# Splendid Isolation? Australia as a Destination for 'Libel Tourism'

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## Abstract

'Libel tourism' has been a source of tension between the United States and the United Kingdom. It highlights the difference not only between these countries' defamation laws but also their conflict of laws rules. Legislation to combat the real or perceived problem of 'libel tourism' has been proposed or enacted in the United States and the United Kingdom. This article analyses the phenomenon of 'libel tourism' and seeks to define the concept and to ascertain its incidence. It examines the *Ehrenfeld v Bin Mahfouz* litigation and the legislative reforms it provoked. It then considers the prospect that Australia will prove an attractive destination for 'libel tourism'.

## I Introduction

The phenomenon of 'libel tourism', or 'libel terrorism', as it has been more tendentiously called, has generated considerable attention in the United States and the United Kingdom. The contention that English courts have exercised jurisdiction over defamation proceedings which have a marginal connection with the United Kingdom and which impinge upon United States citizens' constitutionally protected right to freedom of expression under the First Amendment has elicited a strong response from legislators, judges and academics in the United States and the United Kingdom. The culmination of the American legislative response was the passage of the *SPEECH Act* in 2010,[1] although a number of state legislatures enacted specific provisions dealing with foreign defamation judgments. The issue of 'libel tourism' has also figured prominently in the recent libel law reform process in the United Kingdom, although English courts arguably had already begun to take a more rigorous approach to the exercise of jurisdiction over defamation cases with an international dimension to them.

'Libel tourism' and the American and English responses to it highlight the differences not only between the levels of legal protection afforded to freedom of expression in these countries, but also between their conflict of laws rules. These differences also exist between American and Australian law. Indeed, the tensions are arguably starker, given that Australia has no bill of rights and consequently has not had to reconsider the balance between the right to reputation and freedom of expression in its defamation law, as the United Kingdom has done, following the introduction of the *Human Rights Act 1998* (UK). Moreover, Australian courts and legislatures have not attempted to impose more rigorous threshold tests of jurisdiction on prospective 'libel tourists', again unlike the United

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1 Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act 28 USC 4101-4105 ('*SPEECH Act*').

Kingdom. Therefore, it is instructive to analyse the phenomenon of 'libel tourism' and the United States response to it from an Australian perspective.

This article first explores the concept of 'libel tourism' and its incidence in the United Kingdom and Australia. What is meant by 'libel tourism' and how frequent it is are contentious issues. The article identifies the important differences between American and Anglo-Australian defamation law and conflict of laws, which give rise to the problem of 'libel tourism'. It examines the case which was the impetus for the American legislative response to 'libel tourism', *Ehrenfeld v Bin Mahfouz*. It then traces those legislative developments, as well as the attempts by the United Kingdom to address concerns about 'libel tourism'. Finally, the article considers the prospects of 'libel tourism' occurring in Australia, using the recent case of *Evony LLC v Everiss* as a case study. It suggests that, while the relative geographical isolation of Australia might be a disincentive to 'libel tourism', such a disincentive might be overcome, given the globalised and networked nature of communication technologies and the advantages offered to plaintiffs by Australia's defamation laws and its conflict of laws rules.

## II 'Libel Tourism': Its Definition and Incidence

A significant difficulty with analysing the phenomenon of 'libel tourism' is the definition of the concept itself. The lack of clarity has been noted by law reformers and academics.[2] A neutral meaning of 'libel tourism' was provided by the Libel Working Group, established by the United Kingdom Ministry of Justice, which defined the term as 'a proceeding in which a non-resident sues another non-resident in the forum'.[3] Other definitions identify the type of non-resident litigant involved in 'libel tourism', giving some content to the concept. Thus, 'libel tourism' can be viewed as a form of forum shopping, in which well-resourced, usually high-profile plaintiffs — such as American celebrities, Saudi businessmen and Russian oligarchs — sue for defamation in a place which has little connection to the publication itself and to the parties.[4]

