Libel Tourism – why English Courts are still the preferred venue for many international claimants

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Michael Axe, Senior Associate in our Commercial Disputes Team, takes a look at a number of recent court decisions in the field of international and internet-based libel.

England's defamation laws are considered by many to be amongst the most "claimant friendly" in the world, and as such, the English Courts are a popular forum for bringing international libel claims. To bring a libel claim in England, a claimant will normally need to be able to show that:

a) the defamatory statement was published in England, and,

b) the claimant has a sufficiently close connection with England (for example, they have established a significant reputation in England and/or they have substantial financial and commercial interests in England).

The increase in online publications over the last decade or so has made it easier than ever to establish that a defamatory statement has been "published" in England, because under English law a defamatory statement is "republished" every time it is accessed via the internet (the so-called *"internet publication rule"*). This rule means that as long as the website in question has been accessed by visitors based in England, it may be possible to bring a libel claim in the English Courts even if the parties involved are themselves based abroad, the website in question is operated from abroad and the primary/original publication of the defamatory statement occurred abroad.

The English *"internet publication rule"* is in stark contrast to the libel laws of other countries; for example, the US has the *"single publication doctrine"* which states that only the original publication of an allegedly defamatory statement gives rise to a claim, and so any additional copies (available either in printed form or online) do not give rise to any additional claims.

The *"internet publication rule"* can be of particular concern to any parties who maintain an archive of online material, as illustrated by a number of recent cases.

A second bite of the cherry?

The decision of the European Court of Human Rights ("ECHR") in the 2009 case of Times Newspapers Ltd v UK made it clear that the *"internet publication rule"* applied in England and did not breach the Right to Freedom of Expression under Article 10 of the European Convention on Human Rights. The case in question involved a claim for libel brought by a Russian businessman against The Times newspaper in relation to two articles which had remained accessible via its online archive even after libel proceedings has been issued in relation to the original publication of the articles in the print version of the newspaper.

The ECHR confirmed that The Times' continued publication of the allegedly defamatory material in its online archive had given rise to a second claim for defamation (i.e. in addition to the original claim issued over a year earlier in relation to the paper version of the newspaper articles). The ECHR confirmed that to avoid further liability under the *"internet publication rule"*, owners of online archives would need to ensure either that any potentially defamatory online material was removed from the archive or that qualifying statements were added to the online material as appropriate.

Remove or Amend if the position changes

The ECHR's decision has recently been applied in practice by the English Courts in the 2010 case of Flood v Times Newspapers Ltd.

In June 2006, The Times newspaper published explicit details of allegations made against Detective Sergeant Flood which were the subject of investigation by the Metropolitan Police Service ("MPS"). However, in September 2007, the MPS confirmed to The Times that having concluded its investigation it had found that there was insufficient evidence to proceed with either criminal or disciplinary proceedings.

DS Flood issued libel proceedings against The Times in respect of both the print version of the article and the online version which remained accessible via the internet even after the MPS concluded its investigation in September 2007.

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In relation to the printed newspaper article, the Court of Appeal controversially ruled that the mere fact that allegations were being investigated by the MPS did not justify The Times publishing details of them, because the publication of the details of the allegations was not in the public interest and the newspaper had not taken reasonable steps to ensure their accuracy.

Perhaps less controversially, the Court of Appeal also confirmed that in any event, even if the original publication in printed form had been permissible, the continued online publication of the articles after the MPS had concluded its investigation could not be justified, and the online articles should have either been removed or amended to reflect the MPS' conclusions.

Context is Key

Whilst the Flood v Times decision appears to place quite a heavy burden on website owners in relation to the management of their online archives, the 2010 case of Budu v The BBC does at least offer some comfort to them.

This case hinged on whether the contents of three online articles available on the BBC website were defamatory or not. The High Court ruled that the contents of the second and third articles (chronologically speaking) could not be interpreted as being defamatory, although the first article could potentially, if read in isolation, be considered defamatory.

However, the High Court went on to confirm that because the first article could only be accessed online by people who had already read the second and third articles (and then clicked on the "see also" links), the first article was not was capable of being defamatory. This decision has highlighted the importance of context when considering whether or not a statement is defamatory; in this case, anyone who had read the second and third articles would not then interpret the contents of the first article in the way that the claimant alleged readers would.

This principle was further explored in the later case of Islam Expo Ltd v The Spectator, in which the High Court, when deciding whether the meaning of an online article was defamatory or not, took account of the contents of other web-pages which were accessible via hyperlinks in the allegedly defamatory online article.

Liability for Google "snippets"

The Budu v The BBC case was also important for clarifying whether a party can be held liable for the text contained in a Google "snippet" (i.e. the results of a Google search which links to an online article).

In the Budu case, the claimant alleged that the Google snippet (which was a sentence extracted from the second online article) was a republication of a defamatory statement. However, the High Court confirmed that a "republication" of a defamatory statement could only occur if the original statement was itself defamatory (and in this case, the second online article was not defamatory).

The High Court also reinforced that those using Google would be well aware that the snippet was an automated piece of text generated by the search terms entered, and was nothing more than a fragment of a larger publication. The Court said the snippet was like *"a tiny extract torn at random from a page to which no human publisher has attached any particular significance"*.

