

TRANSNATIONAL MEDIA LAW AT THE BAR AND IN THE CLASSROOM

BY:

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- I. The Increasing Impact of Transnational Law on U.S. Media Outlets
 - A. Libel law.
 1. In the last decade, U.S. publishers have become increasingly aware of their exposure to libel actions filed in London and other former Commonwealth nations.
 2. These actions combine expansive assertions of personal jurisdiction (usually not meaningfully confined by the doctrine of forum non conveniens) with substantive libel law comparable to U.S. common law libel before *New York Times v. Sullivan*.
 - a) For example, in *Berezovsky v. Michaels*, [2000] E.M.L.R. 643 (H.L. 2000), the House of Lords held that England (where Berezovsky claimed to be known and to have a reputation to protect) was an appropriate forum for the Russian tycoon's libel action against Forbes. Forbes was published principally in the U.S. (785,000 copies circulated) and had only secondary distribution (2000 copies) in the U.K. Effectively, anyone (regardless of domicile) with a personal or business nexus in the U.K. can sue any U.S. publication with minimal circulation there. The English courts have even permitted an American public figure to sue another American in London for statements made in the U.S. to American publications. See *King v. Burstein*, [2004] EWCA Civ 1329 (treating High Court in London as proper forum for U.S. boxing promoter's libel action against U.S. lawyer based on statements by lawyer quoted on websites of U.S. boxing publications).
 - b) Relative to American libel law, English libel law is drastically tilted in favor of libel plaintiffs. For example:
 - (1) Defamatory statements are presumed to be false unless the libel defendant carries the burden of proving them to be true. Plaintiff need not prove falsity. (Compare *Hepps v. Philadelphia Newspapers, Inc.*, 474 U.S. 767 (1986)).
 - (2) Defamation is a strict liability tort. It is not necessary for the plaintiff to prove that the libel defendant published with any

form of fault, negligent or otherwise. (*Compare Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

- (3) No special protection exists for defamation actions arising from critiques of public figures or public officials, or for defamation actions arising from speech regarding matters of public concern. (*Compare Sullivan and Gertz*) (*but see Albert Reynolds v. Times Newspapers Limited* [1999] 3 WLR 1010 (H.L. 1999)).
3. The impact of English libel law and the concerns of U.S. publishers have been greatly magnified by the growth of Internet publication.
 - a) In *Gutnick v. Dow Jones & Company, Inc.*, [2002] HCA 56 (Dec. 10, 2002), Australia's High Court affirmed lower court rulings sustaining jurisdiction in Victoria over a libel action based on an article in Barron's magazine. The article principally recounted plaintiff's transactions in the U.S. involving mining stocks and U.S. charities. Jurisdiction was based on the availability of the article on the Internet to Australians who subscribed to Dow Jones' paid website.
 - b) In *Bangoura v. The Washington Post Company*, 235 D.L.R. (4th) 564 (Jan. 27, 2004), an Ontario trial court, relying heavily on the tone and reasoning of *Gutnick*, rejected a personal jurisdiction and forum non conveniens challenge to an internet-based libel action against the Washington Post and several of its reporters. The plaintiff in the action is a former U.N. official who did not even reside in Ontario at the time of publication and who had moved to Ontario more than three years later. On September 16, 2005, the Ontario Court of Appeals reversed the trial court's decision on the ground that the action had no "real and substantial connection" to Ontario. 2005 A.C.W.S.J. LEXIS 6141; 2005 A.C.W.S.J. 12839; 142 A.C.W.S. (3d) 247 (September 16, 2005).
 - c) In *Yousef Jameel v. Dow Jones & Company, Inc.*, [2005] EWCA Civ 75, the English Court of Appeal reversed the High Court and dismissed a libel action brought in London by a Saudi businessman based on Internet publication of an article and PDF published by The Wall Street Journal on *WSJ.com*. The article contained a link to a PDF image of a document prepared by the United States Department of Justice and filed in a criminal proceeding in the Northern District of Illinois that listed an individual with a name similar, but not identical, to that of the plaintiff. The government alleged (in a brief quote on the website) that those on the list had contributed or been approached to contribute money to the al-Qaeda terrorist

organization. Although the article was accessible online by subscribers to the site, Dow Jones offered undisputed proof in the trial court that only five subscribers had actually accessed both the article and the PDF of the U.S. government's document (which was the only place in which the plaintiff's name arguably appeared). The court found that, because only minimal publication and minimal damage to the plaintiff's reputation occurred in England, the case should be stayed as an abuse of process.

