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# LIBEL TOURISM:

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## International Forum Shopping for Defamation Claims

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**ISBN 978-965-218-070-4**

Production Manager: Edna Weinstock-Gabay  
Graphic Design: [www.ramijaki.co.il](http://www.ramijaki.co.il) - Rami & Jacky / Orit Meidan



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## INTRODUCTION

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Libel tourists are claimants who, aggrieved by a publication that hurts their reputation, sue in a court outside their home country in order to increase the likelihood that they will win the case. Libel tourists are also referred to as defamation shoppers. This title emphasizes the shopper's practice of searching for the best deal — in this case for the international jurisdiction friendliest to plaintiffs bringing libel or defamation claims.


Libel tourism has reached the headlines recently due to an increase in the number of persons around the world who have discovered the advantages of bringing libel actions in England and other pro-plaintiff jurisdictions, notwithstanding the lack of substantial connection of either plaintiff or defendant with the country in which the suit is brought. England has become a magnet for such claims both because it welcomes cases with a thin English connection and because its libel law strongly favors the plaintiff, particularly in placing on the defendant speaker the burden of proving the truth of the challenged statement.

### **Libel tourism threatens to internationalize the law of libel, subjecting every writer around the globe to the restrictions of the most pro-plaintiff libel standards available.**

In effect, libel tourism threatens to internationalize the law of libel, subjecting every writer around the globe to the restrictions of the most pro-plaintiff libel standards available. While this is a boon for some individuals, who previously had no effective recourse against false and damaging publications about them, it is also highly damaging to writers, who must now weigh the risk of lengthy and uncertain legal proceedings in England or other pro-plaintiff jurisdictions every time they publish a controversial item. The net effect is almost certainly to deter some valuable and controversial speech.

Libel tourism has not gone unopposed. As a result of increasing controversy about libel tourism, the U.S. has threatened to introduce (and in one instance passed) legislative remedies protecting U.S. authors. In addition, England recently expanded journalists' privileges in libel suits, which may reduce the attractiveness of some kinds of libel tourism.

Shopping for favorable jurisdictions in which to bring claims is not unique to libel or other forms of defamation. Many commercial disputes could potentially be brought in a number of different states. Plaintiffs “forum shop” for the jurisdiction perceived to offer the greatest chances of success. As the number of international transactions grows, so too do the opportunities for forum shopping. Moreover, many courts have increased




their readiness to expand their jurisdiction to include matters that occurred elsewhere in the world, further opening up global options as to where to bring suit. A complex web of private international law rules and conventions has grown up to facilitate this tendency. Additionally, in federal countries such as the U.S., plaintiffs may forum shop within the country for the legal system with the most favorable legal standards.

## **Due to the rise in internet publications, potentially defamatory material is instantly accessible around the globe.**

For several reasons, defamation shopping has become one of the most popular forms of forum shopping. First, in many cases, rules of international law or the express terms of a contract reduce the freedom to choose a jurisdiction or eliminate such freedom altogether. Defamation, however, is one area in which there is little likelihood of any contractual relationship between the allegedly defamed and the alleged defamer; thus the field is left wide open for a claimant to select an advantageous jurisdiction and forum in which to try the case. Second, recent changes in publication technology and law have enhanced the possibilities for libel tourism. Due in no small part to the rise in internet publications, potentially defamatory material is instantly accessible around the globe. Third, English courts — where libel suits are particularly attractive to plaintiffs — have expressed greater readiness to entertain such suits despite the absence of a substantial local connection. As a result, it has become possible for “a man who lives in France [to] sue a magazine that is published in America in a British courtroom,” as the editor of *Vanity Fair* recently complained, following a successful libel suit by director and fugitive Roman Polanski.<sup>2</sup>

The choice of jurisdiction is not only a matter of geographic convenience. The substantive law of defamation varies from jurisdiction to jurisdiction, permitting allegedly defamed individuals to select the jurisdiction whose substantive law appears most attractive. In the case of defamation shopping, as in other cases of forum shopping, the selection is predictably in one direction: plaintiffs choose where to sue, and they shop for pro-plaintiff jurisdictions. Since allegedly defamed individuals bring suit against alleged defamers, they invariably choose jurisdictions that favor the rights of defamation claimants. Consequently, over time, unrestricted libel tourism shifts the balance in favor of the rights of allegedly defamed individuals over those of the alleged defamers. This briefing paper examines the promise and peril of defamation shopping or libel tourism. It describes some of the recent developments in the area and the legal doctrine at the poles of defamation approaches: on the one hand the pro-defendant U.S. and on the other the pro-plaintiff England. The paper also looks briefly at doctrine in some other jurisdictions.



To avert confusion, it is worth clarifying some terms that will appear throughout the paper. Defamation is the name of a legal action that permits a plaintiff to recover damages for (and block future publication of) words spoken or published by the defendant injurious to the plaintiff's reputation. Libel and slander are both types of defamation: generally, libel is written and slander is spoken.<sup>3</sup>

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## THE PROMISE AND PERIL OF DEFAMATION LAW

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The polar extremes of the law of defamation are perhaps best illustrated by several high profile defamation cases of recent decades. These cases demonstrate both the peril of liberal defamation law as a means of silencing or intimidating those who publish uncomfortable truths and the converse peril of restrictive defamation law as a shield behind which inaccurate and damaging reporting can hide.

A striking use of defamation law in an attempt to silence uncomfortable truths was witnessed in the English case *Irving v. Lipstadt*.<sup>4</sup> The case began in 1996, when English writer David Irving sued American historian Deborah Lipstadt for calling him “discredited” as a historian and labelling him an admirer of Hitler and a Holocaust denier. Ultimately, after several years and an expenditure of \$3 million,<sup>5</sup> Lipstadt prevailed and the court found Irving to be an anti-Semitic Holocaust denier who deliberately misrepresented the truth.<sup>6</sup> Some years later, an Austrian court sentenced Irving to serve time in jail for his expressions of Nazi sympathies.<sup>7</sup>

Where it can cost \$3 million to prove such a well known fact as the Holocaust, one can readily see the huge risk that attaches to publishing any work of fact. The case proved an important wake-up call for writers of uncomfortable truths. While he clearly must have been aware of both his bigotry and his historical falsification, Irving felt that bringing suit was a worthwhile gamble under English law, because the law placed the burden on Professor Lipstadt to prove the truth of her allegations. When Irving brought suit, he was aware that Lipstadt had only two choices: either to apologize to Irving and withdraw from circulation her 1994 study *Denying the Holocaust*, or, alternatively, to uproot herself from home in the United States for an indefinite period of months or years and spend hundreds of thousands or millions of dollars to establish the validity of her claims.<sup>8</sup> While Lipstadt heroically chose the latter course, it can hardly be expected that every historian would choose to do the same. Litigation involves uncertainty and requires defendants to invest a great deal of time and money. Many historians might well shy away from controversial subjects in the future rather than expose themselves to the risk of being sued — at least in cases where potential plaintiffs have sufficient funds to credibly threaten suit.




