

THROUGH THE LOOKING-GLASS

English libel law turns US protection for free speech on its head. **Floyd Abrams** considers how the UK became an international libel tribunal

English defamation law is under fire. Last July, the United Nations Human Rights Committee expressed 'concern' that English libel law had 'served to discourage critical media reporting on matters of serious public interest'. Later in the year, representatives of 30 non-governmental organisations publicly expressed concern that lawsuits filed against them in London threatened their ability to continue to report on violations of civil liberties around the world. Early in 2009, Illinois and Florida followed New York in adopting legislation designed to protect their authors against English courts hearing libel cases against them. Congress now appears on the lip of adopting legislation barring enforcement in the United States of any English libel judgment against any American and allowing suits in American courts against those who bring them.

From an American perspective, the furore is overdue. As seen from here, English defamation law is not only loaded against the speech of those who write and speak on the east side of the Atlantic Ocean but those who live on its west side as well. The clamour for reform will continue.

My first brush with English defamation law occurred a score of years ago. A Chicago television station was working on a story about the use of steroids by professional wrestlers. It had been advised by a number of sources that an English doctor had prescribed steroids to many of the wrestlers. Representatives of the station made an appointment with the doctor in London under an assumed name for an examination. At the agreed time, a reporter appeared together with a cameraman who was filming as the doctor opened the door of his inner office. The furious doctor immediately demanded that the pair leave, which they did. As they moved backwards towards the door, camera rolling, the journalist told the doctor why he was there and what he had heard. He asked the doctor if he had prescribed steroids for the wrestlers. The doctor did not respond and the two departed.

A few days later, I received a call from the chief counsel of the station. It had received, by mail, an order from an English court advising it of the doctor's suit and barring it from broadcasting anywhere in the world the film it had taken in the doctor's office. The station had received no notice of any hearing and could not understand how any court, let alone an English one, could enter a prior restraint barring it from broadcasting any part of their story.

I called an English solicitor, described the situation to him and asked what my client's rights were. He promptly replied that this was obviously an egregious case of misbehaviour by the station, that it should be settled promptly for an appropriate sum, an agreement never to air the tape anywhere, a suitably abject apology and the payment of reasonable counsel fees to the doctor's lawyers.

'Why should we settle?' I asked. What was the tort, the legal wrong my client had committed vis-a-vis the doctor? Was it some sort of relatively minor trespass claim, perhaps, because the doctor didn't really mean to invite the journalist to his office? And how, anyway, could an English court order have been entered barring an American station from broadcasting anything?

The answers came quickly. After being told again, even more sternly, that no English judge would countenance such misbehaviour ('I understand,' I said, 'I really do.') I was instructed that the legal claim was one for slander since the *questions* that the reporter had asked the doctor had suggested illegal behaviour by him. Since the cameraman had heard the defamatory statements, they would be deemed to have been 'published' and thus be actionable.

The solicitor continued to educate me. At any trial, the statements, defamatory of the doctor's reputation, would be assumed to be false and it



would be the station's burden to prove their truth. If it attempted to do so and failed, damages would be significantly increased. Little pre-trial discovery so familiar to American lawyers would be permitted, no probing file-searches of the doctor's records or pre-trial depositions of him and others. As for the issuance of a prior restraint, an injunction against broadcasting, in English libel cases they were not at all uncommon.

So began my introduction to English defamation law. Everything about it was American law turned inside out.

No American court would grant any order without at least trying to reach the party against which it was entered. Nor would any American court enter any injunction against the publication of material because it might later be deemed libellous. American courts are barred by the First Amendment from issuing almost any injunctions against speech on matters of public interest and none at all may be entered because speech may be libellous. As for the solicitor's advice that the journalist's questions might themselves be deemed the stuff of slander, that too would be unthinkable in any American court.

Then there were the statements by our solicitor about the nature, the substance, of English defamation law. Under that law, the supposed defamatory accusation by the reporter would be assumed to be false and he or his station would be obliged to prove its truth. Under American law, the burden of proving falsity in such a case would fall to the doctor.

Under English law, the nature of the care devoted by the station to the story would be irrelevant. That three or five or ten sources had indicated that the doctor had prescribed steroids, thus leading the reporter to ask his question of the doctor, would be of no moment and could not even be offered in evidence. Under American law, there could be no credible claim made by the doctor unless he could demonstrate that the station had acted negligently or worse and the work done to prepare the story would be admissible (indeed central) on that issue. In fact, if the doctor had been a public figure (he was not) he could not prevail in court unless he demonstrated what US courts unwisely call 'actual malice' — actual knowledge or at least suspicion by the station that its 'statement' that the doctor had illicitly prescribed steroids was false.

