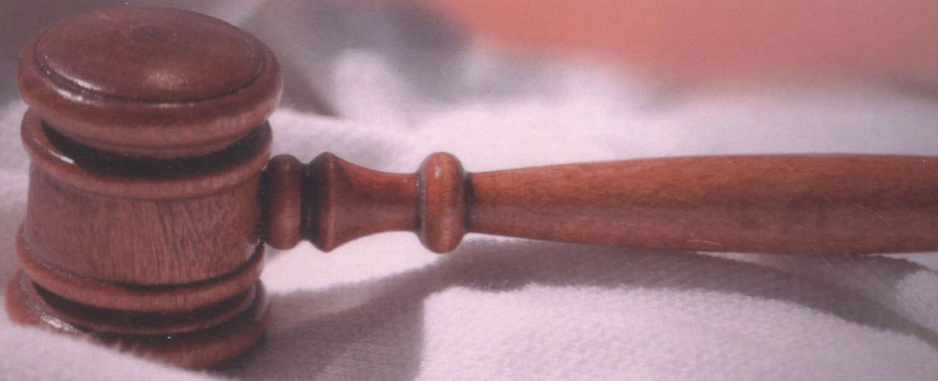
Law, Crime and Law Enforcement

AMY J. BROWER
EDITOR

LIBEL TOURISM AND FOREIGN LIBEL LAWSUITS



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LAW, CRIME AND LAW ENFORCEMENT

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PREFACE

This new book explores recent legislative activity which highlights the phenomenon of "libel tourism," whereby litigants bring libel suits in foreign jurisdictions in order to take advantage of plaintiff-friendly libel laws.

Chapter 1- Recent legislative activity highlights the phenomenon of "libel tourism," whereby litigants bring libel suits in foreign jurisdictions in order to take advantage of plaintiff-friendly libel laws. Suits brought against U.S. citizens in England have been especially prominent.

Chapter 2- The 111th Congress considered several bills addressing "libel tourism," the phenomenon of litigants bringing libel suits in foreign jurisdictions so as to benefit from plaintiff-friendly libel laws. Several U.S. states have also responded to libel tourism by enacting statutes that restrict enforcement of foreign libel judgments. On August 10, 2010, President Barack Obama signed into law the Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), P.L. 111-223, codified at 28 U.S.C. §§ 4101-4105, which bars U.S. courts, both state and federal, from recognizing or enforcing a foreign judgment for defamation unless certain requirements, including consistency with the U.S. Constitution and section 230 of the Communications Act of 1934 (47 U.S.C. § 230), are satisfied.

Chapter 3- This is the testimony of Dr. Rachel Ehrenfeld, Director of the American Center for Democracy, before the Subcommittee on Commercial and Administrative Law, Hearing on "Libel Tourism".

Chapter 4- This is the testimony of Bruce D. Brown, Baker & Hostetler LLP, before the Subcommittee on Commercial and Administrative Law, Hearing on "Libel Tourism".

Chapter 5- This is the testimony of Laura R. Handman, Davis Wright Tremaine LLP, before the Subcommittee on Commercial and Administrative Law, Hearing on "Libel Tourism".

Chapter 6- This is the statement of Professor Linda J. Silberman, Martin Lipton Professor of Law, New York University School of Law, before the Subcommittee on Commercial and Administrative Law, Hearing on "Libel Tourism".

Chapter 7- This is the testimony of Kurt Wimmer, Partner, Covington & Burling LLP, Hearing on "Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights?"

CONTENTS

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Chapter 1

"LIBEL TOURISM": BACKGROUND AND LEGAL ISSUES

Anna C. Henning and Vivian S. Chu

SUMMARY

Recent legislative activity highlights the phenomenon of "libel tourism," whereby litigants bring libel suits in foreign jurisdictions in order to take advantage of plaintiff-friendly libel laws. Suits brought against U.S. citizens in England have been especially prominent.

Under the First Amendment to the U.S. Constitution as interpreted by the U.S. Supreme Court in *New York Times v. Sullivan* and its progeny, U.S. courts place the burden of proof on plaintiffs in all defamation cases involving matters of public concern. In addition, a public figure suing in a U.S. court must prove that a defendant acted with "actual malice" (i.e., with knowledge of or with reckless disregard as to the statement's falsity) in order to win a defamation suit. In contrast, in defamation cases brought in England and various other countries, the burden of proof remains with defendants.

Thus, litigants can recover damages in jurisdictions with plaintiff-friendly libel laws as a result of speech that would be protected by the U.S. Constitution in the United States. This situation has prompted concerns regarding a potential "chilling effect," in which authors and publishers will withhold speech that is constitutionally protected, and perhaps even important

for national security or a well-functioning democracy, because they fear legal repercussions elsewhere.