## **Many historians might well shy away from controversial subjects in the future rather than expose themselves to the risk of being sued.**

Irving is English, and thus his use of English courts did not constitute libel tourism. Nevertheless, potential litigants had learned the lesson about English courts. Indeed, in the case of *Bin Mahfouz v. Ehrenfeld*<sup>9</sup> in 2004, the foreign defendant decided that it was not worth attempting to defend herself in an English court. Rachel Ehrenfeld, a New York-based author, had alleged in her book *Funding Evil: How Terrorism is Financed – and How to Stop It* that Sheikh Khalid Bin Mahfouz and his two sons supported and assisted terrorism, that they were among the principal funders of terrorism, contributing millions of dollars to *al-Qaeda* and other terrorist organizations. Bin Mahfouz is a Saudi who had obtained Irish citizenship<sup>10</sup> and, according to newspaper reports in the U.K., has already threatened or filed at least thirty libel actions there in relation to allegations that he has terrorist connections (he has not been reported to have lost a single one of these).<sup>11</sup> Together with his sons, Bin Mahfouz sued Ehrenfeld for libel and asked for damages, as well as prevention of the book's distribution. Although this book about a Saudi was published in New York by a New York author and only 23 copies of the book had been sold in England (via the internet), the court decided that this limited connection to England (together with availability of a chapter of the book on another U.S. website, ABCNews.com) was sufficient to establish jurisdiction.<sup>12</sup>

Both due to the costs of litigating in England and her ideological objection to what she called the “defendant’s alleged attempt to chill her speech in New York by suing in a claimant-friendly libel jurisdiction to which she lacked any tangible connection,”<sup>13</sup> Ehrenfeld refused to appear in England to defend her book. In a later case in New York, Ehrenfeld argued that to bring libel proceedings in England was an “abuse of the legal process,” the net result of which was that Bin Mahfouz “both hides the truth of his acts behind the screen of English libel law and seriously chills legitimate and good faith investigation into his behaviour [sic] and links to terrorism.”<sup>14</sup>

Given Ehrenfeld’s failure to mount a substantive defense, Bin Mahfouz won a default judgment and the English court not only ordered Ehrenfeld to pay damages to the three claimants but barred further publication of the book in England.<sup>15</sup> In the later New York action, Ehrenfeld sued to prevent enforcement in the U.S. of Bin Mahfouz’s default victory in England.<sup>16</sup> While unsuccessful in her New York law suit,<sup>17</sup> Ehrenfeld ultimately won a legislative change to New York law essentially insulating her from Bin Mahfouz’s potential efforts to collect the damages in that state unless he could prove that the statements would be found defamatory under U.S. law.<sup>18</sup> However, publication of her book remains barred in England and Wales.



Bin Mahfouz won an even more striking victory shortly after his default victory over Ehrenfeld. In their *Alms for Jihad: Charity and Terrorism in the Islamic World*, J. Millard Burr and Robert Collins again wrote of Bin Mahfouz's alleged ties to funding of terror and *al-Qaeda*. True to form, Bin Mahfouz again brought a libel action in plaintiff-friendly England, albeit this time against the book's publisher Cambridge University Press. Rather than bear the expense and difficulty of litigation, the publisher reached a settlement with Bin Mahfouz in which it agreed not only to stop publication of the volume, but to recall and destroy all outstanding copies, publish an apology and pay damages.<sup>19</sup> Cambridge University Press wrote to hundreds of libraries to demand — unsuccessfully — that they remove the volume from their shelves. However, it had great success in driving the book from the marketplace; the book is now nearly impossible to find in U.S. bookstores and online suppliers.<sup>20</sup>

Other defamation cases, however, present the opposite extreme, in which protection of the writer permits or encourages false and harmful statements behind the shield of immunity against libel suits. One striking example of this was presented in *Sharon v. Time, Inc.*<sup>21</sup> *Time* magazine had published an article in 1983 regarding the Sabra and Shatila massacres, in which the Lebanese Phalangist militia murdered Palestinian civilians during a battle against Palestine Liberation Organization terrorists. In order to “demonstrate” Israeli complicity in the Lebanese massacre, the *Time* article falsely alleged that Israeli Defense Minister Ariel Sharon had held a discussion with the Gemayels (heads of the Phalange militia) in which he had discussed Phalangist revenge against the Palestinians for the assassination of Lebanese Prime Minister Bashir Gemayel.<sup>22</sup> Sharon sued in a New York court and, in an unusual move, the trial court ordered the jury to present its ruling separately on each element of the defamation claim.<sup>23</sup> The jury found that *Time's* report was false and defamed Sharon, but that Sharon had not proved the requisite malice in *Time's* reporting; according to the jury, *Time* was merely negligent and careless.<sup>24</sup> As a consequence, *Time* escaped liability because U.S. law permits a court to hold defendants liable for libel against public figures only if the speaker acted with “actual malice.” Disturbingly, after the verdict, *Time* remained defiant, notwithstanding exposure of the falsity of its report and the carelessness of its reporting practices. *Time* issued a statement in which it maintained that, despite the fact that an American company had published a false report in an American news magazine, “the case should never have reached an American courtroom. It was brought by a foreign politician attempting to recoup his political fortunes.”<sup>25</sup>

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## THE EMERGENCE OF LIBEL TOURISM

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Defamation law creates twin dangers: If defamation suits are too difficult to win, defamation law can be a shield for speakers of harmful falsehoods. If defamation suits are too easy to win (or to bring), defamation law can become a sword for censoring and intimidating the speakers of uncomfortable truths. With the emergence of libel tourism, the latter danger has become predominant. Plaintiffs seeking to silence statements take their cases to the jurisdiction most likely to give them a favorable verdict. In a world of internet publishing, writers' work almost inevitably appears simultaneously everywhere in the world, giving plaintiffs near-absolute freedom in choosing a forum for litigation. By contrast, writers do not control the choice of forum, and they cannot shop for the jurisdiction most likely to shield their speech.

**London has come to be recognized as the preferred destination for libel tourists, due to its readiness to accept cases with only the most peripheral and tenuous connection to the U.K.**

London has come to be recognized as the preferred destination for libel tourists, due to its pro-plaintiff approach and its readiness to accept cases in which the plaintiff and defendant hold only the most peripheral and tenuous connection with the U.K. In the last decade, Roman Polanski (an American living in France) brought a successful libel action against *Vanity Fair* (an American magazine) in England,<sup>26</sup> Khalid Bin Mahfouz (a Saudi who also holds Irish citizenship) brought numerous libel actions, with some success, against defendants from around the world,<sup>27</sup> Boris Berezovsky (a Russian) succeeded in persuading the House of Lords of his right to sue *Forbes* (an American magazine)<sup>28</sup> and Rinat Akhmetov (a Ukrainian) successfully sued *Kyiv Post* and *Obozrevatel* (two Ukrainian internet journals).<sup>29</sup> As the suits have multiplied, media accounts have acknowledged the importance of England as the libel plaintiff's destination of choice.<sup>30</sup>

The practical result of the liberal English approach towards foreign libel claims is to chill speech throughout the world. Everyone who publishes a statement that will appear on the internet, or in a book that can be sold in England, must be aware that an English court will be ready to entertain a libel suit against the writer, subjecting him or her to the pro-plaintiff English legal standards.





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## ORIGINS OF AMERICAN AND ENGLISH LIBEL LAW

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To understand the phenomenon of libel tourism, one must understand the different ways in which libel has developed in various jurisdictions and how this affects the incentives of speakers and potential plaintiffs.

This paper focuses on the American and English laws of defamation, since although they have a common origin, they have developed into near polar opposites in their approach to the law of defamation. In fact, the U.S. is seen as a jurisdiction so pro-defendant that it is often pointless to bring defamation actions, while English defamation law has come to be seen as so pro-plaintiff that English courts have become magnets for defamation cases from around the world. The contrast between these two substantive laws of defamation illustrates the promise and peril of defamation litigation and libel tourism.

Defamation law first developed in England in church courts and later in common law courts, both as a criminal action and as a civil action for which monetary damages could be awarded.<sup>31</sup> Defamation law provided redress against communications which harmed the plaintiff's reputation; only gradually did the courts develop the rule that the truth of the communication could be a good defense to the charge of defamation. While many courts eventually referred to the falsity of the communication as an element of the defamation charge, both falsity and damage to the plaintiff were presumed by the court, meaning that the defendant bore the burden of proving the truth of the allegedly defamatory statement.<sup>32</sup> In other words, at least in theory, in traditional English libel cases, plaintiffs could win a recovery simply by showing they were harmed by a statement, even though the statement did nothing more than describe the truth.

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## AMERICAN LIBEL LAW

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While emerging from English law, in the last half-century American libel law has diverged sharply from its English origins. This is due in large part to the decision of the U.S. Supreme Court to view the tort of libel as limited by constitutional free speech rights.

