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## Growth of 'Libel Tourism' in England and U.S. Response

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The sharply conflicting English and American defamation regimes have recently returned to the international spotlight, following New York state's enactment of the Libel Terrorism Protection Act,<sup>1</sup> the so-called Rachel's Law, which potentially renders many English libel judgments unenforceable in New York state.

In the Internet era, when virtually all media is internationally available, the English courts have shown increasing willingness to extend the reach of English defamation laws well beyond English territorial waters.

As a result, "libel tourism" is a growing phenomenon, where non-English citizens travel to England to sue U.S. citizens in defamation, for statements published in the United States, which would likely be protected under U.S. law. New York state's recent strong reaction to this phenomenon is perhaps a preview of the international disputes which may develop between the United States and the United Kingdom, who otherwise generally respect each other's legal traditions and court judgments.

### 'Bin Mahfouz'

The direct impetus for the New York Bill was the case of *Khalid Salim Bin Mahfouz (and others) v. Dr. Rachel Ehrenfeld (and others)*,<sup>2</sup> in which Mr. Bin Mahfouz, a Saudi businessman, alleged that Rachel Ehrenfeld had published defamatory statements about him, with respect to al Qaeda's Sept. 11, 2001 terrorist attacks, in her book "Funding Evil, How Terrorism Is Financed - And How to Stop It." The book was published in the United States, and only 23 copies were sold in England, but the first chapter was available online internationally.

When Ms. Ehrenfeld did not appear in England, Mr. Bin Mahfouz successfully applied for a default judgment. The English court focused on the availability of the material in England, but gave little consideration to Mr. Bin Mahfouz's lack of connection with England, or to the fact that the publisher

and author were based in New York, where the statements were originally published. The English court declared the statements false, awarded damages and costs, and required defendants to publish an apology.

Ms. Ehrenfeld filed a pre-emptive suit in New York, seeking a declaration that the English judgment was unenforceable. The New York Court of Appeals ultimately rejected her case, on the ground that it lacked personal jurisdiction over Mr. Bin Mahfouz under New York state's long-arm statute and, therefore, could not decide the matter unless and until Mr. Bin Mahfouz came to a New York court to seek enforcement. *Ehrenfeld v. Bin Mahfouz*.<sup>3</sup> The Court stated that any amendment to New York's long-arm statute would have to come from the Legislature.<sup>4</sup>

In response, on or about May 1, 2008, New York enacted the Libel Terrorism Protection Act, explicitly aimed at the chilling effect on free speech which is created by the specter of a potential foreign libel judgment being enforced in New York. The act expands New York state's long-arm jurisdiction, in cases seeking to invalidate foreign defamation judgments, to any person who obtains a foreign defamation judgment for statements published in New York, against either a New York resident or anyone subject to New York jurisdiction who either has assets in New York, or who may have to take action in New York to comply with the judgment.<sup>5</sup> The act provides that a foreign defamation judgment need not be recognized unless the law applied "in the foreign court's adjudication provided at least as much protection for freedom of speech and press" as U.S. and New York law.<sup>6</sup> This law may effectively render many English libel judgments unenforceable in New York.

The act is retroactive, so Ms. Ehrenfeld now has a new chance to invalidate the judgment against her.

### **Conflicting Defamation Regimes**

English libel laws exist to protect a person's reputation from untrue and damaging statements. The damaging statements are presumed to be false and the media has the burden of proving that they are true. The media may also be able to rely on other defenses. In particular, given the right to free speech enshrined in Article 10 of the European Convention on Human Rights, which is now part of English domestic law under the Human Rights Act of 1998, the defense of qualified privilege has been extended. So, where matters of genuine "public interest" are published, the defense will succeed as long as it was necessary to include the defamatory material in the publication and the media acted "responsibly" in publishing the article.<sup>7</sup> This defense has, however, failed more than it has succeeded, although an attempt was made to reinvigorate it in a House of Lords' decision in 2006.<sup>8</sup>

The United States, however, has a sharply different defamation regime, at least with respect of matters of public concern, which focuses on the policy of protecting a free press engaged in robust, vehement political debate, without the chilling effect of a defamation judgment every time a mistake is made. In New York, the media is given substantial latitude to determine whether a statement reasonably relates to an issue of public concern, subject to court review for abuse of editorial discretion.<sup>9</sup> Thereafter, the plaintiff has the burden of establishing falsity of a defamatory statement.<sup>10</sup> Furthermore, assuming a statement is proved to be false, additional obstacles are placed in the path of defamation plaintiffs. Public figures, such as celebrities and politicians, need to prove that a false statement was made with "malice," meaning that the statement was made with actual knowledge of

falsity or with reckless indifference as to whether the statement was false.<sup>11</sup> Even private figures, when involved in issues of public concern, must establish some level of fault (which may vary from state to state) beyond mere incorrectness.<sup>12</sup> In New York, these plaintiffs must prove that a statement was "grossly irresponsible" and made "without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties."<sup>13</sup>

In summary, the laws of the two countries are in clear conflict, both with respect to underlying policy considerations and as a practical matter with respect to expected results.

### **Personal Jurisdiction**

Aside from the contrasting substantive laws, the English and New York courts take sharply divergent views on long-arm defamation jurisdiction. English courts may assume jurisdiction over non-English defendants if defamatory material is accessible online to English readers, even where the claimant, defendant, and publication have little connection with England and demonstrably few individuals viewed the material in England. In 2004, the High Court stated, "the global publisher should not be too fastidious as to the part of the globe where he is made libel defendant."<sup>14</sup>

The trend of travelling to London to sue for libel began in earnest when two well-known Russian businessmen, Mr. Berezovsky and Mr. Glouchkov, successfully argued that statements published in Forbes (an American magazine with a total circulation of 1,915 in England) could be challenged as defamatory in England. Evidence that both men were regular visitors to England, with substantial business relationships and personal family ties motivating their visits, was sufficient to establish jurisdiction.

