Hartley on The Problem of “Libel Tourism”

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The problem

As Diana Wallis points out, libel tourism is now recognized as a serious problem. Finding a solution, however, is not so easy. There are a number of possibilities.

Harmonization of substantive law?

Although some people have suggested a limited measure of harmonization as regards substantive law, this would not be desirable. The law of defamation and privacy reflects the balance a particular society regards a right between two important rights: freedom of speech and protection of reputation. This is a delicate cultural matter, and the relative importance of these values differs greatly between different cultures. Even in Western Europe, there are important differences. In France, for example, the right of privacy is strongly protected; in England, it is hardly protected at all: the English feel that if something is true, you should (usually) be allowed to say it. It would be wrong for the EU to establish Union-wide norms in this area.

A uniform choice-of-law rule?

It is sometimes said that a uniform EU choice-of-law rule in this area would lead to greater predictability and certainty. This is a misconception. At present, the choice-of-law rule applicable in a case will be that of the country in which the litigation arises. In most Member States, these rules are fairly clear and easy to apply. There is no reason to believe that an EU rule would be any clearer or lead to more a predictable outcome. Indeed, the contrary is likely to be the case, since EU legislation is the product of negotiations between the Member States and it has to be based on consensus. In the case of a contentious matter – and defamation is nothing if not contentious – this is bound to lead to a complicated text. If proof of this is needed, one only has to look at the convoluted and opaque text in the Rome II Regulation on products liability. No one can say that the

adoption of this measure has lead to greater certainty and predictability.

It might, however, be argued that, even if the EU measure was obscure and difficult to apply, it would at least uniform, so that the same choice-of-law rule would apply wherever the action was brought. It might be thought that this would lead to greater predictability. Even this is wrong. The fact that the same substantive law is applied does not mean that it will be interpreted in the same way. Defamation is very much a question of value judgment, value judgment based on cultural norms. What is defamatory to a Greek might not be defamatory to a Swede. Moreover, what would constitute a justification in one country might not do so in another.

In addition to these differences of values and attitudes, there are simple questions of procedure. Whether a claimant can bring his action at all will depend on whether or not he can obtain the services of a lawyer. This may depend on whether legal aid is available or whether libel proceedings can be brought on the basis of a conditional or contingent fee agreement. The defendant may have a similar problem. The enormous fees charged by English libel lawyers can deter defendants from even fighting the case: they may simply give up and admit they were wrong, even if they know they were right.

For these reasons, a uniform choice-of-law rule is unlikely to lead to greater certainty and predictability. Moreover, its adoption would mean that references would have to be made to the ECJ. This could easily add two years to the length of time needed to obtain a final judgment.

Even if it were thought desirable to have a uniform choice-of-law rule, it is hard to see what rule would be satisfactory. At present, most Member States apply the law of the place of publication or the place where harm occurs (sometimes combined with the law of the forum). This, however, gives rise to serious problems. It is difficult to define where the harm occurs (especially in the case of the Internet), and it might not be obvious where the damage is felt.

Another possibility is the law of the claimant’s domicile or habitual residence. However, this would not be acceptable without major qualification. We must remember that the Rome II Regulation applies not just where the choice of law is between the legal systems of the EU States: it also applies where the potentially applicable law is that of a non-Member State. If we adopted a rule that the law of

the claimant's habitual residence applied, a dictator in a non-Member State could change the law of his country to say that any criticism of him (even if true) was defamatory and would lead to a huge damage award. Would we want to apply such a law? If we try to solve the problem by adopting a proviso that the free-speech law of the forum will always override foreign defamation law, the practical result will be that the lex fori will apply in defamation cases, because all cases will be defended on freedom-of-speech grounds. This is what happens in the United States where state defamation law has been eclipsed by federal free-speech law (the First Amendment). It should be noted that a uniform rule that the law of the forum applies will lead to no greater predictability than the application of the choice-of-law rule of the forum. I both cases, you cannot know the applicable law until you know what the forum will be.

The media of course want a uniform rule that applies the law of the defendant's place of establishment. This would be nice for them, but not so good for the citizen. British newspapers could ride roughshod over French privacy law and publish the results in France, while American media could defame public figures in Europe with impunity – telling lies about them as long as it could not be proved that they were motivated by malice.

For these reasons, no attempt should be made to adopt a uniform choice-of-law rule.

Jurisdiction

The last possibility is to do something on the jurisdictional front. Jurisdiction in libel is already covered by the Brussels I Regulation. Under this, the courts of the defendant's domicile have jurisdiction. No objection can be taken to this. If the defendant is domiciled in another Member State, Article 5(3) gives jurisdiction to the courts of the place where the harmful event occurred. In Shevill v Presse Alliance SA, the ECJ held that this allows the claimant to sue in the courts for the place where the material is distributed (though the claim must be limited to damage flowing from the copies of the publication distributed in the territory of the forum). It is this provision that can lead to libel tourism, since the claimant might choose a forum with which he has no connection simply because he is most likely to win there.

The material must of course be published in the territory of the forum. With the

advent of the Internet, however, this requirement is almost meaningless. Since most media outlets (newspapers, magazines, and TV stations) have their own websites, almost all defamatory material that is published in the media is also available on the Internet. So if material is regarded as published in a country if it is accessible on the Internet there, almost everything can be regarded as published everywhere.

It is suggested that it is in this area that a new legal initiative is needed at EU level. However, this must wait until the review of the Brussels I Regulation takes place.