Another definition of 'libel tourism' has gained currency, which differs from these meanings in important respects. In *Ehrenfeld v Bin Mahfouz*, Ehrenfeld herself defined 'libel tourism' as 'the use of libel judgments procured in jurisdictions with claimant-friendly libel laws — and little or no connection to the author or purported libelous material — to chill free speech in the United States'.[5] Some American legal scholars also define 'libel tourism' in this way.[6] The difficulty with this definition is that it focuses on the effect of foreign defamation litigation on United States defendants and their right to freedom of speech

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2 As to the recognition of this problem by law reformers, see, eg, Ministry of Justice, *Report of the Libel Working Group* 2010 [2]. As to the recognition of this problem by academics, see David Partlett and Barbara McDonald, 'International Publications and Protection of Reputation: A Margin of Appreciation but not Subservience?' (2011) 62 *Alabama Law Journal* 477, 489.

3 Ministry of Justice, *Report of the Libel Working Group*, 2010, [4].

4 Yasmine Lahlou, 'Libel Tourism: A Transatlantic Quandary' (2008) 2 *Journal of Law and Policy* 199, 200; Sarah Staveley-O'Carroll, 'Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment?' (2009) 4 *New York University Journal of Law and Liberty* 252, 254; Robert Balin, Laura Handman and Erin Reid, 'Libel Tourism and the Duke's Manservant — an American Perspective' (2009) 3 *European Human Rights Law Review* 303, 303.

5 *Ehrenfeld v Bin Mahfouz* 881 NE 2d 830, 834 (NY 2007) (Ciparick J).

6 See, eg, Doug Rendleman, 'Collecting a Libel Tourist's Defamation Judgment?' (2010) 67 *Washington and Lee Law Review* 467, 468–9; Erica Klazmer, 'The Uncertainties of Libel Tourism: Is Diplomacy the Answer?' (2012) 23 *Entertainment Law Review* 164, 164. See also Harry Melkonian, 'When the Cure Appears Worse than the Illness: America Reacts to England's Plaintiff-Friendly Defamation Laws' (2009) 14 *Media and Arts Law Review* 474, 474.

without considering the identity of the plaintiffs and their relationship to the fora in which they sue. Some plaintiffs who sue United States publications could be labelled 'libel tourists' without those plaintiffs ever leaving home. For example, applying this definition, Joseph Gutnick, the plaintiff in the High Court of Australia's landmark decision on jurisdiction over internet defamation,[7] could be perceived as a 'libel tourist'; he sued in a jurisdiction with 'claimant-friendly libel laws' (relative to the United States); he sued a magazine which had little connection to the forum; and he sued in respect of an article written by an author who equally had little connection to the forum. Yet Gutnick never left home — he was a resident of Victoria, suing in the Supreme Court of Victoria for damage to his reputation solely within Victoria, which was the principal, but not the sole, place in which he conducted business.[8]

Partlett and McDonald suggest that there has been insufficient attention given to important distinctions between proceedings which might be classified as 'libel tourism'. They identify three categories of claim which are usually treated as 'libel tourism': first, where a foreign plaintiff sues a defendant in the forum in which the defendant resides or conducts business; second, where a plaintiff sues a foreign defendant in the forum in which the plaintiff resides or conducts business; and third, where a plaintiff sues a defendant in a forum in which neither party resides or conducts business but in which publication has occurred.[9] It is the latter two categories which are most readily recognised as 'libel tourism', yet arguably they raise distinct concerns, with the third category being more egregious than the second. The conflation of these two categories in most analyses of 'libel tourism' indicates the centrality of American anxieties about encroachments upon First Amendment rights in this debate.

