Not all libels lead to London

Andrew Waters looks at the reality behind the publicity

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The issue of 'libel tourism' has recently been much in the news. However, libel tourism is often conflated with the wider campaign for libel reform, creating a sense that foreigners are using the English courts for unbefitting purposes and endangering our traditions of free speech. The cause of libel reform has been promoted by scientists and comedians, and has become government policy, including a proposal to limit libel tourism by tightening the applicable procedural rules.

The Libel Reform Campaign has generated significant momentum towards libel reform in this country. That momentum may not be surprising, given the vested interest of the press in seeking to relax the rules which may hold them to account when they publish untruths. However, the perception that London is the capital of the world for libel tourism is not entirely well-founded. This article seeks to set out the jurisdiction and other rules which limit the libel claims that can be brought before the English courts, to present a balanced view of the case for reform.

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Defining libel tourism

Libel tourism can be described as the use of the English courts by overseas claimants to bring libel claims which have only a minimal connection to this jurisdiction, concerning publications which have achieved far greater dissemination elsewhere.

The example of alleged libel tourism which has caused the most controversy is that of Dr Rachel Ehrenfeld (see *Bin Mahfouz & ors v Ehrenfeld & anor* [2005]). Dr Ehrenfeld published a book alleging that Khalid Bin Mahfouz, a Saudi Arabian businessman, and his family had channelled funds to Al-Qaeda and other terrorist organisations. Only 23 copies of the book were sold in the UK, although the first chapter of the book was made available on the US ABC News website, which was accessible from the UK. Mr Mahfouz denied the allegations and commenced libel proceedings (along with two of his sons) in London against Dr Ehrenfeld and her publisher.

A second example of alleged libel tourism is *Berezovsky v Michaels & ors* [2000]. In that case Mr Berezovsky, a prominent Russian businessman and politician, and an associate sued *Forbes* magazine and its editor in London regarding an article which alleged that he was a leader of organised crime and corruption in Russia. Approximately 785,000 copies of the magazine had been sold in the US and Canada, whereas it was agreed that only around 6,000 individuals were likely to have read the article in England and Wales (although the number of copies actually sold in England and Wales was only around 1,900).

At first sight, these cases appear to be egregious examples of libel tourism: overseas businessmen suing US defendants before the English courts, in relation to publications made mainly in the US. *Ehrenfeld* in particular caused uproar in the US, ultimately leading to bills being passed by state legislatures in New York and elsewhere to block any enforcement of foreign judgments in libel cases unless the foreign law in question provides at least as much protection to US citizens as the US and state constitutions.

It is in this context that I will consider the jurisdiction and other rules that restrict the libel actions which can be brought before the English courts. However, first I will examine the features of libel law which make the English courts particularly susceptible to libel tourism.

Features of English libel law

A key feature of libel is that each publication of a libellous statement constitutes a separate tort (the rule in *Duke of Brunswick v Harmer* [1849]). Although the effects of this rule have been tempered in recent years (as discussed below), an action may still be brought in England whenever a claimant's reputation has suffered harm in this jurisdiction (which includes when an internet article has been accessed or downloaded in this jurisdiction; see *Godfrey v Demon Internet Ltd* [1999]). Publications on the internet or in international publications can therefore give rise to a right to bring libel actions in a number of jurisdictions, allowing a claimant to choose the jurisdiction which offers the greatest advantage.

With that choice in mind, England and Wales is perceived as being more advantageous to libel claimants than comparable jurisdictions. Although a full review of the criticisms made by the Libel Reform Campaign is beyond the scope of this article, several key areas can be highlighted.

First, English libel law does not allow the same wide freedom of speech exclusion available in the US (but in few other jurisdictions) on the basis of the US Supreme Court's ruling in *New York Times v Sullivan* [1964]. That case provides authority for the proposition that 'public figures' cannot bring proceedings for libel unless they can prove actual malice on the part of the maker of the statement; a high hurdle for any potential claimant to pass.