- d) *But see King v. Burstein*, [2004] EWCA Civ 1329, in which the same English Court of Appeal permitted Don King's High Court libel action against a fellow American to proceed in England. The court cited *Gutnick* with qualified approval; refused to adopt a special, narrow rule of jurisdiction or forum non conveniens in cases involving internet publication; and generally deferred to the discretion of the trial court in evaluating the appropriateness of the English forum.
4. U.S. publishers also have had to confront transnational issues relating to the enforcement of foreign libel judgments in the U.S. and the jurisdiction of U.S. courts (if any) to protect U.S. publishers from the arguably extravagant assertion of jurisdiction over U.S. publishers.
- a) In *Telnikoff v. Matusevich*, 702 A.2d 230 (Md. 1997) and *Bachchan v. India Abroad Publications Incorporated*, 585 N.Y.S.2d 661 (1992), U.S. courts refused to enforce English libel judgments on grounds of repugnance to U.S. public policy.
 - b) More recently, however, the reporters' notes to the ALI International Jurisdiction and Judgments Project called attention to the "academic debate" over the correctness of *Telnikoff* in particular, given the arguable lack of U.S. nexus with the underlying English libel action (both plaintiff and defendant resided in England during the litigation of the libel action there; only later did defendant move to the U.S. and plaintiff seek to enforce his English judgment here). The reporters also questioned whether the non-conformity of a foreign libel regime with First Amendment requirements *ipso facto* should render a foreign libel judgment unenforceable in the U.S.
 - c) In an effort to limit the reach of foreign courts, U.S. publishers have asked federal courts to protect them from foreign libel actions that seek to punish, and therefore arguably would chill, protected speech targeted primarily at a U.S. audience. In *Dow Jones & Company, Inc. v. Harrods, Ltd.*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd* 346 F.3d 357 (2d Cir. 2003), Dow Jones

sued the London department store owner in federal court in New York seeking a declaratory judgment and an anti-suit injunction to prevent Harrods (over which Dow Jones alleged the American court had personal jurisdiction) from proceeding with an internet-based libel action in London. According to Dow Jones' complaint, the London action sought to punish Dow Jones for publishing plainly satirical speech protected by the First Amendment. The District Court dismissed the action as non-justiciable. In addition, the District Court exercised its discretion (principally on grounds of international comity) to deny the requested relief. The Second Circuit affirmed the dismissal as within the District Court's discretion without reaching the justiciability of Dow Jones' claims. *See also Ehrenfeld v. Bin Mahfouz*, No. 04-CV-9641 (RCC) (SDNY) (American book author seeks declaratory judgment that English default libel judgment, not yet sought to be enforced in U.S., unenforceable as against public policy).

5. In addition to the case law described above, U.S. media interests are affected by various multinational efforts to regulate jurisdiction and choice of law in internet-related cases, for example:
 - a) E-Commerce Directive of the European Union (electronic commerce activities only; "country of origin" principle—companies subject only to the jurisdiction and law of the state where they are established).
 - b) "Rome II" initiative (draft general rule initially provided that law of the country where damage arises would apply to tort actions based on Internet content; European Parliament amendments emphasize "country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised...")

B. Other media law issues.

1. Reporters' privilege.

- a) In *Goodwin v. United Kingdom* (ECHR 1996), the European Court on Human Rights held that an order compelling a reporter to reveal his confidential source was an interference with freedom of expression not "necessary in a democratic society" within the meaning of Article 10 of the European Convention on Human Rights.¹

¹ "Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments

b) *See also Randal (2002)* (appeals chamber of International Criminal Tribunal for the former Yugoslavia adopts "war correspondent privilege") (before a war correspondent may be subpoenaed to testify before the ICTY, it must be shown that the testimony "is of direct and important value to determining a core issue in the case" and that the evidence cannot reasonably be obtained elsewhere.)

2. Fair trial/free press

a) The U.K. has an extensive regime of statutory as well as judicial contempt regulating permissible news coverage of pending legal proceedings. *See Contempt of Court Act 1981* (creates crime of contempt for publication that creates substantial risk that course of justice in particular "active" proceedings will be seriously impeded or prejudiced).

3. Injunctions against speech (prior restraint)

a) Although English law has strictures against prior restraint not unlike our own, English courts have long considered it an appropriate remedy to enjoin defamatory speech after trial in addition to awarding damages. As one English treatise notes, "It is common for English judges to grant such injunctions at trial to prevent any repetitive publication of the defamatory material." Carey, *Media Law* (2d Ed.1999).

b) In contrast, there is little American precedent supporting the issuance of post-trial injunctions in libel cases. *See, e.g., Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991).