We settled the case, paid some money to the doctor, more money to his solicitors, apologised obsequiously and promised never again to use the tape. We had learned much about English law. Not long afterwards, I handled a case in the United States which highlighted the vastness of the differences in law in the two nations.

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The case arose out of a broadcast on National Public Radio (NPR) in 1992. Dan Schorr, a renowned broadcaster for decades, was ruminating on air about intrusions by the press into the privacy of individuals who were caught up in highly publicised events. He recalled that in 1975, President Gerald Ford had been the target of an attempted assassination in San Francisco by a female assailant and that his life had been saved by a person later identified by the press as being a homosexual. He identified the man's name.

Claimants win about 90 per cent of cases in English courts – unimaginable in the more litigious US

Schorr's memory had failed him. There had been two separate foiled attempts by women on President Ford's life in 1975, one prevented by the gay man Schorr recalled, the other by a male Special Agent of the Secret Service, whose role it is to protect the president. When Schorr referred to the gay saviour of the president, he mistakenly used the name of the Secret Service agent.

Four months later, the agent sued. Claiming that the false statement about him had substantially impaired his reputation and had 'eroded my self-confidence, affected my self-image, influenced my attitudes in dealing with family, friends, fellow-employees and others', he sought damages in excess of \$1m.

Under American law, the lawsuit posed no difficulty for NPR. The agent was a public official and as such could not recover in the absence of proof that NPR broadcast the inaccurate information knowingly or with a high degree of awareness of probable falsity. Since it was indisputable that the statement about the agent in NPR's broadcast was inadvertently inaccurate, there could be no claim and no recovery.

No damages were awarded and no counsel fees were paid (except to me). No court order was entered except one dismissing the case. An easy case, an easy win.

Both these cases were trivial and probably never should have been commenced. But they begin to explain why English solicitors with whom I have spoken estimate that libel claimants win about 90 per cent of their cases in English courts – a stunning figure that would be unimaginable in the far more litigious United States for any sort of litigation. It helps to explain why in a disturbing number of prominent cases in England, successful libel plaintiffs were later revealed to have lied their way to victory. Liberate won a celebrated libel case against an English gossip columnist for suggesting he was gay; he was. John Profumo, while minister of war, won libel damages for the published suggestion that he had been involved sexually with Christine Keeler, a prostitute; he had been. Lord Jeffrey Archer won a celebrated case over a charge that he had consorted with a prostitute; so he had.

The chilling impact of English libel law within England itself has been unmistakable. Robert Maxwell cowed the English press with repetitive libel actions over published suggestions that he was a fraud; so he was. More broadly, as Geoffrey Robertson QC and Andrew Nicol QC have written in their superlative text on English media law, ‘there were a large number of cases, and an untold number of settlements, where justifiable journalism was punished by heavy damages – hence the chill factor that inhibited the British press from proper reporting of enveloping scandals such as the sale of arms to Iraq and the collapse of Lloyd’s of London’.

The ease with which libel plaintiffs prevail in England would be of less interest and concern to writers from other nations if England, as a result of a series of judicial rulings, had not become the centre for libel litigation throughout the world. Viewed through American eyes, some of those rulings are simply bizarre. Who would have imagined that a litigation by Don King, the flamboyant American boxing promoter, against a New York lawyer who responded to a question about King asked by a California website with an observation that suggested King was anti-Semitic, would wind up in England? But so it did, and there it remained, on the basis that King had a reputation to lose in that nation too. Stripped of a possibly winning defence available in the United States but not England – no boxing promoter in American history was more obviously a public figure than the garrulous and ubiquitous King – and unable under English law to utilise the probing drill of pre-trial discovery, the lawyer settled.

The King case raises a broader issue. What had the American lawyer done to subject himself to English jurisdiction? He had not set foot in England, not appeared on English television, not written a word published

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by an English newspaper. He had said nothing about any English resident. What he had done was to answer, in the United States via email, a query put to him by a California website. Repeating an observation from an earlier judicial opinion, the English Court of Appeals concluded that one who uses the Internet as a means of communication 'must accept' that he may be sued in any jurisdiction reached by his speech. Which is to say, he may be sued anywhere including the home of libel litigation in London. Which he was.