It is further argued that English libel law lacks adequately broad 'public interest' and 'fair comment' defences, leaving journalists and scientists in particular with no defence where reports made in good faith on issues of public importance subsequently turn out to have been untrue.

Finally, it is contended that English libel law places additional burdens on defendants in libel cases by applying a 'guilty until proven innocent' policy, which requires a defendant to prove that the statements made were true (if indeed they were), and because of the costs of defending libel proceedings in London, which can be many times the cost of defending proceedings in comparable jurisdictions.

In light of these perceived advantages for libel claimants, it is crucial that adequate safeguards exist to prevent claims being brought in England when they have little or no connection to this jurisdiction. These safeguards are considered below.

Jurisdiction

The jurisdiction rules which apply to libel claims depend on whether or not the defendant is domiciled in an EU state.

Where the defendant is so domiciled, the English courts may take jurisdiction over a claim only in accordance with EU Council Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Regulation).

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The Regulation provides that, subject to the exceptions set out within, persons domiciled in an EU member state shall, whatever their nationality, be sued in the courts of that member state (Article 2). Article 5(3) creates an exception to this rule, providing that, in matters relating to tort, delict or quasi-delict, a person domiciled in member state may also be sued in the courts of the place where the harmful event occurred.

These jurisdiction rules (then as part of the previous Brussels Convention) were interpreted in the context of libel in *Shevill & ors v Presse Alliance SA* [1995], in which the European Court of Justice (ECJ) held that where a defamatory publication has been made in a number of EU member states, a claimant has two options:

- to commence proceedings in the jurisdiction of the defendant's domicile, in which case the claimant can claim for all damage suffered due to publications of the defamatory material in any member state; or

- on the basis of Article 5(3), to commence proceedings in any jurisdiction in which the material was published (ie a place where the harmful event occurred), only in relation to the harm suffered by the claimant due to the publication in that jurisdiction.

Following the ECJ's decision in *Owusu v Jackson* [2005], it appears that the English courts have no discretion to refuse jurisdiction where a claimant founds their case on either of the above provisions of the Regulation. However, this approach (which may be said to legitimise forum shopping) is common to all EU jurisdictions, and the UK is unable to unilaterally change this position.

In contrast, where the defendant is not domiciled in an EU member state the English courts retain more flexibility. Notwithstanding that the elements of an English tort can be established by a potential claimant, the court can still either refuse permission to serve the proceedings outside the jurisdiction or allow the defendant's application to stay the proceedings, where it considers that England is not the proper place to bring the claim (in accordance with the *forum non conveniens* principles most recently set out in *Spiliada Maritime Corporation v Cansulex Ltd* [1987]). This involves a wide-ranging consideration of the nature of the dispute at hand and of any other forums which may be available to a potential claimant (albeit subject to a presumption that the jurisdiction in which the tort has been committed is the appropriate place for its determination).

Berezovsky demonstrates the practical application of the *forum non conveniens* principles. In that case, there was evidence before the court that the claimants both had extensive business connections to London, including maintaining properties there. In addition, Mr Berezovsky's ex-wife and their two children (whom he visited regularly) were resident in London. Evidence was also produced demonstrating that the *Forbes* article had influenced senior businesspeople in London with whom the claimants may have wished to have dealings.

A significant consideration was the potential availability of another forum in which the claimants could pursue their claims. In *Berezovsky* the most closely connected jurisdictions were Russia (where the claimants' most significant business interests were based and where the events referred to in the article took place) and the US (where the defendants were based and where the *Forbes* article was most widely disseminated). In the House of Lords, both alternative jurisdictions were dismissed by the majority as being no more appropriate for resolution of the dispute than London. In the case of Russia, only 19 copies of the magazine had been sold, and the claimants argued persuasively that, because of the nature of the allegations made by the article and the international reputation of the Russian courts, a judgment in their favour would do little to remedy the damage caused to their reputations by the defamatory publication. In the case of the US, the claimants had little connection to the jurisdiction and therefore were unlikely to be able to establish the necessary reputation which could be harmed by the publication.