The First Amendment to the U.S. Constitution prohibits Congress from making any law “abridging the freedom of speech, or of the press.”<sup>33</sup> Historically, the state action doctrine held that this right to free speech had no application in civil claims between private litigants because a private defamation action did not involve any government action that restricted speech.<sup>34</sup> This changed in 1964 in the seminal case *New York Times Co. v. Sullivan*.<sup>35</sup>

*Sullivan* concerned an advertisement published in the *New York Times* alleging (with a number of inaccuracies) that various police actions had taken place in Alabama against civil rights protestors. A commissioner who had supervisory duties over the police department initially won a libel action, but the U.S. Supreme Court overturned the ruling. In *Sullivan*, the Supreme Court held that the First Amendment (applied to the states through the Fourteenth Amendment) forbids a state to award damages to a public official for defamation relating to his official conduct unless the plaintiff proves not only that the allegations were false, but also that they were made with “actual malice” — that is, that the speaker made the statement with knowledge of its falsity or with reckless disregard as to its truth or falsity.

**In the U.S., a public figure who has been “defamed” can only win the defamation case by proving that the challenged statement was false, harmful to his or her reputation and accompanied by “actual malice.”**

After *Sullivan* and its successor cases, a defamation plaintiff who is a public figure (a public official or a person who has been “defamed” with respect to a matter of public concern) can only win the defamation case by proving that the challenged statement was false, harmful to his or her reputation and accompanied by “actual malice.” In addition, if the defamation plaintiff is a private individual, but the subject matter of the challenged claims is a matter of public concern, the plaintiff cannot prevail unless the defendant acted negligently regarding the falsity of the statement. Theoretically, *Sullivan* and related cases do not affect defamation law between private individuals who are not public officials and are not



expressing themselves on matters of public concern. In these purely private libel cases, American libel law remains closer to its English origins and does not impose a requirement that the plaintiff demonstrate some kind of faulty behavior by the speaker.<sup>36</sup>

A later case added an important protection to libel defendants in addition to the *Sullivan* rules. In *Philadelphia Newspapers, Inc. v. Hepps*,<sup>37</sup> the Court rejected another English common law doctrine by placing the burden of proving falsity on the plaintiff. The court ruled that presuming falsity and requiring the defendant to establish truth as a defense were not consonant with constitutional requirements.<sup>38</sup>


The resulting American libel law is a complex patchwork of constitutional and common law in which elements of pro-plaintiff English law remain, but are in most cases overwhelmed by pro-defendant American innovations. If public figures or public issues are concerned, it is exceptionally difficult for plaintiffs to win defamation cases, even if they can prove the falsity of the defamatory statement, because the plaintiffs must also additionally prove a form of the speaker's culpability. As a consequence, it is rarely worthwhile for a public figure to bring a libel suit in the U.S., even if the published statements are demonstrably false and harmful.

### **Defamation of Public Figures**

Following the Supreme Court's ruling in *Sullivan*, a series of cases continued to develop defamation doctrine in favor of the defendant. These cases extended the *Sullivan* rule in two directions: first, by expanding the class of public officials covered by the rule and, second, by extending the rule to cases of private figures discussing issues of public concern. These extensions increased the number of cases in which a defendant writer or speaker could be sure of near-immunity against defamation suits as a result of the plaintiff's need to prove "actual malice."

*Sullivan* did not precisely define which "public officials" would fall under the *Sullivan* standard, leaving this issue to ensuing cases. However, a case of the same year held that the "actual malice" rule extended to "anything which might touch on an official's fitness for office."<sup>39</sup> Two years later, in *Rosenblatt v. Baer*,<sup>40</sup> the Court clarified that the touchstone of officialdom for purposes of the *Sullivan* rule was not just control over public affairs, but whether the position itself would invite discussion. Thus, the Court ruled that a former supervisor of the Belknap County Recreation Area was considered a public official since he was "responsible for governmental operations" and his position was "one which would invite public scrutiny and discussion of the person holding it."<sup>41</sup>

A year later, and three years after the *Sullivan* case, the Court extended the *Sullivan* "actual malice" rule to cover not just potentially defamatory criticism of "public officials" but also of "public figures." Two cases heralded this expansion: *Curtis Publishing Co. v. Butts*,<sup>42</sup> and its companion, *Associated Press v. Walker*.<sup>43</sup> In *Walker* the defamation claim




concerned an AP story that falsely asserted that former Major General Edwin Walker had led a “mob” of pro-segregation white protesters demonstrating against integration of the University of Mississippi. General Walker had by that time retired, and thus he was no longer a “public official.” He sought to recover damages for the falsehood without proving actual malice. The Court, however, ruled for the defendants; although the court acknowledged that Walker was no longer in public service, it applied the *Sullivan* rule on the grounds that Walker was in the category of private persons who “are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.”<sup>44</sup> By the Court’s reading, *Walker* concerned “news which required immediate dissemination,”<sup>45</sup> leading the Court to conclude that, notwithstanding sloppy reporting and fact-checking, the defendants had not acted with “reckless disregard” for the truth and therefore were not liable for damages in libel.

By contrast, a defamation judgment in favor of the plaintiff was upheld in *Curtis Publishing Co. v. Butts*. *Butts* concerned the allegation that University of Georgia football coach Wally Butts (whose salary was paid by a private alumni association) had conspired with University of Alabama coach Paul “Bear” Bryant to throw a college football game in favor of Bryant’s team. The evidence for the claim was hotly contested, and the jury ultimately found in favor of Butts.<sup>46</sup> While the Court upheld the result, it was deeply divided on the reasoning and rule to be applied. Most of the justices agreed that the *Sullivan* rule applied to Butts as a public figure, even though he was not an employee of the state.<sup>47</sup> However, only Justice Warren went further and ruled that Butts should prevail under the *Sullivan* standard. Justice Warren reasoned that since the trial judge had ordered the jury to impose punitive damages only if it found “actual malice” under the *Sullivan* standard, and the jury did impose punitive damages, any other errors in jury instructions were harmless, since Butts would have prevailed anyway.<sup>48</sup> The other four justices ruling for Butts constituted a minority of the Court in insisting that the *Sullivan* standard should not apply. They ruled for Butts after examining and finding inadequate the quality of the evidence and journalistic practices.<sup>49</sup> In any event, the libel claim and the attendant punitive damages were upheld by a vote of 5-4 and the *Sullivan* rule was applied, albeit by a different five justices.<sup>50</sup>

Thus, there arose an important guideline for libel cases to follow: “public figures” as well as “public officials” must prove “actual malice” in order to establish a libel claim. While plaintiffs might win under a *Sullivan* standard, they would have to prove actual malice to the jury, as in *Butts*.

### **“Public or General Interest”**


At roughly the same time, the Court considered the opportunity to extend the *Sullivan* doctrine in a different direction. In *Time, Inc. v. Hill*,<sup>51</sup> the Court considered the libel



claims of individuals who had not placed themselves in the public eye, but had become public figures involuntarily. *Hill* concerned a family that had been held hostage by escaped convicts. *Life* magazine (published by Time, Inc.) had incorrectly reported that a play about a hostage-taking was a “re-enactment” of the Hill incident. *Life’s* defense was that the article was “a subject of legitimate news interest,” “a subject of general interest and of value and concern to the public” at the time of publication, and that it was “published in good faith without any malice whatsoever.”<sup>52</sup> The Court ruled that the *Sullivan* standard should be applied and that Time, Inc. should be given the opportunity to defend its claim of good faith on remand.