In addition to the definitional difficulties, there is disagreement as to whether 'libel tourism' is a serious problem in the United Kingdom and elsewhere.[10] There are, in fact, few cases of 'libel tourism' which proceed to final judgment. More proceedings are commenced but are discontinued or settled. However, as the Joint Committee on the Draft Defamation Bill accepted, merely looking at the decided cases is likely to provide an incomplete understanding as to the true extent of 'libel tourism'. The threat of defamation litigation by prospective 'libel tourists' and the resulting 'chilling effect' on freedom of expression needs to be taken into consideration.[11] Even if 'libel tourism' is not in fact a significant problem, in terms of the number of actual or threatened defamation cases, the widespread perception that a Western liberal democracy is inimical to, or insufficiently protective of, freedom of expression might be sufficient to warrant law reform.[12] Addressing 'libel tourism' then might be an instance in which law reform needs to proceed not in response to an empirically demonstrated problem but on the basis of principle.

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7 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575.

8 Ibid 594–5 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

9 Partlett and McDonald, above n 2, 489–91. For an alternative attempt at the categorisation of 'libel tourism' claims, see Richard Garnett and Megan Richardson, 'Libel Tourism or Just Redress? Reconciling the (English) Right to Reputation with the (American) Right to Free Speech in Cross-Border Libel Cases' (2009) 5 *Journal of Private International Law* 471, 474–8.

10 See, eg, Joint Committee on the Draft Defamation Bill, *Report* [55].

11 Ibid. See also Trevor C Hartley, "'Libel Tourism" and Conflict of Laws' (2010) 59 *International and Comparative Law Quarterly* 25, 32.

12 See, eg, Joint Committee on the Draft Defamation Bill, *Report*, [54]–[56].

English courts have indeed attracted an eclectic range of defamation litigants. They include American celebrities, such as Cameron Diaz, Justin Timberlake and Kate Hudson. They include Russian oligarchs, such as Boris Berezovsky and Grigori Loutchansky.[13] They include Saudi businessmen, such as Khalid bin Mahfouz.[14] Further, more exotic examples include defamation proceedings brought by boxing promoter, Don King, against British boxer and New York resident, Lennox Lewis, as well as a Nevada promotion company and a New York attorney;[15] renowned film director, Roman Polanski's defamation proceedings against *Vanity Fair* magazine;[16] the Beatles' hanger-on, 'Magic Alex' Mardas' defamation proceedings against *The New York Times* and *The International Herald Tribune*;[17] an Icelandic businessman against an Icelandic academic;[18] and former New Zealand cricket captain, Chris Cairns' defamation proceedings against Indian cricket administrator, Lalit Modi arising out of a tweet.[19] Australia has also managed to attract some high-profile 'libel tourists'. For instance, film stars Jim Carrey and Penelope Cruz have sued for defamation in Australia, although their proceedings were ultimately settled or discontinued.[20] These are only some of the many libel proceedings that generated concern about 'libel tourism'.[21]

## III Differences between American and Anglo-Australian Defamation Law and Conflict of Laws

'Libel tourism' has become a potent political issue because of the differences between American and Anglo-Australian defamation law. It is well known that the First Amendment of the United States Constitution protects freedom of expression highly, at the expense of individuals protecting their reputation. By contrast, Anglo-Australian defamation law is perceived as being pro-plaintiff, at the expense of freedom of expression. Yet 'libel tourism' does not only highlight the differences between these jurisdictions' defamation laws. In addition, 'libel tourism' exposes the differences in conflict of laws rules between American and Anglo-Australian law. Anglo-Australian conflict of laws rules permit courts in those fora to exercise jurisdiction more readily over defamation claims with a foreign element than American conflict of laws rules. These differences widen the

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13 See, eg, *Berezovsky v Michaels* [2000] 1 WLR 1004; *Loutchansky v Times Newspapers Ltd (Nos 2-5)* [2002] QB 783. See also *Terluk v Berezovsky* [2011] EWCA Civ 1534.

14 See, eg, *Bin Mahfouz v Ehrenfeld* [2005] EWHC 1156 (QB). See also *Al Rajhi Banking & Investment Corporation v Wall Street Journal Europe SprL* [2003] EWHC 1358 (QB).

15 *King v Lewis* [2005] EMLR 4.