Several legislative responses address such concerns. Four states have enacted statutes that restrict their state courts' enforcement of foreign libel judgments. On the federal level, S. 449 and H.R. 1304, introduced during the 111th Congress, propose a federal cause of action which would allow an individual against whom a foreign libel suit was brought to sue, in some circumstances, to (1) bar enforcement of any resulting foreign judgment in U.S. courts, or (2) recover money damages for losses incurred as a result of the foreign libel suit.

The state laws and federal proposals implicate several legal issues. The state laws have prompted calls for a national approach to the recognition of foreign judgments. On the federal level, the legislative debate has prompted questions regarding Congress's authority to act in this area. It has also raised the issue of whether a federal statute should bar enforcement of foreign judgments or take the additional step of establishing a new cause of action enabling suits against foreign libel plaintiffs. The effectiveness of a new cause of action would be shaped by constitutional rules limiting U.S. courts' assertion of personal jurisdiction over foreign defendants. Additionally, international relations concerns might inform some responses to legislative proposals; in particular, there is some possibility that foreign countries could reciprocally decline to enforce U.S. libel judgments or could become less receptive to calls for enforcement of U.S. judgments in legal areas in which U.S. law is relatively friendly to plaintiffs.

In February 2010, a committee of the English House of Commons issued a report recommending reforms to English libel laws. If instituted, such changes might shift the emphasis in the legislative debate to other countries in which libel judgments are obtained more easily than in the United States.

INTRODUCTION

"Libel tourism"[1] is the phenomenon whereby a plaintiff brings a defamation[2] suit in a country with plaintiff-friendly libel laws, even though the parties might have had relatively few contacts with the chosen jurisdiction prior to the suit. As with "forum shopping," the phrase "libel tourism" evokes negative notions regarding a plaintiff's attempt to strategically manipulate legal processes to enhance the likelihood of a favorable outcome. More

positively described, a plaintiff's goal might be to find a favorable law under which to obtain redress for a grievance which he perceives as legitimate. Regardless of the characterization, given the increasingly globalized market for publications, some have warned that the libel tourism trend will cause an international lowest common denominator effect for speech, whereby "every writer around the globe [will be subjected] to the restrictions of the most pro-plaintiff libel standards available."[3]

The practice has affected U.S. persons in several suits brought by litigants who wish to avoid the relatively high burden of proof necessary to win defamation claims in the United States. U.S. courts interpret the First Amendment to protect speech that would be considered defamatory under traditional common law and in many other countries. For that reason, U.S. authors and publishers are especially vulnerable to the possibility that a foreign libel judgment will impose penalties for speech that is protected in the author's home country.[4]

Although a committee of the English House of Commons has recommended reforms,[5] England[6] has a long history of providing redress for reputational injuries.[7] Arising from this history, modern English law offers libel plaintiffs a dual advantage: plaintiff-friendly libel laws and a relatively low bar for personal jurisdiction in libel suits. As a result, although England is not the only country with plaintiff-friendly libel laws, English courts have been an especially popular venue for defamation suits.[8]

Because obtaining a judgment and actually receiving money awarded constitute two separate components of a successful lawsuit, winning a judgment in a foreign court does not end the discussion. If a defendant chooses not to appear in a foreign court, the court will typically award a default judgment against the defendant. In such circumstances, plaintiffs in foreign libel suits might involve U.S. courts when they seek to enforce judgments against U.S. defendants because foreign courts typically lack jurisdiction over assets located in the United States. Thus, although foreign libel suits provide context for the issue, legislative proposals have focused on subsequent actions to enforce foreign court judgments in U.S. courts.

KEY CASES AND CALLS FOR LEGISLATIVE ACTION

The most prominent example of the libel tourism trend, and the case most often referenced by bill sponsors and media reports,[9] is the suit brought by a

Saudi billionaire, Sheikh Khalid Bin Mahfouz, against a New York author, Rachel Ehrenfeld, whose book documented his alleged role in financing terrorism.[10] Although the book was published in the United States, an English judge allowed the case to proceed in England because 23 copies of the book were sold through the Internet to English residents.[11] Ehrenfeld did not defend herself in the litigation, and the English court ultimately entered a default judgment against her, awarding more than $200,000 in damages and ordering her to destroy copies of the book and apologize.[12] In response, Ehrenfeld attempted to obtain a judgment from the U.S. District Court for the Southern District of New York declaring Bin Mahfouz' judgment unenforceable. The district court dismissed Ehrenfeld's suit for lack of personal jurisdiction, prompting legislative action, discussed *infra*, in New York State.[13]

A small number of other foreign libel suits have also made headlines. A high-profile suit that has been described as another "striking use of defamation law in an attempt to silence uncomfortable truths" was brought by English historian David Irving against Emory University Professor Deborah Lipstadt after she characterized him as a Holocaust denier.[14] However, the English court in that case ruled in Lipstadt's favor, after finding that her statements regarding Irving were truthful.[15] Other cases have involved defendants from other countries,[16] have settled out of court, or have received less public attention.