Whilst it may, in theory at least, be possible for a Google snippet to be interpreted as being defamatory when read in isolation, the Court commented that it would nevertheless be unjust to hold a party liable for a defamatory Google snippet in circumstances where the original publication itself was not defamatory (i.e. where the extracted sentence could not be interpreted as being defamatory when read in the context of the whole article).

The need for "substantial" Publication

Although the *"internet publication rule"* states that a defamatory statement is republished in England every time someone in England accesses the relevant material via the internet, it is important to bear in mind that the Courts are still likely to strike out a claim as an abuse of process if there is no evidence of a "substantial" publication in England (see, for example, our previous article on internet libel).

In the 2009 case of Lonzim plc v Sprague, the English High Court dismissed a libel claim brought against a South African banker on the grounds that there was a lack of substantial publication. The claim was based upon an article that appeared in the online publication of a South African financial magazine, but the defendant was able to show that during the relevant period only four UK-based visitors had accessed the South African magazine's website. The Court confirmed that there was, at best, only evidence of minimal publication in England and dismissed the claim accordingly.

That said, it is also important not to be too cavalier about the extent of the publication, as in the 2011 case of Talbot v Elsbury the High Court ordered a town councillor to issue a public apology and to pay a rival politician compensation (£3,000) and legal costs (understood to be in the region of £50,000), in relation to a defamatory comment the town councillor had published on his Twitter page during a local by-election. This is understood to be the first English court case brought in relation to a comment posted on Twitter. In this case, the untrue comment was allegedly based on a case of mistaken identity, but the immediate nature of Twitter and other social media makes it far too easy for such comments to be published without proper fact-checking.

Alternative options to consider...

In the current international legal arena, defamation is still the most commonly used basis for bringing claims in relation to untrue statements, but it is important to remember that it is not the only option.

In the 2010 case of Ajinomoto Sweeteners Europe v Asda Stores Ltd, the claimant (the French subsidiary of a Japanese-based corporation) brought a claim for malicious falsehood against the defendant (the UK subsidiary of the American-based Walmart corporation) in relation to product packaging which included the phrases *"NO*

HIDDEN NASTIES" and *"No artificial colours or flavours and no aspartame"* (aspartame being the claimant's product).

A claim for malicious falsehood is sometimes referred to as a claim for "slander of goods", which perhaps more accurately describes its function. It differs from a claim for defamation in a number of ways; one key difference is in relation to the so called *"single meaning rule"*. Under English defamation law, the Courts must attribute a single meaning to an allegedly defamatory statement by adopting the most natural and reasonable interpretation of the words used. However, this rule causes problems where it is perfectly reasonable that different people would attribute different meanings to the words used.

In this case, it was decided at a preliminary court hearing that customers reading the Asda packaging would take it to mean either:

a) that there is a risk that aspartame is harmful or unhealthy (the claimant's interpretation); or,

b) that these Asda products are for customers who found aspartame objectionable (the defendant's interpretation).

At the preliminary hearing, the judge considered that he had to apply the *"single meaning rule"*, which meant that he decided that the defendant's interpretation was operative meaning of the relevant words and therefore the claimants had no claim.

However, the Court of Appeal overruled this decision and confirmed that as this was a claim for malicious falsehood and not defamation, the *"single meaning rule"* did not apply. On the basis that a significant number of customers would consider the words in question to be derogatory of the claimant's product, the case should proceed to trial (even though it was equally true that a significant number of customers would not consider the words in question to be derogatory).

This case has highlighted that claims for malicious falsehood can, in some circumstances, allow a party to take action in relation to allegedly derogatory statements in circumstances where a defamation claim could not be pursued.

The Future of Libel Cases in England

There have been numerous calls, especially during the last year, for the English libel laws to be reviewed and updated. Commentators have highlighted a number of cases where the current laws have allegedly been abused by larger claimants to try to stifle genuine criticism from smaller defendants (the most famous recent example of which was the British Chiropractic Association's claim against the science author Simon Singh MBE).

Legal reform may now be on the horizon, as the Ministry of Justice published its Draft Defamation Bill in March 2011. However, any actual changes to the English libel laws are still some way off, and some commentators argue that the Draft Defamation Bill really only codifies the existing defamation laws whilst adding little new. That said, there are proposals in the Draft Defamation Bill to implement a *"single publication rule"* which would replace the *"internet publication rule"*, and to tackle so-called *"libel tourism"* by prohibiting English courts from hearing defamation cases unless England is the *"most appropriate jurisdiction"* in which to bring the claim.

However, the Draft Defamation Bill has only been published for consultation purposes at this stage, and it will be some time before any (or all) of the proposals actually become law. It therefore seems likely that the English courts will, at least for the foreseeable future, remain the preferred venue for international libel claims.

Of course, none of this is intended to suggest that establishing jurisdiction and dealing with some of the issues outlined in this article will be the only hurdles for claimants to contend with; it will still be necessary to overcome potentially complex defences such as justification, fair/honest comment and privilege, and these issues will also have to be the subject of separate detailed analysis.

For further information on this or any other issues relating to international or internet-based defamation, please contact Michael Axe by emailing Michael or by calling him on 08450 990045, or speak to your usual contact in the Commercial Disputes Team.

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