The King case followed a ruling in the House of Lords in a case commenced by a Russian businessman and politician, Boris Berezovsky, against *Forbes*. The overwhelming amount of *Forbes's* readers of an article it published about Berezovsky were not in England – almost 800,000 subscribers and purchasers were in the United States, just over 1,900 in England. Berezovsky could have sued in either Russia, where the matters discussed in the article occurred and where he was best known, or the United States, where the article was by far most read. Enticed by England's plaintiff-friendly law, however, he sued there, and there the case was permitted to remain. In the face of a dissenting opinion in the House of Lords expressing concern that 'the English courts should not be an international libel tribunal for a dispute between foreigners which had no connection with this country', the majority opinion permitted the case to continue. It, too, was eventually settled. Tellingly, Berezovsky extracted an apology from *Forbes* with respect to a suggestion that he was complicit in the murder of rivals (a charge the magazine could not prove), but dropped his claims relating to his alleged corrupt conduct, a charge *Forbes* asserted in its pleadings it could prove. There is good reason to believe the action would have been vigorously, and quite likely successfully, defended in the United States.

The effect of offering England as a promiscuously friendly base for libel plaintiffs from around the world has been startling. A legal brief submitted to a committee of the House of Commons by a number of newspapers based overseas pointed out that 'blatant Internet forum shoppers can come to London to sue foreign news organisations in relation to allegations that are entirely sourced abroad'.

That is precisely what has occurred. Case after case having little if anything to do with England has been commenced there against American publishers and writers. Dow Jones has been sued by American and Saudi businessmen, and *Forbes* by American and Russian businessmen. American movie stars have used English courts to sue American magazines that wrote about them. And most notoriously, an American scholar was sued in London by a Saudi banker.



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Khalid bin Mahfouz, a Saudi billionaire, chose poorly when he decided to sue Rachel Ehrenfeld in England following allegations about him and charities associated with him in her book *Funding Evil: how terrorism is funded and how to stop it*. Ehrenfeld is an intrepid New York-based scholar and author. Her ties with England with respect to her book were all but non-existent. The book was published in New York, but not in England. It had been researched and written in New York. She had not promoted it in England or spoken there about bin Mahfouz. In fact, only 23 copies were sold in England, all purchased through amazon.com.

Nonetheless, on that slim basis an English court held that there was jurisdiction for it to hear the case. Bin Mahfouz himself, a resident of Saudi Arabia, was no stranger to English courts. He had commenced or threatened over 30 actions against individuals or publications that had made similar accusations. When Ehrenfeld refused to cross the ocean to appear in a nation that had all but nothing to do with her book (and that, not coincidentally, was a singularly inhospitable forum for her to defend her book), the court entered a judgment against her in the amount of US\$225,000 and concluded that the book was 'defamatory and false'. Ehrenfeld had no assets in England (and little more in the United States). The judgment remains uncollected (bin Mahfouz obviously has no desire to litigate in the United States), but bin Mahfouz has refused to say that he will not do so.

Ehrenfeld was well advised not to litigate her case in England. The text of her book, including statements highly critical of bin Mahfouz, was based on numerous sources. They included statements made by the Federal Reserve Board, a 1992 report of a United States Senate Committee, the Islamic Human Rights Committee, and various books and articles. The sources were duly identified in footnotes.

Bin Mahfouz was likely a public figure under American law and Ehrenfeld could have comfortably relied on sources such as these as the basis for her belief in the truth of what she wrote. She thus could have prevailed with ease in any case commenced against her in the United States. But not in England, which takes no account of an author's state of mind and would therefore not have permitted such materials even to be admitted into evidence.¹

1. So speech-destructive is English defamation law that, on the advice of a prominent and skilled English solicitor, I am neither describing what it is Ehrenfeld had to say about bin Mahfouz or what the sources relied upon by her had stated, lest the estimable but none too richly financed magazine you are reading run the risk of finding itself drawn into yet another libel action based upon the Ehrenfeld book. Could there be a better example of the baleful impact of English libel law?

While the Ehrenfeld case is itself over in England, the controversy and the legislative battles the case has spawned in the United States continues. From bin Mahfouz's perspective, his legal victory over Ehrenfeld has become a public relations disaster. As for Ehrenfeld, she has become the leader in an increasingly successful effort to amend American law to protect US authors against English law.