A few cases have involved U.S. plaintiffs suing U.S. defendants. An English court dismissed at least one such case on forum *non conveniens* grounds (i.e., because England was an inappropriate forum for litigation given the parties' circumstances) despite finding that it had the requisite ground for jurisdiction.[17] In other cases, English courts have allowed such suits to proceed in England as long as a book or other publication had at least some exposure there.[18]

In response to libel suits against U.S. defendants in foreign courts, some lawmakers and editorial boards have characterized the libel tourism phenomenon as a threat to the United States' strong free-speech protections.[19] A key concern is that foreign libel suits will have a "chilling effect" that extends beyond the harm caused by particular libel cases. The phrase "chilling effect" typically refers to the stifling of protected speech caused by overly broad bases for potential criminal or civil liability for expression.[20] In the libel context, some fear that the possibility of foreign libel suits will stifle speech and publication that is protected by the First Amendment and, in turn, inhibit the exchange of ideas vital to a functioning democracy.[21] Relatedly,

proponents of the legislative proposals are troubled by the negative impact of such suits on the fight against terrorism.[22]

In her testimony before the House Judiciary Committee, Ehrenfeld expressed a concern that libel tourism was "limiting [scholars'] ability to write freely about important matters of public policy vital to our national security."[23] Similarly, some have testified about situations in which U.S. authors have been intimidated by a threatened foreign libel suit unless they withdraw publication,[24] and in at least one situation, a publisher removed a book about terrorism funding by two well-known authors from many suppliers after it was sued by Bin Mahfouz in England.[25] Beyond the documented impacts in particular cases, the full extent of the chilling effect caused by foreign libel suits is unclear.

DISTINCTIONS BETWEEN U.S. AND ENGLISH LIBEL LAWS

The U.S. approach to defamation is quite different from the English approach. Although U.S. defamation laws have their origin in and are similar in many ways to the English common law, U.S. defamation laws have evolved differently. The difference is primarily attributable to the Supreme Court's interpretation of the First Amendment to the U.S. Constitution.[26] The U.S. Supreme Court places the burden of proof on plaintiffs, making it more difficult for them to win defamation suits. In some instances, American case law has been called upon in England to aid, and according to some scholars, to "attempt to persuade [English courts] to change the direction of the English law."[27] Likewise, England has developed defenses that make it somewhat more difficult for a public official to succeed in a defamation claim. However, those defenses are not typically available to assist a defendant involved in a libel tourism scenario.

The U.S. Supreme Court established a federal constitutional privilege in defamation law in a landmark First Amendment case, *New York Times v. Sullivan*.[28] The Court held that a public official is prohibited from recovering damages for a defamatory falsehood relating to his official conduct unless he or she can prove with "convincing clarity" that the statement in question was made with "actual malice," defined by the Court as "with knowledge that it was false or with reckless disregard of whether it was false or not."[29] The Court reasoned that this constitutional restriction found its source in the First Amendment, which prohibits any law "abridging freedom of speech or of the

press," and which has been applied to the states through the Fourteenth Amendment.[30] The Court further stated that the restriction on recovery is based on a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[31] Furthermore, the Court stated, "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."[32] The Court subsequently extended this constitutional protection to all "public figures."[33]

Defamation liability has also evolved differently in the United States and England with regard to non-public officials and figures. Traditionally, at common law, defamation liability was strict, meaning that a defendant did not have to be aware of the false or defamatory nature of the statement, or even be negligent in failing to ascertain that character. Instead, a plaintiff had to prove only that a statement (1) is defamatory; (2) refers to the claimant; and (3) is communicated to a third party.

Whereas the common law rule still applies in England, U.S. treatment of defamation as a strict liability tort changed with the Supreme Court's decision in *Gertz v. Robert Welch*.[34] In *Gertz*, the Court rejected the English law of strict liability, holding that even a private plaintiff is required to show fault amounting to the defendant's negligence or higher to recover damages.[35] A plaintiff in a U.S. court must prove (1) a false and defamatory communication that concerns another and is (2) an unprivileged publication to a third party; (3) fault that is at least negligence by the publisher; and (4) in certain instances, special damages.