Likewise, more recently, an English court upheld the right of a Ukrainian energy tycoon to sue the Kyiv Post and Obozrevatel (both Ukrainian Internet journals published in Ukrainian) for libel in England, based on the claimant's reputation and business links in England. Similarly, an Icelandic bank was able to bring an action for defamation in England against a Danish publisher.

Where the extent of publication in England is low and the claimant does not trade or have connections with England, no "real and substantial" tort will have been committed in England and defendants can apply for the defamation claim to be struck out as an abuse of process. However, the English courts are less willing than before to strike out defamation claims on such grounds.

New York state, by contrast, has adopted a policy of protecting the free-speech rights of non-New York residents by permitting them to defend defamation claims in their home territories. New York's long-arm statute specifically excludes the tort of defamation from long-arm jurisdiction, even for statements made available, published and read in New York.<sup>15</sup> These conflicting jurisdictional trends clearly increase New York state's dismay at the willingness of English courts to expand their jurisdiction to New York citizens speaking and writing in New York.

### **Effect of Libel Terrorism Act**

Despite the fanfare, it is unclear how broad an effect the proposed Rachel's Law will have, or whether it

presages a trend of general hostility to English defamation judgments in the United States.

On the one hand, a defamation claimant does not necessarily need to enforce an English libel judgment in New York or in any specific jurisdiction which has a demonstrated hostility to English defamation law. Thus, it may be that English libel claimants will be able easily to maneuver around this law depriving it of effect. Indeed, in his approval message, Governor David A. Paterson expressly stated that the issues raised by "libel tourism" could not be entirely resolved until other states and the federal government enacted similar legislation.

On the other hand, the effect may turn out to be broad. The New York statute allows a pre-emptive strike against a foreign libel judgment before any attempt is made to enforce it, whether in New York or elsewhere. Once a New York court strikes down a foreign libel judgment, principles of "full faith and credit," which generally require courts in the United States to give effect to judgments rendered by other state courts (with certain exceptions) may render the English judgment unenforceable elsewhere in the United States.<sup>16</sup> Likewise, an attempt to enforce the judgment in a third country might become more difficult if that court is faced with two competing judgments, from England and America, leading to two opposite results.

Moreover, the New York act may invite some reverse "tourism" of its own. Specifically, if publication was in New York, the act is available not only to New York residents, but also to any person or entity amenable to jurisdiction in New York (including most media companies who do substantial business in New York), who either has assets in New York or might be required to act in New York as a result of the English judgment. In other words, the ironic result of English "libel tourism" is that New York may become a hub of "nonenforcement tourism," by, among others, multistate media entities, who find themselves subject to English libel judgments.

## Conclusion

In an increasingly Web-linked world, the English courts have grown more amenable to the argument that libel claimants have reputations worthy of protection both in their home country and further afield. The ubiquity of the English language as the default global language of the Internet increases the ability and willingness of English courts to determine defamation claims and to accept jurisdiction where others fear to tread.

All this makes grim reading for non-English publishers and newspaper proprietors. Care must be taken where material is available online and accessible in England.

However, this phenomenon has led to increased criticism in the United States, which has strikingly different defamation laws which the United States may seek to protect from "foreign" interference. New York state has now struck back, and it will be interesting to see what happens next.

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## Endnotes:

1. Laws of New York 2008, Chapter 66, amending CPLR §§5304 and 302.
2. [2005] EWHC 1156 (QB).
3. 9 NY3d 501, 508 (2007).
4. *Id.* at 513.
5. New York CPLR §302(d) (2008) (as amended).
6. New York CPLR §5304(2)(b)(8) (2008) (as amended).
7. *Reynolds v. Times Newspapers*, [2001] 2AC127.
8. In addition, both the United Kingdom and United States offer "qualified privileges" to certain private statements, such as statements subject to a "common interest" between speaker and recipient. These types of private privileges are beyond the scope of this article.
9. *Gaeta v. New York News Inc.*, 62 NY2d 340, 349-50 (1984).
10. *Rinaldi v. Holt, Rinehart & Winston Inc.*, 42 NY2d 369, 379-80 (N.Y. 1977) ("At common law, the libelous statement was presumed to be false . . . . Although there has been doubt, the burden is now on the libel plaintiff to establish the falsity of the libel.") (citation omitted). However, because *Rinaldi* was a "public concern" case, some later New York cases involving purely private matters (and the absence of any qualified private privilege) continue to assign to defendant the burden of proving truth.
11. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).
12. *Gertz v. Robert Welch Inc.*, 418 U.S. 323, 346-47 (1974).
13. *Gaeta*, 62 NY2d at 351.
14. *King v. Lewis* [2004] EWHC Civ 1329.
15. New York CPLR §§302(a)(2), 302(a)(3).
16. See U.S. Const. Art. 4, §1; 28 U.S.C. §1738. See also, *Jaffe v. Accredited Surety & Cas. Co. Inc.*, 294 F.3d 584, 590-93 (4th Cir. 2002) (federal court in Virginia required to give full faith and credit to judgment of Florida state court, which had refused to recognize Canadian default judgment in favour of plaintiff).