Berezovsky demonstrates that there may be significant reasons why a claim should be brought in England and Wales even where, at first sight, no substantial connection appears to exist. Commerce is increasingly international, and businesspeople may have reputations which they are entitled to protect from damage in a number of jurisdictions. In this case the role of London as a European financial centre was emphasised; given that many overseas businesspeople frequently have contact with persons and companies based in London, they are perhaps more likely to have reputations in London than in other jurisdictions and, in turn, may be more likely to bring libel proceedings before the English courts to protect those reputations.

Other restricting factors

A key ingredient in any libel claim in England is that the claimant must have a reputation in this jurisdiction (see *Berezovsky*).

Further, in a recent development on the rule in *Duke of Brunswick*, libel proceedings may be struck out as an abuse of process where the damage caused to the claimant's reputation in this jurisdiction is insignificant (see *Jameel v Dow Jones & Co Inc* [2005]). That decision concerned libel proceedings brought where the statements complained of had been published on a US website which, the publishers claimed, had only been accessed by five subscribers in this jurisdiction. On that basis the Court of Appeal found that there had been no 'real and substantial' tort in this jurisdiction, and struck the case out.

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These principles will determine many 'libel tourism' cases at an early stage, and can be considered by the court on an early application by a defendant. It is interesting to note the potential application of this rule in *Ehrenfeld*, had Dr Ehrenfeld decided to appear in the English courts to defend the action. In a recent speech, Lord Hoffmann noted that whether Dr Ehrenfeld would have been successful in a strike-out application for abuse of process on the basis that only 23 copies of her book were sold here would have been 'a nicely balanced question' (although the internet publication would also have to have been taken into account). Even if that argument had failed, other defences remained available to her, including that of 'responsible publication' set down by the House of Lords in *Reynolds v Times Newspapers & ors* [1999].

Ultimately, the outcome of *Ehrenfeld* cannot be known, as no defence was ever filed. In spite of this position, the case is often cited by critics of libel tourism, and was the cause of significant controversy in the US.

Conclusion

The jurisdiction rules which govern libel proceedings in England hardly seem so draconian for defendants. Their key protection is that claimants must demonstrate a reputation in this jurisdiction which has suffered 'real and substantial' harm. However, this is in addition to the jurisdictional requirements which, for non-EU defendants at least, demand a consideration of the appropriate forum for hearing the claim before that claim is allowed to proceed in England. For EU defendants the position is less flexible, but that is caused by the approach of the ECJ rather than that of the English courts.

When considered in light of those rules and with a broad view of the context of the cases, the oft-cited *Ehrenfeld* and *Berezovsky* decisions appear much more reasonable. London may always attract more libel claims from international businesspeople because of its unique standing in the world's financial markets, which place a premium on the reputations of those involved. It is therefore inevitable that many, but by no means all, libels will lead to London. It is part of the role of the courts to ensure that the principles set out above are applied consistently, in order to divert unmeritorious claims at an early stage. ■

Berezovsky v Michaels & ors
[2000] UKHL 25

Bin Mahfouz & ors v Ehrenfeld & anor
[2005] EWHC 1156 (QB)

Duke of Brunswick v Harmer
(1849) 14 QB 185

Godfrey v Demon Internet Ltd
[1999] EWHC 244 (QB)

Jameel v Dow Jones & Co Inc
[2005] EWCA Civ 75

New York Times v Sullivan
(1964) 376 US 254

Owusu v Jackson
[2005] EUECJ C-281/02

Reynolds v Times Newspapers & ors
[1999] UKHL 45

Shevill & ors v Presse Alliance SA
[1995] EUECJ C-68/93

Spiliada Maritime Corporation v Cansulex Ltd
[1987] AC 460