As discussed, unlike the U.S. Supreme Court, English courts have not modified the traditional common law elements that a public official must prove to recover for defamation. Rather, they have allowed a defendant to invoke, as a defense, a qualified or conditional privilege,[36] known as the *Reynolds* Privilege. The *Reynolds* Privilege is a relatively new defense, often referred to as "the test of responsible journalism."[37] In the case of *Reynolds v. Times*,[38] the court considered that statements in the newspaper, which related to the conduct of individuals in public life, should be covered by a qualified privilege. Thus, while Members of Parliament or other public officials need only prove the traditional common law elements of defamation, English courts have made their ability to recover more difficult by giving defendants the *possibility* of claiming that their publications fall under the *Reynolds* Privilege, thus enabling a defendant to avoid liability.

However, the *Reynolds* Privilege seems to be available only to the media, and not authors or others who publish outside the realm of journalism. Furthermore, while the privilege can protect statements made about public officials or figures, in English courts, it is the judge who determines whether the occasion is privileged (i.e., whether the statement rises to the level of being in the public interest), thus allowing a defendant to benefit from use of the defense. In other words, it seems defendants may only invoke the *Reynolds* Privilege if the judge allows them to do so. In the cases of libel tourism litigation, judgments generally have been in plaintiffs' favor, as it appears that defendants who are sued in England have not been able to invoke the *Reynolds* Privilege because they either do not qualify as media, or because their statements are not deemed to be privileged by the judge.

Proposals to reform libel laws in England have garnered attention.[39] A report of a House of Commons committee, printed February 9, 2010, recommends changes such as shifting the burden of proof in some cases; a one-year statute of limitations for libel cases arising from Internet speech; and strengthening the *Reynolds* Privilege.[40] The report explicitly refers to the debate that has taken place in the U.S. Congress as one motivation for the examination of English libel law.[41] It is unclear what specific changes will result from the report.

RECOGNITION OF FOREIGN JUDGMENTS IN U.S. COURTS

State law governs the recognition and enforcement of foreign judgments in U.S. courts. No federal law provides uniform rules, nor is the United States a party to any international agreement regarding treatment of such judgments.[42] Although states generally must recognize judgments from sister states under the Full Faith and Credit clause of the U.S. Constitution, that requirement does not apply to judgments from foreign courts.[43] For that reason, even if one state enacts a law prohibiting its courts from enforcing foreign libel judgments, the judgment might be enforceable in another state where a defendant has assets.

Nonetheless, many states' recognition statutes share identical language, because most are based on one of a few common sources—namely, rules articulated in *Hilton v. Guyot*,[44] a 19th-century U.S. Supreme Court case, or one of two uniform state acts, which in turn draw from *Hilton*. Principles of international comity (i.e., "friendly dealing between nations at peace"[45])

undergird all of these sources. Comity need not be applied reciprocally, and reciprocity has been disregarded as a basis for recognition in some recent U.S. cases. In contrast, countries such as England have adopted a reciprocity-based approach to recognition of foreign judgments.[46] Such countries will generally decline to recognize U.S. judgments if U.S. courts would not recognize a similar judgment rendered by its courts.

In *Hilton*, the Supreme Court explained that international comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, on the other."[47] Rather, "it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens[.]"[48] Under this principle, a foreign judgment should be recognized "where there has been opportunity for a full and fair trial ... under a system of jurisprudence likely to secure an impartial administration of justice ... and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment."[49] Although states are not bound by that interpretation,[50] most states have adopted the basic approach from *Hilton* as a matter of statutory or common law.[51]

Two uniform laws[52]—the 1962 Uniform Foreign Money-Judgments Recognition Act and the 2005 Uniform Foreign-Country Money Judgments Recognition Act, which clarifies and updates the 1962 version—provide statutory language which many state legislatures have enacted to codify the basic principles articulated in *Hilton*.[53] More than 30 states have enacted one of the two model laws, in whole or in part. The model acts provide, as a general rule, that "any foreign judgment that is final and conclusive and enforceable where rendered," and in which an award for money damages has been granted or denied, shall be recognized.[54]

However, exceptions apply. Both the common law comity principles and the uniform statutes provide grounds for refusing to recognize foreign judgments. Most relevant is the discretionary public policy exception, which is based on the idea that "no nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum."[55] In states that have enacted the 1962 model act, a court may refuse to recognize a judgment arising from a cause of action or claim for relief that is "repugnant to the public policy of the state."[56] The 2005 version, which only a handful of states have adopted, offers an even broader public policy exception. Under this exception, a state court may refuse to recognize a foreign judgment if the judgment itself, as opposed to the underlying cause of action, is