16 *Polanski v Conde Nast Publications Ltd* [2005] 1 WLR 637.

17 *Mardas v New York Times Co* [2008] EWHC 3135 (QB).

18 *Olafsson v Gissurarson* [2008] EWCA Civ 152.

19 *Cairns v Modi* [2012] EWCA Civ 1382.

20 See *Carrey v ACP Publishing Pty Ltd* [1999] 1 VR 875. See also 'Cruz settles defamation case', *The Age* (online), 3 June 2003 <http://www.theage.com.au/articles/2003/06/03/1054406185950.html>.

21 For further examples, see also *Ghannouchi v Houni Ltd* [2003] EWHC 552 (QB) (Tunisian politician suing *Al Arab* newspaper); *Lennon v Scottish Daily Record & Sunday Mail Ltd* [2004] EWHC 359 (QB) (Northern Irish footballer suing Scottish newspaper); *El Dirany v Hansen* [2011] EWHC 2077 (QB) (British solicitor suing Norwegian journalist and Norwegian police officer); *Adelson v Anderson* [2011] EWHC 2497 (QB) (American businessman suing American trade union official and American trade union). Adrian Briggs has described the growth in 'libel tourism' as 'spectacular' and 'pretty shameless': *The Conflict of Laws* (Oxford University Press, 2nd ed, 2008) 188. For further examples of 'libel tourism', see Robin Morse, 'Rights Relating to Personality, Freedom of the Press and Private International Law: Some Common Law Comments' (2005) 58 *Current Legal Problems* 133, 136–40; Balin, Handman and Reid, above n 4, 315–16, 318–20; Staveley-O'Carroll, above n 4, 266; Ellen Bernstein, 'Libel Tourism's Final Boarding Call' (2010) 20 *Seton Hall Journal of Sports and Entertainment Law* 205, 206-07, 210–13; Partlett and McDonald, above n 2, 487–9.

gap between American and Anglo-Australian law, increasing the political tension around 'libel tourism'. Although 'libel tourism' has not become a significant political issue between Australia and the United States in the way that it has affected Anglo-American relations, it has the potential to do so. This is because Australian defamation law is even less protective of freedom of expression than English defamation law and, under its conflict of laws rules, is more willing to assume jurisdiction over cases involving a foreign aspect than English conflict of laws rules.

Prior to the United States Supreme Court's landmark decision in *New York Times v Sullivan*,[22] American defamation law was not dissimilar to Anglo-Australian defamation law.[23] The constitutionalisation of American defamation law effected by this case marks a radical departure from the common law in a number of significant respects. In *NY Times v Sullivan*, the United States Supreme Court held that, in order to give adequate protection to the First Amendment, a public official suing a media outlet for libel needed to prove actual malice on the part of that media outlet.[24] The standard of actual malice was a difficult one to establish. The decision also deprived the plaintiff of the presumption of falsity.[25] In Anglo-Australian defamation law, once the plaintiff establishes that there has been defamatory matter published of and concerning him or her, the matter is presumed to be false and it falls to the defendant to prove the substantial truth of it, if he or she wishes to do so.[26] Subsequent United States Supreme Court decisions extended the reach of *NY Times v Sullivan* from public officials to public figures more generally, including forced public figures (that is, people who only came to public attention because something newsworthy happened to them) and private figures where the publication related to a matter of public concern.[27] Even private figures have to prove at least negligence on the part of a defendant,[28] whereas, in Anglo-Australian law, defamation remains a tort of strict liability.[29] The effect of *NY Times v Sullivan* has been to reduce dramatically the volume of defamation litigation in the United States.[30] By contrast, defamation litigation in the United Kingdom and Australia remains vigorous, reflecting the higher level of legal protection to reputation afforded in these jurisdictions.

Given the primacy that United States defamation law gives to freedom of expression, it is unsurprising that Americans perceive English defamation law as being insufficiently protective of this value. However, if they compared English and Australian defamation law, they could well form the view that the former is more protective of freedom of expression than the latter.