After the entry of the English judgment against her, Ehrenfeld made the critical decision to bring her own suit against bin Mahfouz in the United States. She sought a declaratory judgment in the New York courts determining that the English judgment was not enforceable there, and that her work was protected under American law. When the New York Court of Appeals determined that her suit could not be heard under state law, the New York state legislature quickly adopted legislation permitting judges in the state not to enforce foreign libel judgments from nations that did not provide First Amendment-like protections and authorising authors such as Ehrenfeld who had been sued abroad to countersue in New York against those that claimed against them. Similar legislation was adopted in Illinois and is now under serious consideration in Congress, which may well provide such protections to all Americans who are sued abroad.

The tone of the debate in the United States is illustrated by the statement on the floor of the US Senate by Senator Arlen Specter who observed that: 'I note that the person who sued Dr Ehrenfeld has filed dozens of lawsuits in England, and there is a real danger that other American writers and researchers will be afraid to address this crucial subject of terror funding and other important matters. Other countries should be free to have their own libel law, but so too should the United States. Venues that have become magnets for defamation plaintiffs from around the world permit those who want to intimidate our journalists to succeed in doing so. The stakes are high. The United Nations in 2008 noted the importance of free speech and a free press, and the threat that libel tourism poses to the world.'

American civil liberties organisations have joined the effort to adopt protective legislation. The American Civil Liberties Union has endorsed the bill. So have a wide-ranging collection of civil liberties oriented groups such as the American Library Association, the American Association of University Professors, the National Coalition Against Censorship and PEN American Center. It appears more likely than not that some protective national legislation will be adopted.

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But there are major limits to how much protection the American Congress can offer in response to English law. Libel judgments entered in England may not be enforceable in the United States, but they are enforceable in all EU countries except Denmark and affect the reputations of all who are subject to them.

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That is the problem. Of course, English libel law is for the English to decide. In some ways, that law has recently taken a slight turn for the better since a 1998 ruling in which the House of Lords afforded some protection to 'responsible journalism' based on solid research and sources. Nonetheless, English law continues to lean heavily towards the interests of plaintiffs, still puts the burden of proving truth on defendants, still generally rejects the notion that even the highest level of care in the preparation of an article or book matters at all.

English libel law has increasingly become international libel law. Because it is so accommodating to those who sue, because English courts welcome foreign plaintiffs with such ardour, and because English judgments are routinely given effect almost everywhere except in the United States, only a re-evaluation of English law by England itself can truly begin to address the problem.

The MP Denis MacShane put the case well:

The practice of libel tourism as it is known – the willingness of British courts to allow wealthy foreigners who do not live here to attack publications that have no connection with Britain – is now an international scandal. It shames Britain and makes a mockery of the idea that Britain is a protector of core democratic freedoms. Libel tourism sounds innocuous, but underneath the banal phrase is a major assault on freedom of information, which in today's complex world is more necessary than ever if evil, such as the jihad ideology that led to the Mumbai massacres, is not to flourish, and if those who traffic arms,

blood diamonds, drugs and money to support Islamist extremist organisations that hide behind charitable status are not to be exposed.

There are three ways to deal with the problem. One is for English courts to stop hearing libel cases that have so little to do with England. The fact that a few emails or books reach England should not suffice to provide a basis for an English court to proceed with a libel litigation between foreigners. Let disputes between Americans be resolved in America. Send Russian oligarchs back to Russia to seek to clear their names or to the nation – usually the United States – where the great bulk of critical articles about them are written and read.

The second is for English courts, in cases in which all editorial work on a challenged foreign publication is done abroad and the primary audience for the publication is there, to apply the law with the closest ties to the publication. In the Ehrenfeld case, that would have resulted in an English court applying American law – something that is common enough in certain commercial cases.

The final possibility may well be impossible but it would be far better than the other two. It is time, past time, for England to give serious thought to adopting fundamental changes to its libel law.

The changes could take various forms. One would be to abandon the offensive and speech-destructive assumption that all defamatory statements are false. Another would permit defendants in libel actions greater opportunities to test, by expanded pre-trial discovery, the accuracy of the claimant's assertions before the commencement of a trial. A third might permit defendants to demonstrate to juries their basis for publishing what they did and to permit the juries to take that into account in rendering a verdict on either liability or damages. The changes could be more or less drastic than that, but should be instituted to strike a different, more freedom-protecting, balance between the desirability of protecting individual reputation and the need to protect freedom of speech.

English libel law need not be American law lite but it should stop being English law heavy. □

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