This led, naturally, to the question of whether statements concerning matters of public interest should enjoy the enhanced protection of the *Sullivan* standard, even if made about purely private individuals. In *Rosenbloom v. Metromedia, Inc.*,<sup>53</sup> the Court considered whether the *Sullivan* protection extended to publishers of allegedly defamatory statements made about private persons where the statements concerned matters of “public or general interest.”<sup>54</sup> *Rosenbloom* concerned the description of a distributor of nudist magazines by a local radio station as the purveyor of “smut” and “obscenity.” In a split opinion, the Court ruled that a libel verdict in favor of the plaintiff had been properly reversed. Three justices, led by Justice Brennan, urged the Court to rid itself of “the artificiality, in terms of the public’s interest, of a simple distinction between ‘public’ and ‘private’ individuals or institutions.”<sup>55</sup> Justice Black joined the three justices on this point and restated his opinion that the *Sullivan* standard should apply to “all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.”<sup>56</sup> However, on the issue of the applicability of the *Sullivan* rule to private individuals’ statements about matters of public concern, these opinions did not win a majority. A majority of members of the Court felt that the *Sullivan* standards should not apply to a private litigant, even if the subject matter of the alleged libel was of “public concern.”

*Gertz v. Robert Welch, Inc.*,<sup>57</sup> signaled the end of the *Sullivan* extensions, ruling that the actual malice standard did not apply to plaintiffs who were private individuals, notwithstanding public interest in the story. *Gertz* concerned a publication of a story falsely alleging that the plaintiff was part of a communist conspiracy to discredit local police. The Court, noting that the plaintiff was neither a public official nor a public figure, rejected the *Sullivan* rule, notwithstanding the public nature of the issue. However, the Court added several protections for persons accused of defaming even private persons. First, the Court held that a private plaintiff, in the absence of a demonstration of actual malice, could not recover punitive or presumed damages and would be restricted to actual damages for proven real injuries, at least where the subject of the challenged statement was a matter of public concern.<sup>58</sup> Second, the Court ruled that the First Amendment forbids the finding of defamation in the absence of fault. In other words, even private plaintiffs must prove that the speaker was at least negligent in making the false statement being challenged. By the Court’s understanding, the common law standard of strict negligence



for statements harmful to the plaintiff's reputation was constitutionally faulty.<sup>59</sup> Thus, while Gertz rejected application of the actual malice rule to private figures' defamation claims, it imposed a significant, albeit lesser standard of negligence.

### **Defamation of Private Individuals on Matters of Purely Private Concern**

In the U.S., the common law of defamation remains in force in those cases where the “defamed” party is not a public figure and where the subject of the “defamation” is not a matter of public concern. The common law of defamation is difficult to summarize, even in the small set of cases unaffected by constitutional concerns about free speech. This is due in no small part to the fact that common law defamation is a matter of state law, creating fifty different bodies of defamation law within the U.S.<sup>60</sup>

A good guideline, however, may be found in Section 558 of the *Second Restatement of Torts*, which represents an influential scholarly view on how common law courts should rule. Under Section 558, a defamation plaintiff must prove four elements in order to prevail: “(a) a false and defamatory statement concerning [the plaintiff]; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.”<sup>61</sup>


This standard is considerably more favorable to defendants than the old English libel rule.

### **Burden of Proving Falsity or Truth**

An issue perhaps more important to libel law than the complex fault rules introduced by *Sullivan* and its successor cases is the burden of proof.

In English common law, a plaintiff could win a defamation claim even if the allegedly defamatory statement was true.<sup>62</sup> Indeed, it was oft-remarked that “the greater the truth, the greater the libel.”<sup>63</sup> Eventually, English libel law recognized truth as a defense against a defamation claim. However, it placed the burden of proof on the defendant, rather than the plaintiff. Specifically, English law requires the defendant speaker to prove the truth of the allegedly “defamatory” statements in order to enjoy the benefits of this defense.

In *Philadelphia Newspapers, Inc. v. Hepps*, the Supreme Court decided that this English rule was unconstitutional in the U.S. According to the Court, every defamation plaintiff — whether a public or private figure, and whether opining on a matter of public concern or one of private concern — bears the burden of proving the statement's falsity. If such proof is lacking, the Court ruled, the Constitution's free speech requirements prevent a plaintiff from recovering for defamation.<sup>64</sup>



## **In English common law, a plaintiff could win a defamation claim even if the allegedly defamatory statement was true.**

As evidence is often less than completely compelling, this shift in burdens is enormously important: it may spell the difference between victory and defeat in a defamation claim.

### **Summation of American Libel Law**

After *Sullivan* and its successor cases, most libel plaintiffs in the U.S. should not expect a favorable outcome. As the *Sharon* case illustrates, notwithstanding the one plaintiff victory in *Butts*, the *Sullivan* standard places a near-impossible burden on a libel plaintiff who is a public figure. Such a plaintiff can lose even after proving that a publication was false, defamatory and the result of negligent reporting. This creates a situation in which, were it not for the availability of libel tourism, those who have been defamed in the U.S. would have no legal recourse, and their only possible channel of defense would be through public debate.

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## **ENGLISH LIBEL LAW**

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In contrast to American law, English defamation law has remained closer to its pro-plaintiff roots and their inferior protection of speakers. English libel law requires plaintiffs only to prove that publication of a story harmed the plaintiff's reputation; the falsity of the story is presumed unless the defendant publisher/speaker can prove its truth.<sup>65</sup> This leads to the opposite extreme of that found in the U.S. Those who have been defamed, and are willing to pay to litigate, can be reasonably confident that they will win legal protection. However, another result of this is that potential publishers of any controversial item must be extremely cautious: they may be forced to produce all their records as evidence before a court and hope that the court is similarly convinced of the accuracy of the writers' conclusions. In other words, not only is it theoretically possible that some defendants will be found liable for defamation even though they spoke the truth, it is also probable that many potential speakers of controversial truths will simply shut up, out of fear of ending up in court.

English law has also been extremely generous in accepting foreign libel suits. Essentially, the courts have been willing to accept any suit from foreigners about foreign publications, as long as the plaintiff has been able to show that the publication had even the smallest of exposures in England and that some elements of the



plaintiffs' reputation in England were harmed: This has opened the doors wide to libel tourists.

## **English libel law requires plaintiffs only to prove that publication of a story harmed the plaintiff's reputation.**

In recent years, English law has expanded the defense of “responsible journalism in the public interest,” which gives defendant speakers another means of defending themselves against defamation lawsuits. However, the burden of establishing this defense falls upon the defendant speaker, and is much less favorable to speakers than the *Sullivan* standard. Expansion of the “responsible journalism” defense has dampened, but not halted, libel tourism to England.

## **English courts have been willing to accept any suit from foreigners about foreign publications, as long as the plaintiff has been able to show that the publication had even the smallest of exposures in England.**


Recent cases illustrate the attractiveness for foreign libel tourists of bringing a libel suit in England.

### ***Berezovsky v. Michaels***

The consolidated appeals of *Berezovsky v. Michaels and Others* and *Glouchkov v. Michaels and Others*<sup>66</sup> in the House of Lords highlight the way libel tourists can use the plaintiff-friendly English libel standards to silence unfriendly publications around the world.

Boris Berezovsky, a Russian businessman and politician, and Nikolai Glouchkov, then First Deputy of the Russian international airline *Aeroflot*, were the subjects of intense investigation by *Forbes* magazine journalists, who spent months interviewing contacts and gathering graphic evidence. The magazine's story, published on December 30, 1996, described the two men, the claimants in these actions, as “criminals on an outrageous scale.” Berezovsky was introduced on the contents page in the following terms: “Is he the Godfather of the Kremlin? Power, Politics, Murder. Boris Berezovsky can teach the guys in Sicily a thing or two.” Glouchkov was described in similar terms; as “in short, an associate of Berezovsky.”





Due to the anonymous sources used in the article, bringing suit in England was central to Berezovsky's chances for victory. Had Berezovsky sued for libel in the U.S., where *Forbes* is published, he would have needed to prove that the story was inaccurate and had been published with reckless disregard of the truth. In England, by contrast, Berezovsky needed to prove nothing. Rather, he could force *Forbes* to try to produce its anonymous Russian sources in an English court.

The central question facing the House of Lords was whether England was an appropriate forum for this law suit. The plaintiff was Russian, and the defendant an American corporation. There was an agreed estimate that around 6,000 readers probably saw the magazine in England and Wales (1,915 copies circulated through newsstands and subscriptions, the remainder viewing it by internet), as opposed to around almost 800,000 hard copies of the magazine sold in the U.S. alone, and many more viewed over the internet.