II. Transnational Law in a U.S. Media Law Seminar

A. Judge Robert Sack of the Second Circuit and I team teach a seminar on "The First Amendment and the Institutional Press".

1. Our principal text is Franklin, Anderson et al., *Mass Media Law* (7th Ed. 2005, Foundation Press).

2. The main topics we cover are prior restraint, libel, invasion of privacy, newsgathering torts, access (primarily access to the judicial

on journalistic freedoms ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest."

process), subpoenas to the media (reporters' privilege), and liability of the media for physical and economic harm (primarily incitement).

- B. In the first years of the course, we began the semester with two classes in which we attempted to provide a general overview of U.K. media law—not just libel, but contempt, prior restraint, and reporters' privilege.
- C. More recently, we've limited the transnational material to the following:
 - 1. An introductory class on English common law libel. Primary case discussed is *Hulton v. Jones* [1910]AC 20 (H.L. 1910).
 - a) We use *Hulton* to illustrate the strict liability nature of English libel law and to discuss the impact of the strict liability regime on the behavior of publishers.
 - b) Indeed, we use *Hulton* as a springboard for more general discussion of the connection between substantive legal rules affecting speech and the primary conduct of publishers.
 - 2. Obviously, it is also critical, as a foundation for class discussion of *New York Times Co. v. Sullivan*, to establish class understanding of the basics of common law libel.
 - 3. The evolving *Reynolds* "responsible journalism" privilege applicable to "matters of public interest" provides a useful comparative framework for discussion of *Sullivan*.
 - 4. We now devote one additional class to transnational jurisdiction over internet publication.
 - a) This class includes consideration of *Gutnick* and expansive U.K. jurisdiction, which we contrast with the prevailing U.S. trend of limited interstate jurisdiction over internet publishers. See, e.g., *Young v. Hartford Courant*, 315 F.3d 256 (4th Cir. 2003), cert. denied, 155 L.Ed. 2d 1065 (U.S. 2003).
 - 5. We also cover the U.S. case law on enforcement of foreign libel judgments (e.g., *Telnikoff*) and discuss the questions raised by the ALI reporters concerning the correctness of those cases.
 - 6. Time permitting, we have included discussion of *Dow Jones v. Harrods*.
 - 7. We try to invite a leading English libel solicitor or barrister to speak as a guest at one class.
 - 8. Suggested paper topics may include transnational law topics not covered in class. Students have written on, e.g., a comparison of Canadian, U.K., and U.S. approaches to fair trial/free press; and the libel regimes and jurisdictional approaches of European states other than the U.K. (Spain, France).

- III. Observations on Use of Transnational Material
- A. We feel that it is essential that students gain a general awareness of non-US media law (at least in the U.K. and former Commonwealth).
1. U.S. publishers are keenly aware of these issues and the exposures to liability that they present.
 2. Non-U.S. law provides comparative perspective on U.S. law.
 3. Foreign judges offer valuable criticism and commentary on U.S. law. See *Gutnick; Bangoura*.
 4. Non-U.S. law may be used to argue U.S. law. For example, in my firm's amicus brief in *U.S. v. Miller*, we argued that European recognition of a reporters' privilege (see *Goodwin* and *Randal, supra*) supported the recognition of a U.S. common law privilege under Fed.R.Ev. 501.
- B. In contrast to U.S. libel law, in particular, which is doctrinally stable and which has seen largely interstitial elaboration since *Gertz* in 1974, this is an era of major change and ferment for U.K. media law in particular.
1. On April 5, 2005, the House of Lords agreed to review an important Court of Appeal decision limiting the threshold "public interest" standard for the application of the *Reynolds* defense. *Jameel and another v. Wall Street Journal Europe SPRL*, [2005] EWCA Civ 74. The case is expected to be argued in June, 2006.
 2. There are many open issues arising from the European Convention on Human Rights and the application of the Human Rights Act 1998 to U.K. media law.
 3. The Court of Appeal in *Yousef Jameel, supra*, for the first time held that publication in the U.K. can be so limited as to make it an abuse of process for the English courts to permit a libel case to proceed there.
 4. In general, this decade in U.K. media law (in particular libel law) may be analogous to the formative decade of 1964-1974 in this country.
- C. Nevertheless, we have found that detailed in-class critical analysis of non-U.S. law is not feasible. We have neither the time, nor the expertise, to cover these materials adequately.
- D. If non-U.S. cases are to be used, they must be carefully edited.
- E. Paper topics provide an opportunity for more in-depth exploration by students interested in going beyond the largely contextual classroom discussion.