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22 376 US 254; 84 S Ct 710 (1964) ('*NY Times v Sullivan*').

23 See, eg, *Chaplinsky v State of New Hampshire* 315 US 568, 571–2; 62 S Ct 766, 769 (Murphy J).

24 *NY Times v Sullivan*, 376 US 254 (1964) 279–80; 726 (Brennan J).

25 See, eg, *Garrison v State of Louisiana*, 379 US 64, 74; 85 S Ct 209, 215 (1964) (Brennan J); *Philadelphia Newspapers Inc v Hepps*, 475 US 776, 775–6; 106 S Ct 1558 , 1563 (1986) (O'Connor J).

26 *Roberts v Camden* (1807) 9 East 93; (1807) 103 ER 508, 509 (Lord Ellenborough CJ); *Singleton v French* (1986) 5 NSWLR 425, 442 (McHugh JA). See also Dario Milo, *Defamation and Freedom of Speech* (Oxford University Press, 2008) 156; Patrick Milmo and W V H Rogers (eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 11th ed, 2008) [11.3].

27 *Curtis Publishing Co v Butts*, 388 US 130, 155; 87 S Ct 1975, 1991 (1967) (Harlan J); *Gertz v Robert Welch Inc*, 418 US 323, 345, 351; 94 S Ct 2997, 3009, 3013 (1974) (Powell J).

28 *Gertz v Robert Welch Inc*, 418 US 323, 347–8; 94 S Ct 2997, 3010–11 (Powell J).

29 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, [25] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

30 See, eg, Michael Newcity, 'The Sociology of Defamation in Australia and the United States' (1991) 26 *Texas International Law Journal* 1, 63–4. The position has not changed in the intervening two decades.

Australian defamation law has little direct protection of freedom of expression; its principles embody a balance between freedom of expression and the protection of reputation but the balance is tilted in favour of reputation. During the 1990s, the High Court of Australia recognised the implied freedom of political communication, derived from the text and structure of the *Commonwealth Constitution*.[31] The impact of the implied freedom of political communication on Australian defamation law was settled in the High Court's decision in *Lange v Australian Broadcasting Corporation*.[32] In this case, the High Court unanimously found that Australian defamation law provided inadequate protection of political and governmental speech. Thus, an adaptation of the common law defence of qualified privilege was required to accommodate the implied freedom of political communication.[33] Where a publication relates to a governmental or political matter, a defendant could have a defence so long as it establishes that it had acted reasonably in the circumstances of publication.[34] The subsequent attempts at applying '*Lange* qualified privilege' have been largely unsuccessful.[35] Its promise at the level of principle has not been fulfilled in practice.

At the same time, English defamation law has also reassessed its treatment of freedom of expression. Since the enactment of the *Human Rights Act 1998* (UK), which introduced the *European Convention on Human Rights*[36] into domestic laws, English courts have had to grapple with the issue of whether English defamation law provides adequate protection for freedom of expression. In its first consideration of the impact of the *Human Rights Act 1998* (UK) on defamation law, the House of Lords was invited to follow the High Court's decision in *Lange v ABC* and provide an adapted defence of qualified privilege attaching to governmental or political speech. However, the House of Lords rejected this, finding that there was no reason in principle to distinguish between governmental or political speech and other forms of speech relating to matters of public interest. Their Lordships therefore extended the common law defence of qualified privilege to protect responsible journalism on matters of public interest.[37] The subsequent application of the *Reynolds* privilege has resulted in a number of decisions in favour of defendants exercising their freedom of expression.[38] The difference between the Australian and English approaches is probably not limited to the articulation of principle but also includes the more beneficial approach adopted by English judges in their application of the defence.[39] If the American perception

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31 The key cases in which this doctrine was developed are *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106.

32 (1997) 189 CLR 520 ('*Lange v ABC*'). This case resolved the difficulties created by the division of opinion in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

33 *Lange v ABC* (1997) 189 CLR 520, 569.