The House of Lords upheld Berezovsky's right to sue in England, finding his connections to the country sufficiently strong, and rejecting the claim that the U.S. or Russia was a more appropriate forum for the lawsuit.

Lord Steyn found that Berezovsky had established sufficient English connections by demonstrating extensive business and governmental contacts, work he conducted in London and business interests there. Berezovsky gave examples of fruitful negotiations in London on behalf of Russian enterprises and listed his visits to the city. He also told the House that his wife, from whom he was separated, lived in London, as did his two children. In addition, he had two further daughters from a previous marriage who were both students at Cambridge University. Glouchkov's connections were less substantial, but he also proved to have business interests and contacts in England, as well as retaining a flat in London since 1993.


Lord Steyn then turned his attention to the question of whether England was the appropriate forum for the suit. Steyn applied the rule of *Spiliada Maritime Corporation v. Cansulex Ltd.*,<sup>67</sup> which requires a court "to identify the jurisdiction in which the case may be tried most suitably or appropriately for the interests of all the parties and the ends of justice."<sup>68</sup> In the Court of Appeal, counsel for *Forbes* had submitted that the correct approach was to treat multi-jurisdiction cases such as this as giving rise to a single cause of action, leaving courts to ascertain where the global cause of action arose. Lord Steyn, however, rejected this approach. Sticking to the pro-plaintiff English rules, he reiterated that (1) each communication is a separate libel; (2) publication takes place where the words are heard or read; and (3) it is not necessary for the plaintiff to prove that publication of defamatory words caused him damage because damage is presumed. Consequently, he concluded that as long as real and substantial harm to the plaintiffs' reputation had occurred in England, the plaintiffs could sue in England

(just as they might elsewhere in the world), and it was irrelevant that the litigants were foreign and the primary and first publication had taken place in another country. “The distribution in England of the defamatory material was significant [a]nd the plaintiffs have reputations in England to protect,” said Lord Steyn, concluding that it would not be easy “to imagine what other facts could displace the conclusion that the courts of [England] are the natural forum.”<sup>69</sup>

Counsel for *Forbes* then argued that, on conventional *Spiliada* principles, Russia or the U.S. would be more appropriate jurisdictions for the trial of the action. The House disagreed, primarily because a judgment in favor of the plaintiffs in Russia would not be seen to redress the damage to their reputations in England. Furthermore, Lord Hoffman, in considering the appropriate forum for trial of the case, and quoting a lower court’s remark that this was “a peculiarly Russian case” involving “nothing but Russia,”<sup>70</sup> stubbornly stuck to the thesis that England should provide a forum for libel litigants from around the world: “I do not have to decide whether Russia or America is more appropriate *inter se*. I merely have to decide whether there is some other forum where substantial justice can be done [...]. If a plaintiff is libelled in this country, *prima facie* he should be allowed to bring his claim here where the publication is.”<sup>71</sup> The reason given by Berezovsky for choosing to sue in the English rather than a U.S. court where the defendant was located was that under U.S. law he would probably lose a defamation suit. Additionally, and unusually, he rejected Russia as an appropriate forum because, as Lord Hoffman noted, success in the Russian courts would not be adequate to vindicate his reputation, but rather might be attributed to his alleged corrupt influence over the Russian judiciary.

### ***Lewis v. King***

Shortly after Berezovsky’s case, another case was brought in England concerning two U.S. residents and allegedly defamatory statements published on U.S.-based websites. Once again, notwithstanding the American-centered nature of the defamation claim, English courts found no difficulty in accepting jurisdiction and ruling on the claim. The Court of Appeal case of *Lennox Lewis and Others v. Don King*<sup>72</sup> emerged from a dispute between boxing promoter Don King and former heavyweight boxing champion Lennox Lewis. King is an American citizen and resident; Lewis, the former world heavyweight boxing champion, is an Englishman, with residences both in the U.S. and the U.K. Lewis had sued Don King in New York in connection to a proposed fight with Mike Tyson.<sup>73</sup> Before the court issued a final ruling, Judd Burstein, Lewis’s attorney, wrote an item that appeared on the website *fightnews.com*, accusing King of anti-Semitism, on the basis of an article published in the *New York Daily News*. Burstein also made similar accusations in an interview published as part of an article on the *boxingtalk.com* website. Don King sued Burstein, together with Lewis and a promotion company, for libel in England.



Once again, the central question was whether King could demonstrate a sufficient connection to England to persuade the court to hear the case. While both websites are based in the U.S., they are naturally available everywhere in the internet-connected world, which includes England. The court ruled that publication for purposes of a libel suit takes place where the defamatory words are heard or read,<sup>74</sup> and that in cases regarding internet-published stories, publication takes place when material is downloaded, i.e., everywhere.<sup>75</sup> Since every “publication” is a separate act in English law, it was enough for King to show some downloads in England, notwithstanding the American-centered nature of the dispute.<sup>76</sup>


In addition, King needed to show that his reputation in England had been harmed in order to permit the suit to proceed. Against this background, King was able to prove that he had a substantial reputation in England, considerable financial and business connections and many friends and acquaintances, in particular within the Jewish community in England. Evidence was also heard as to the readership of the websites in question within the jurisdiction. Mr. Justice Eady found all of these to provide satisfactory reason that England was the proper place to bring the action and agreed to hear the case.

As a result of the English proceedings, Burstein decided to withdraw from acting for Lewis in the pending New York proceedings, which then collapsed.

### **Akhmetov and Kaupthing Bank**

The *Berezovsky* case has recently been mirrored in several similar libel claims launched in the English courts. On January 11, 2008, judgment was entered in default against the Kiev-based internet publication *Obozrevatel*, two of its editors and a journalist, in an action concerning a series of defamatory statements about Rinat Akhmetov, the Ukrainian energy magnate. Akhmetov also secured an apology, in England, from the Ukrainian *Kyiv Post*, in relation to their October 4, 2007, article entitled, “Appalling Kyiv City Council Land Grab.” The article had alleged that Mr. Akhmetov had acted unlawfully in certain business transactions relating to the Dnipropenergo thermoelectric generator and the Kryvorizhstal steel mill. Both of these actions concerned Ukrainian parties, Ukrainian publications and Ukrainian articles, but, said his solicitor in relation to the *Obozrevatel* case, “Mr. Akhmetov brought this action in the High Court to defend his very substantial reputation, as a business and political leader. By seeking redress in the courts of England, Mr. Akhmetov will ensure that there will be a fair legal process.”<sup>77</sup>

Icelandic Kaupthing Bank recently settled its English High Court libel action against the publisher of the Danish newspaper *Ekstra Bladet* and its website, [www.ekstrabladet.dk](http://www.ekstrabladet.dk). A joint statement presented before the High Court in London on February 13, 2008, related how the website had published a series of articles concerning the activities of Kaupthing Bank. The stories were published in both English and Danish, and downloaded by readers



in England and Wales. As a result of the action, brought in London, the defendants publicly apologized for publishing any potentially misleading information regarding the bank's activities (it had alleged tax evasion, evasion of legal duties and risks of money-laundering) and agreed to pay "very substantial damages" as well as legal costs.

