Heiderhoff: Privacy and Personality Rights in the Rome II Regime – Yes, Lex Fori, Please!

Bettina Heiderhoff is Professor of Law at the University of Hamburg.

I. Overview

It would seem that there are already three camps in the symposium. The first two contributions (*Wallis'* working paper, even if very carefully phrased, and *von Hein's* paper) are both in favour of specific regulation to deal with violation of privacy and defamation in Rome II and have both stressed the importance of finding a balanced approach. Whilst the working paper is more strategic and, understandably, refrains from formulating a potential rule, *von Hein* has designed a full rule. In doing so, he has opted for a system that is, vaguely, similar to the Romanian one that *Wallis'* working paper presents as an example: the location of the injured party's habitual residence is taken as primarily decisive and this is then combined with a foreseeability rule. There is more to *von Hein's* suggestion, which will be touched on below.

Boskovic's paper also favours the integration of defamation into Rome II. However, she is promoting the application of article 4 Rome II – or, in other words, she simply wants to delete the exception in article 1(2) (g) Rome II.

The last two contributors (*Dickinson* and *Hartley*) prefer maintaining the status quo for the time being. In particular, they highlight the current revision of the Brussels I Regulation as a reason to hold off. However, it seems that

article 2 and article 5 (3), which are applicable to jurisdiction in defamation cases, are not under reconstruction. There is no reason to believe that the Shevill doctrine will be changed in the near future. On the contrary, it may be advisable to draft a conflict rule soon so that, if necessary, Brussels I can be changed accordingly. Nevertheless, this position raises a very important point: Jurisdiction and applicable law are, at least in the eyes of English lawyers, often perceived as closely connected.

It seems that, as far apart as they may sound, at least the two extreme positions should be reconcilable.

II. Important issues

If a new rule on the violation of privacy rights and defamation is aspired to, then first and foremost its task must be to consider and weigh the interests of both parties. This is an obvious need with regard to the injured party. However, even more than in other cases of tortious liability, the injurer must also be protected, as he/she is acting within the sphere of basic rights, namely the right to free expression. Therefore, article 4 Rome II seems unsuitable for privacy violations.

In trying to balance potentially conflicting interests, one faces two layers of difficulty. Firstly, there is the conflict of basic laws as mentioned above. Secondly, this conflict between freedom of expression and privacy is viewed and weighted quite differently all across Europe. It is, therefore, not easy for a European conflict of laws rule to weigh the various interests in a manner that all member states will find acceptable. The task of finding a solution to this conflict is set be fulfilled by the new rule. However, it must be solved not only in PIL, but also in procedural law, when fixing jurisdiction.

Certainly, in international procedural law we are at a

completely different point. Unlike Rome II, Brussels I already comprises claims based on the injury of privacy rights and the ECJ has formed a rule on how to cope with multi-state cases. The court shaped the Shevill doctrine very carefully and, it appears, acceptably. The Shevill doctrine excludes exorbitant cherry-picking for the injured and, at the same time, impedes publishers from retreating to libel havens (if they exist).

III. Lex fori solution

Having such a balanced procedural rule (even if it is judge-made) for jurisdiction, it seems obvious to test its suitability for private international law (PIL). In doing so, it is obvious that one cannot merely transpose the entire rule into PIL. Were one to do so, the result would be ridiculous: the claimant would be allowed to choose both the forum and, independently, the applicable law. If an Italian newspaper reported, in a defamatory manner, on an English actress, the actress could opt to sue the publisher in England under Italian law – or vice versa. This risk, it appears, is not quite precluded in *von Hein's* approach. His draft rule *allows* the injured party to choose the law of the forum – but what if they don't? Why not force such synchronization?

By applying the lex fori, as Wagner has suggested (e.g. in the hearing), this goal is easily reached. At the same time, the somewhat contentious foreseeability test is side-stepped and, maybe more importantly, the application of foreign law in a legal field, where cultural differences truly exist, is completely proscribed.

At first glance, this seems a very un-German suggestion. After all, the lex fori paradigm is an English one and it is usually something of a taboo in continental systems. In defamation and privacy cases – and in combination with Shevill – such prejudice should be overcome, as the lex fori offers all the required advantages.

The Shevill approach has, admittedly, got its own disadvantages. While *Wallis* claims that "*By providing a mechanism for informed choice, either by the judge or the parties themselves, from all of the available options, the conflict-of-law rule is far more likely to designate the most suitable law in practice*" – this is only partly true. For one thing, following the Shevill doctrine, it is not the court that chooses the applicable law: it is always the party choosing the court that, thereby, automatically chooses the law. Now, the party obviously doesn't make the choice personally, but acts on the advice of a lawyer. Even for a lawyer, however, it must be noted that choosing the best forum for the party is extremely difficult and mistakes will occur.

IV. End

In many papers, here and before, it has been assumed that violations of privacy rights and defamation are rare, because judicial protection is effective. Still, it should be effective *and fair.* Only where there are balanced rules, can media and injured parties can be certain that their rights are adequately and equally considered.

Fairness, it seems, can be reached by a conflict of law rule much more simply than by a minimum standard or unified material rule. Why should a country like France, that has article 9 cc protecting privacy, and a country like England, where, as Hartley has put it "*if something is true, you should (usually) be allowed to say it*", be forced into parallel standards?