34 Ibid 571–3.

35 See, eg, *John Fairfax Publications Pty Ltd v O'Shane* (2005) Aust Torts Reports ¶81-789, 67,468-67,469 (Giles JA), 67,485-67,487 (Young CJ in Eq); *Obeid v John Fairfax Publications Pty Ltd* (2006) 68 NSWLR 150, 164–71 (Hoeben J); *Lewincamp v ACP Magazines Ltd* [2008] ACTSC 69 (23 July 2008), [219]–[248] (Besanko J). Cf *Brander v Ryan* (2000) 78 SASR 234, 249–50 (Lander J); *Cornwall v Rowan* (2004) 90 SASR 269, 414–16.

36 *European Convention on Human Rights*, Rome, signed 4 November 1950 (entered into force 3 September 1953).

37 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 204–5 (Lord Nicholls), 217 (Lord Cooke), 237 (Lord Hobhouse).

38 See, eg, *Bonnick v Morris* [2003] 1 AC 300; *Jameel v Wall Street Journal Europe SprL (No 3)* [2007] 1 AC 359; *Roberts v Gable* [2008] QB 502; *Charman v Orion Publishing Group Ltd* [2008] 1 All ER 750; *Flood v Times Newspapers Ltd* [2012] 2 WLR 760.

39 See, eg, *Jameel v Wall Street Journal Europe SprL (No 3)* [2007] 1 AC 359, 384 (Lord Hoffmann); *Seaga v Harper* [2009] 1 AC 1, 12.

is that English defamation law is inimical to freedom of expression, that view could legitimately be even more strongly held about Australian defamation law.

It is not only in relation to the substance of defamation law that American and Anglo-Australian law diverges in ways which are likely to produce tensions about 'libel tourism'. The conflict of laws rules and the way in which they apply to multistate defamation also create problems. Indeed, it is arguable that the differences in conflict of laws rules, rather than defamation law, more readily facilitate 'libel tourism'.[40] A notable difference between American and Anglo-Australian conflict of laws rules relating to defamation is that the United States has a 'single publication' rule,[41] whereas a long-standing feature of Anglo-Australian law is the 'multiple publication' rule. The 'multiple publication' rule, derived from the decision in *Duke of Brunswick v Harmer*,[42] treats each communication of defamatory matter to a recipient as a separate publication. Therefore, there are as many publications as there are recipients. If the recipients are located in more than one jurisdiction, there is publication in each of those jurisdictions.[43] Thus, claims in multistate defamation in Anglo-Australian law have the potential to be complex, implicating, as they do, multiple legal systems.[44] By contrast, in the United States, 'a single publication' rule prevails. The 'single publication' rule deems all dissemination of the same defamatory matter, wherever occurring, as giving rise to only one cause of action. Whereas the 'multiple publication' rule implicates multiple legal systems, the 'single publication' rule radically reduces the number of legal systems that can legitimately exercise jurisdiction over a multistate defamation claim. Although the 'multiple publication' rule has been criticised,[45] it remains part of the common law in England and Australia.[46] The presence of the 'single publication' rule in American conflict of laws is a significant difference from Anglo-Australian law — and one which is likely to contribute to American antipathy to 'libel tourism'.

Another important difference between American and Anglo-Australian law is the basis upon which a court can exercise jurisdiction over a foreign defendant. Under the relevant rules of court in the United Kingdom and Australia, a court may order the service of

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40 Balin, Handman and Reid, above n 4, 312–13.

41 American Law Institute, *Restatement (Second) of Torts*, 1977, §577A.

42 (1849) 14 QB 185.

43 *Toomey v Mirror Newspapers Ltd* (1985) 1 NSWLR 173, 177–8 (Hunt J); *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 607, 610 (Gleeson CJ, McHugh, Gummow and Hayne JJ); *King v Lewis* [2005] EMLR 4, 57. The European Court of Human Rights has held that the 'multiple publication' rule does not infringe art 10 of the *European Convention on Human Rights*: *Times Newspapers Ltd (Nos 1 and 2) v United Kingdom* [2009] EMLR 14.