### ***Bin Mahfouz v. Ehrenfeld***

This case, already discussed earlier, concerns perhaps the most notorious of libel tourists: Khalid Bin Mahfouz, the Saudi businessman who has brought dozens of libel suits in England. In 2005, Bin Mahfouz won a default judgment against Rachel Ehrenfeld for allegations she made in her book, *Funding Evil: How Terrorism is Financed – and How to Stop It*, that he had terrorist connections. As in previous cases, no barrier to the suit was posed by the fact that primary publication took place outside England. In a witness statement of July 31, 2004, referred to in the judgment of May 3, 2005, Bin Mahfouz referred to his standing in the U.K. financial community, his ownership of five homes in the jurisdiction and his sons' ownership of Nimir Petroleum Limited, an English-registered company. The judgment did not refer to Bin Mahfouz's place of residence, which *Forbes* listed as Saudi Arabia in 2006.<sup>78</sup> Bin Mahfouz concluded: "The allegations that have been made about me in the book are of the utmost seriousness and are highly damaging to me, both in my personal and business life, particularly in the present global climate. As can be imagined, these allegations have also caused me (and my family) great personal distress." For her part, Ehrenfeld refused to challenge the merits of his statements, later arguing (in her legal action in New York) that the libel claim in England was abusive and an attempt to chill "legitimate and good faith investigation."<sup>79</sup> Mr. Justice Eady, in his judgment of May 3, 2005, found it sufficient that the claimants regarded the pursuit of these proceedings in England and Wales as valuable, notwithstanding that there may be proceedings pending in the U.S., as a mechanism for vindicating their reputations."

Ehrenfeld's refusal to mount a substantive defense in England paved the way for Bin Mahfouz to win a summary judgment, and she was ordered to pay damages to the three claimants.<sup>80</sup> She refused to pay and commenced proceedings in New York, seeking a judgment that, first, the English judgment cannot be enforced in the U.S. and, second, the allegations about Bin Mahfouz contained in her book were not defamatory under U.S. law.<sup>81</sup> While Ehrenfeld's case was unsuccessful for reasons unrelated to the merits of her claims,<sup>82</sup> she eventually won a legislative change to the laws of the State of New York. Her victory on this score, described below, may begin to change the attractiveness of libel tourism.



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## LIBEL LAW OF OTHER COMMONWEALTH COUNTRIES

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Other common law countries, such as Australia and Canada, have libel laws based on the English tradition and have refrained from adopting the American *Sullivan* rule that protects critics of public figures. While none of these jurisdictions has become as popular as England among libel tourists, the potential is very much alive, and must be borne in mind when considering any future English changes in libel law. Simply put, libel tourists can be expected to gravitate towards jurisdictions with the most pro-plaintiff view of libel and the easiest access for foreign litigants. If another jurisdiction supplants England in providing such services, libel tourists can be expected to move their business accordingly.


**If another jurisdiction supplants England in providing such services, libel tourists can be expected to move their business accordingly.**

### ***Dow Jones and Company Inc. v. Gutnick***

The landmark Australian case of *Dow Jones and Company Inc. v. Gutnick*<sup>83</sup> is seen in that country as an important precedent for libel tourists. Although the plaintiff, Joseph Gutnick, is an Australian resident of Victoria, the sole connections of the defendant publication to the jurisdiction were five copies of the issue containing the matter complained of sold on newsstands in Victoria and, of course, the availability of the article on the internet.

*Gutnick* concerned a case against Dow Jones & Company Inc., printer and publisher of the *Wall Street Journal* newspaper and *Barron's* magazine. The edition of *Barron's Online* of October 28, 2000, and the equivalent print edition of the magazine, featured an article entitled "Unholy Gains," in which several references were made to the respondent, Joseph Gutnick. Gutnick contended that part of the article defamed him. Gutnick had no difficulty in establishing his connection to the jurisdiction as he lived in Victoria, had based his business headquarters there, and much of his social and business life could be said to be focused in Victoria, notwithstanding his conduct of business outside Australia, including in the U.S., and his contributions to charities in the U.S. and Israel.

As in the English libel tourist cases, the principal legal issues were whether the defendant could properly be said to have published the allegedly defamatory material within the jurisdiction, and whether the Victorian court constituted an appropriate forum in which to hear the case. Argument of the appeal proceeded from an acceptance, by both parties, of certain principles. It had already been established in *Voth*<sup>84</sup> that an Australian



court would only decline to exercise jurisdiction on the basis of *forum non conveniens*, when it is shown that the forum whose jurisdiction is invoked by the plaintiff is clearly inappropriate. Earlier cases had also established that when the parties or the events have some connection with a jurisdiction outside Australia, courts hearing a tort case should apply the substantive law of the place in which the tort was committed.<sup>85</sup> Adopting an English approach, both to the location of publication and the appropriateness of forum, the court upheld Gutnick's right to sue in Australia. The tort in libel claims being the injury to reputation, the bench held that "harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer."<sup>86</sup> Given the handful of people who had read the material in Victoria, the judges concluded that Victoria was clearly an appropriate forum for the litigation of "the respondent's claim to vindicate his reputation which has been attacked in Victoria, as well, plainly as elsewhere."<sup>87</sup> The judges also saw no reason why, if a person had been defamed in more than one jurisdiction, he should not litigate the case in each of those jurisdictions. They were not convinced by Dow Jones' argument that this interpretation of the law would expose any internet publisher to potential liability under "the defamation laws of every country from Afghanistan to Zimbabwe."<sup>88</sup>


While defamation law in Australia has since been altered by the adoption, in the several states, of the Defamation Act 2005, the new act does not affect the substance of case law in respect to international libel claims.

### ***Hill v. Church of Scientology of Toronto and Cheikh Bangoura v. Washington Post***

England is not the only Commonwealth jurisdiction favorable to libel plaintiffs; Canada's substantive law of libel may be even more favorable to plaintiffs than England's. However, Canada's attraction for libel tourists is limited by the country's unwillingness to accept essentially foreign litigation, keeping the country out of the defamation shopping game.

The 1995 case of *Hill v. Church of Scientology of Toronto*<sup>89</sup> provides a good overview of the pro-plaintiff Canadian view of libel. In *Hill*, the judges rejected the *Sullivan* approach to libel, finding both that libel suits were not government action within the meaning of Section 32 of the Canadian Charter of Rights and Freedoms<sup>90</sup> (and, therefore, not subject to free speech restrictions) and, additionally, that no greater latitude for speech should be recognized when the target of the speech is a public figure.<sup>91</sup>

**Canada's attraction for libel tourists is limited by the country's unwillingness to accept essentially foreign litigation.**



In this case, a lawyer acting for the Church of Scientology held a press conference on the courthouse steps in which he read out, and commented upon, allegations contained in a notice of motion by which the Church intended to commence criminal contempt proceedings against the respondent, a Crown attorney. The notice of motion alleged that the respondent had misled a judge and breached orders sealing certain documents belonging to the Church. The allegations were found to be untrue and without foundation, and the respondent, Hill, commenced and won an action for damages in libel against the appellants. The appellant lawyer and the Church of Scientology were found jointly liable for general damages of C\$300,000. The Church alone was liable for aggravated damages of C\$500,000 and punitive damages of C\$800,000.

To illustrate just how powerful a weapon a defamation claim can be under Canadian law, one need only look at the case, which settled before trial, of Sharman Networks, the Australian-based owner of Kazaa — the internet file-sharing application — and p2p.net, the Canadian digital media news site. In 2006, Sharman Networks and its CEO Nikki Hemming brought an action in the Supreme Court of British Columbia against Jon Newton of p2p.net, suing for general, special, aggravated and punitive damages. The allegedly libellous comments in question were contained in an article quoting an Associated Press story, and readers' comments on that article. Given the parties' knowledge of Canadian libel laws and their ability to prove the truth — or lack thereof — of the challenged statements, Kazaa reportedly paid \$100 million to settle the litigation.

However, while Canada may be the forum of choice for libel plaintiffs, libel tourists may face difficulty convincing a Canadian court to accept jurisdiction. In Canada's counterpart to the *Gutnick* case, the Court of Appeal for Ontario, in *Cheickh Bangoura v. Washington Post*,<sup>92</sup> found that despite the defamatory material in question being published on the internet and downloaded by readers in Canada, there was not a sufficient connection between the plaintiff and the jurisdiction for the court to try the claim, since the plaintiff was not at the time resident there. In 2006 the Canadian Supreme Court stated that it would not hear a further appeal.<sup>93</sup>

Nevertheless, for the plaintiff who can successfully argue a case for jurisdiction, Canada's libel laws present an attractive forum for trial.

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## RECEDING TIDES?

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The high-profile English libel cases have led to some potentially significant reforms in both the U.S. and England.


