the courts of a country have a legitimate interest in protecting the reputation of a person who is domiciled in that country, in so far as the offending material is distributed there.

The only other situation in which one can clearly say that jurisdiction based on distribution is justified is where the territory of the forum is the main focus of distribution – in other words, where the distribution is aimed at that country more than any other. In view of the nature of the Internet, however, it would have to be a requirement for this ground of jurisdiction that the defendant had taken positive steps to target that country more than any other.

A possible text

In a revised Brussels Regulation, the right to sue for defamation on the basis of Article 5(3) (tort committed within the territory of the forum) should be limited as explained above. A possible text would be as follows:

In the case of non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, Article 5(3) shall apply only if –

- (a) the claimant is domiciled in the territory of the forum; or
- (b) the defendant has taken significant steps to make the offending material available in the country of the forum and has targeted that country more than any other.

This would apply in addition to jurisdiction based on the domicile of the defendant.

Appendix

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EDITORIAL
Libel Tourism

American law, with its strong First Amendment traditions, makes it hard to sue authors for libel. To get around these protections, book subjects have been suing American authors in England, where the libel law is much less writer-friendly. Two states — New York and Illinois — have already adopted laws prohibiting “libel tourism,” and several more, including Florida and California, may soon join them.

That is a good start, but it still leaves writers with only a patchwork of protection. Congress needs to pass a law that makes clear that no American court will enforce libel judgments from countries that provide less protection for the written word.

The dangers to authors and free speech are clear in the case of Rachel Ehrenfeld, who wrote a book in 2003 alleging that a prominent Saudi businessman financed terrorism. The book was published in the United States, but because a few copies were sold over the Internet in England, the British courts allowed the businessman to sue for libel.

In British law, writers are at a distinct disadvantage. In some cases, the burden is on them to prove the truth of what they have written, rather than on the subject to prove that it was false. Ms. Ehrenfeld

decided not to defend herself because she did not believe she should have to appear before a British court. The Saudi businessman was awarded more than \$200,000 in damages.

The House of Representatives passed a bill against libel tourism last year. Peter King, Republican of New York, and Anthony Weiner, Democrat of New York, are sponsoring a stronger bill, which would, among other things, allow writers in Ms. Ehrenfeld's position to countersue for treble damages. Congress should pass one of these versions of the law, preferably the tougher one, which has a companion bill in the Senate.

If authors believe they are too vulnerable, they may be discouraged from taking on difficult and important topics, like terrorism financing, or from writing about wealthy and litigious people. That would not only be bad for writers, it would be bad for everyone.

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