Recently, the U.S. has seen movement to block the enforcement of foreign libel judgments obtained by libel tourists. In the wake of the Rachel Ehrenfeld case, New York adopted the Libel Terrorism Protection Act (known as “Rachel’s Law” in journalist circles) on March 31, 2008, allowing redress for the defendant in a defamation action in two ways. First, it prevents litigants from enforcing foreign libel judgments in the State of New York unless a New York court finds that the jurisdiction issuing the judgment provides the same protection of free speech as guaranteed under the New York and U.S. constitutions. Secondly, it grants New York courts jurisdiction over litigants who obtain a foreign defamation judgment against New York State citizens.<sup>94</sup> This second protection allows defendants such as Ehrenfeld to petition a state court for a declaratory judgment rendering the foreign judgment unenforceable in the State of New York. The significance of this is that New York has extended its “long arm” provisions to protect writers and publishers from the enforcement of defamation claims against them in jurisdictions that lack the “free speech” standards set by the U.S. Constitution. Since the courts of the U.S. interpret the “actual malice” standard as being required by the Constitution, the result is that New York writers have not only been protected from libel tourism, they have also recovered what is more or less complete immunity for their New York assets from libel suits.

Federal legislation may also be on the way. Senators Arlen Specter and Joseph Lieberman have proposed legislation entitled the Free Speech Protection Act of 2008<sup>95</sup> that would essentially replicate Rachel’s Law on a nationwide scale.

### ***Jameel v. Wall Street Journal***

In the meantime, the balance of English defamation law may also be shifting towards a freer press. In 2006, in *Jameel v. Wall Street Journal Europe Sprl*,<sup>96</sup> the House of Lords appeared to expand the privilege of “responsible journalism,” giving the media greater scope for defending themselves against libel plaintiffs including libel tourists. The case concerned two claimants, a prominent Saudi Arabian businessman and the trading company, incorporated in Saudi Arabia, of which he was president and general manager. The defendant, the *Wall Street Journal Europe*, had published an article asserting that, at the request of U.S. enforcement agencies, the central bank of Saudi Arabia was monitoring several bank accounts in connection with the channelling of funds to support terrorist activities. The claimant company was one of several companies and individuals named as accountholders (incidentally, Bin Mahfouz was another). Only five copies of the





offending publication had been accessed by readers over the internet in England, two of which were Mr. Jameel's business associates and a third, his lawyer. In keeping with the pro-plaintiff tilt of English libel law, the House of Lords saw sufficient potential damage to the claimants' reputations to view England as an appropriate forum for jurisdiction.

One of the questions addressed by the House was whether the "responsible journalism" test had been satisfied, and in so asking the Lords revisited the scope and application of the *Reynolds* privilege. In the seminal case of *Reynolds v. Times Newspapers Ltd.*,<sup>97</sup> the House of Lords had expanded the defense of "responsible journalism" available to defamation defendants to increase the weight given to the value of informed public debate on significant issues, involving a reciprocal duty and interest between publisher and recipient of the statement in question. The Lords found that if the article as a whole concerned a matter of public interest, the inclusion of an otherwise defamatory statement might be justifiable, so long as it made a proper contribution to the whole thrust of the publication. Once the public interest criterion had been satisfied, a court should then turn its attention to the matter of responsible journalism by showing that the steps taken to gather and publish the information were responsible and fair.

"These are not tests which the publication has to pass," Lord Hoffmann said, referring to the well-known list of ten matters set out by Lord Nicholls in *Reynolds*, which should in suitable cases be taken into account. "In the hands of a judge hostile to the spirit of *Reynolds*, they can become ten hurdles at any of which the defense may fail. That is how Mr. Justice Eady interpreted them." Instead, and perhaps in some part due to the timing of the *Jameel* case (in the years ensuing the September 11, 2001, terrorist attacks in America and the increased discussion of the legitimate rights of the public to be exposed to information regarding the funding of terrorism), Lord Hoffman read the *Reynolds* requirements as non-exhaustive and found the article as a whole to be sufficiently within the public interest. If the article as a whole concerned a matter of public interest, said Lord Hoffman, the next question would be whether the inclusion of the defamatory statement was justifiable, and "on that question, allowance must be made for editorial judgment."<sup>98</sup>

The "responsible journalism" test was discussed again in *Michael Charman v. Orion Group Publishing Ltd. and Others*,<sup>99</sup> which furthered the view taken in *Jameel* by affirming the rights of the defendants to the wider interpretation of the *Reynolds* privilege. The defendants were found to be justified in publishing otherwise defamatory material because it was shown that they had acted responsibly in researching and publishing material that as a whole served the public interest.

These rulings have been hailed as heralding a "revolutionary new era of English defamation law."<sup>100</sup> However, at least on the basis of the post-2006 cases mentioned above, it seems that libel tourists' appetite for suit in England has not been dampened.



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## CONCLUSION

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Despite some recent reforms in the U.S. and England, libel tourism remains an important phenomenon in the internet age. As long as at least some pro-libel plaintiff courts remain ready to cater to libel tourists, we can expect to see libel tourists taking their defamation claims to the most plaintiff-friendly jurisdiction realistically open to them. Persons who find themselves aggrieved by publications anywhere in the world should take advantage of this opportunity to seek redress in a friendly court, while speakers and writers of controversial items of any kind should consider their steps carefully, lest they find themselves hauled into an unfriendly court in a far-away country.

## Notes

- 1 Avi Bell (B.A., J.D., University of Chicago; S.J.D., Harvard University) is Director of the Global Law Forum at the Jerusalem Center for Public Affairs, Professor of Law at the Bar-Ilan University Faculty of Law and Visiting Professor at the University of Connecticut School of Law.
- 2 See Sarah Lyall, "Polanski Wins Vanity Fair Libel Suit," *N.Y. Times* (July 23, 2005).
- 3 Van Vechter Veeder, "The History and Theory of the Law of Defamation," 3 *Col. Law Rev.* 546 (1903).
- 4 *Irving v. Penguin Books Ltd. & Deborah Lipstadt* [2000] EWHC QB 115 (Eng).
- 5 Sarah Lyall, "Where Suing for Libel Is a National Specialty; Britain's Plaintiff-Friendly Laws Have Become a Magnet for Litigators," *N.Y. Times* (July 22, 2000).
- 6 *Irving v. Penguin Books Ltd. & Deborah Lipstadt* [2000] EWHC QB 115, [13].
- 7 Ian Traynor, "Irving Jailed for Denying Holocaust," *The Guardian* (February 21, 2006), <http://www.guardian.co.uk/world/2006/feb/21/thefarright.highereducation>.
- 8 The court ultimately awarded Professor Lipstadt a monetary award to pay for court costs, but Irving did not pay. See Vikram Dodd, "Irving Ordered to Pay £150,000 Interim Costs," *The Guardian* (Manchester) 10, (May 6, 2000).
- 9 *Mahfouz v. Ehrenfeld*, [2005] EWHC (Q.B.D.) 1156 (Eng).
- 10 Bin Mahfouz Information, Ireland. [http://www.binmahfouz.info/faqs\\_5.html](http://www.binmahfouz.info/faqs_5.html).
- 11 David Pallister, "US Author Mounts 'Libel Tourism' Challenge," *The Guardian* (November 15, 2007), <http://www.guardian.co.uk/world/2007/nov/15/books.usa>.
- 12 [2005] EWHC (Q.B.D.) 1156, 23.
- 13 *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830, 506 (2007).
- 14 [2005] EWHC (Q.B.D.) 1156, 30.
- 15 *Id.* at 74.
- 16 *Ehrenfeld v. Bin Mahfouz*, No. 04 Civ. 9641(RCC), 2006 WL 1096816. (S.D.N.Y. April 26, 2006).
- 17 *Id.*
- 18 Assemb.S06687-C, 2008 Assemb., Reg. Sess. (N.Y. 2008).
- 19 Rachel Donadio, "Libel Without Borders," *N.Y. Times* (October 7, 2007).
- 20 "Up in Smoke," *Wash. Times* (August 31, 2007), <http://www.washingtontimes.com/news/2007/aug/31/up-in-smoke>.
- 21 *Sharon v. Time, Inc.*, 599 F. Supp. 538 (S.D.N.Y. 1984).
- 22 William E. Smith, "The Verdict Is Guilty," *Time* (February 21, 1983), <http://www.time.com/time/magazine/article/0,9171,925886-1,00.html>.
- 23 See Evans, "Declarations of Victory" (Book Review), *N.Y. Times* 88 (Aug. 11, 1987).
- 24 *Id.*
- 25 Brooke Kroeger, "Sharon Loses Libel Suit; Time Cleared of Malice," *Newsday* 3, 27 (January 25, 1984).
- 26 *Polanski v. Conde Nast Publications*, UKHL 10 (2005).
- 27 E.g., *Mahfouz v. Ehrenfeld*, [2005] EWHC (Q.B.D.) 1156.
- 28 *Berezovsky v. Forbes Inc.* (No.1) [2000] 1 W.L.R. 1004.
- 29 Schillings, Corporate Client Press Release: "Rinat Akhmetov Awarded Substantial Damages Over Malicious Report" (June 9 2008), <http://www.schillings.co.uk/Display.aspx?MasterId=8bda1fce->

- abd6-4100-9ab2-7f6509bc4d47&NavigationId=32.
- 30 E.g., Doreen Carvajal, “Britain, A Destination for ‘Libel Tourism,’” *Int’l Herald Trib.* (January 20, 2008).
- 31 Criminal indictment for libel follows in cases where the libel tends to provoke the person defamed to commit a breach of the peace, or where it is in the public interest considering all the circumstances that criminal proceedings should be brought. See *R. v. Summers* (1665) 1 Lev 139; *Goldsmith v. Pressdram Ltd.* [1977] QB 83, [1977] 2 All ER 557; Carr, “The English Law of Defamation” (pts. 1 & 2), 78 *L. Q. Rev.* 255, 388 (1982).
- 32 E.g., *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369 (1977); See M. Linda Dragas, “Curing a Bad Reputation: Reforming Defamation Law,” 17 *U. Haw. L. Rev.* 113, 125-27 (1995).
- 33 US Const., amend. I.
- 34 See, e.g., Norman Rosenberg, “Protecting the Best Men,” 208 (1985).
- 35 376 U.S. 254 (1964).
- 36 *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 479 (1985). See, generally, Jeff Boykin, “*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*: Does the Actual Malice Standard of *Gertz v. Robert Welch, Inc.* Apply to Speech on Matters of Purely Private Concern,” 14 *Pepperdine L. Rev.* 337, 337-47 (1987).
- 37 475 U.S. 767 (1986).
- 38 *Id.* at 12.
- 39 *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).
- 40 383 U.S. 75 (1966).
- 41 *Id.* at 86, 87.
- 42 388 U.S. 130 (1967).
- 43 389 U.S. 28 (1967).
- 44 388 U.S. 130, 164 (1967).
- 45 *Id.* at 158.
- 46 *Butts v. Curtis Publishing Co.*, 225 F. Supp. 916 (N.D. Ga. 1964).
- 47 388 U.S. 130 (1967).
- 48 *Id.* at 166.
- 49 *Id.* at 156-159.
- 50 *Id.* at 161.
- 51 385 U.S. 374 (1967).
- 52 *Id.* at 379.
- 53 403 U.S. 29 (1971).
- 54 *Id.* at 31.
- 55 *Id.* at 41.
- 56 *Id.* at 47.
- 57 418 U.S. 323 (1974).
- 58 *Id.* at 348-350.
- 59 *Id.* at 349-351.
- 60 See W. Prosser & W. Keeton, *The Law of Torts*, § 111, at 773 (5th ed. 1984).
- 61 Restatement (Second) of Torts § 558 (1977).
- 62 See B. Sanford, *Libel and Privacy: The Prevention of Defense and Litigation* § 6.2.1, at 162 (1985).
- 63 See Zechariah Chafee, Jr., *Free Speech in the United States* 500 (4th ed. 1948).

64 475 U.S. 767 (1986).  
65 Restatement of Torts § 559 (1938).  
66 [2000] 2 All ER 986 (HL).  
67 [1987] 1 A.C.460.  
68 [1987] A.C. 460, 474D and 484E.  
69 [2000] 2 All ER 986, 16  
70 [2000] 2 All ER 986, 47.  
71 *Id.*  
72 [2004] EWCA Civ 1329.  
73 Bill Pennington, "BOXING; Rahman Is Said to Have an Agreement with King," *N.Y. Times* (May 12, 2001), <http://query.nytimes.com/gst/fullpage.html?res=9A05E6DF1F3BF931A25756C0A9679C8B63&scp=9&sq=lenox%20Lewis%20sued%20Don%20King%20&st=cse>.  
74 *Bata v. Bata* (1948) WN 366.  
75 *Godfrey v. Demon Internet* [2001] QB 201; *Loutchansky v. Times Newspapers Ltd.* [2002] QB 783, 58; *Gutnick v. Dow Jones, Inc.* [2002] HCA 56, 44.  
76 *Shevill v. Presse Alliance SA* [1996] AC 959; *Berezovsky v. Michaels* [2000] 1 WLR 1004.  
77 Schillings, Corporate Client Press Releases: "Ukrainian Businessman and Political Leader Files Libel Suit in London" (April 2, 2007), <http://www.schillings.co.uk/Display.aspx?MasterId=ebec2217-8ba9-4c82-8e52-23152b660368&NavigationId=330>.  
78 Forbes.com, "Billionaires," <http://www.forbes.com/lists/2006/10/JKTG.html> (last visited October 30, 2008).  
79 *Supra*, note 14.  
80 [2005] EWHC (Q.B.D.) 1156, 74.  
81 489 F.3d 542 (2d Cir. 2007).  
82 *Id.* at 545. Her claim was dismissed for lack of personal jurisdiction over Bin Mahfouz – a defense that, ironically, was not available to Ehrenfeld.  
83 [2002] HCA 56; 210 CLR 575; 194 ALR 433; 77 ALJR 255 (10 December 2002).  
84 [1990] HCA 55; (1990) 171 CLR 538.  
85 *Regie National des Usines Renault SA v. Zhang* [2002] HCA 10; (2002) 76 ALJR 551; 187 ALR 1.  
86 [2002] HCA 56, 26.  
87 [2002] HCA 56, 202.  
88 [2002] HCA 56, 54.  
89 [1995] S.C.J. No. 64.  
90 Section 32 concerns the application of the Charter and reads as follows: 32. (1) This Charter applies  
a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and  
b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.  
Section 2 of the Charter protects freedom of expression.  
91 [1995] S.C.J. No. 64, 74.  
92 (2004), 235 D.L.R. (4th) 564.  
93 2005 A.C.W.S.J. LEXIS 6141, 622.



94 See supra note 17 at section 8D.

95 Free Speech Protection Act, S. 2977, 110 Cong., (2008).

96 [2006] UKHL 44 .

97 [2001] 2 AC 127.

98 [2006] UKHL 44, 51 .

99 [2007] EWCA Civ 972.

100 Marin Roger Scordato, “The International Legal Environment for Serious Political Reporting Has Fundamentally Changed: Understanding the Revolutionary New Era of English Defamation Law,” 40 *Conn. L. Rev.* 165, 167 (2007).



### **Professor Avi Bell**

Avi Bell is a professor at the Faculty of Law of Bar-Ilan University and a Visiting Professor at the University of Connecticut Law School, specializing in international law and property law. Professor Bell's articles have appeared in premier law journals and he formerly served as a Visiting Professor at the Fordham University Law School. Professor Bell received his undergraduate and law degrees from the University of Chicago, and his doctorate from Harvard University. In 2006, Professor Bell was awarded an Alon Fellowship for outstanding young researchers by the Israel Ministry of Education.

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