44 See, eg, *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6; (1973) 22 FLR 181.

45 See, eg, *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 619-20 (Kirby J). See also *Jameel v Dow Jones & Co Inc* [2005] QB 946, 966; Briggs, above n 21, 188.

46 *McLean v David Syme & Co Ltd* (1970) 72 SR(NSW) 513, 520 (Asprey JA), 528 (Mason and Manning JJA); (1970) 92 WN(NSW) 611, 616–17, 625; *Toomey v Mirror Newspapers Ltd* (1985) 1 NSWLR 173, 178 (Hunt J); *Jones v TCN Channel Nine Pty* Ltd (1992) 26 NSWLR 732, 736 (Hunt CJ at CL); *Berezovsky v Michaels* [2000] 1 WLR 1004, 1012 (Lord Steyn); *Loutchansky v Times Newspapers Ltd (Nos 2–5)* [2002] QB 783, 813. See also Martin Davies, Andrew Bell and Paul Brereton, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2010) [7.16]. The recent libel law reform process in the United Kingdom has not relevantly affected the 'multiple publication' rule. The national, uniform defamation laws have essentially introduced a 'single publication' rule for defamation committed within Australia. See David Rolph, 'A Critique of the National, Uniform Defamation Laws' (2008) 16 *Torts Law Journal* 207, 210–11.

initiating process on a foreign defendant if the tort was committed within the forum.[47] Given the 'multiple publication' rule, this condition can be readily satisfied. In the United States, there are additional constraints on courts exercising jurisdiction over foreign defendants, flowing from constitutional considerations. A court must be satisfied that there are 'minimum contacts' with the forum[48] or that the forum was targeted by the publication, such that the 'effects' will be felt there.[49] These additional considerations make it more difficult for United States courts to exercise jurisdiction over foreign defendants than English or Australian courts confronted with the same issue.

If English courts are readier to assume jurisdiction over multistate defamation claims than American courts, then Australian courts are even readier, when regard is had to the differences between English and Australian law. A notable divergence between English and Australian conflict of laws rules is the doctrine of *forum non conveniens*. An English court will decline to exercise jurisdiction if it can be demonstrated that there is a more appropriate forum.[50] The High Court of Australia has rejected this formulation of principle, instead preferring a test that a local court can only decline to exercise jurisdiction if it can be established that it is a clearly inappropriate forum.[51] Thus, Australian courts are more protective of their jurisdiction and less likely than English courts to divest themselves of it.

Another important difference which has developed between English and Australian law in relation to the exercise of jurisdiction over multistate defamation claims is the principle derived from the English Court of Appeal's decision in *Jameel v Dow Jones & Co Inc*.[52] In that case, the Court found that a local court could only exercise jurisdiction over a defamation claim with significant foreign aspects if it were satisfied that a real and substantial tort had been committed within the forum.[53] In *Jameel*, the claimant could only point to five subscribers in England who had downloaded the article in question, three of whom were connected to the claimant, including one who was the claimant's solicitor.[54] Related to this is the decision in *Al Amoudi v Brisard*,[55] in which Gray J held that, in relation to an internet publication, there was no presumption of substantial publication within the forum. Rather, the claimant had to prove that substantial publication had occurred.[56]

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47 See, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 11.2(1) sch 6(d); *Civil Procedure Rules* (UK) r 6.36, Practice Direction 6B s 3.1(9)(a). Service of originating process outside the jurisdiction may also be effected if damage from a tort committed outside the jurisdiction is suffered within the jurisdiction. See, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 11.2(2) sch 6(e); *Civil Procedure Rules* (UK) r 6.36, Practice Direction 6B s 3.1(9)(b).

48 See, eg, *Keeton v Hustler Magazine Inc*, 46 US 770, 775–6; 104 S Ct 1473, 1478 (1984) (Rehnquist J); *Blumenthal v Drudge*, 992 F Supp 44, 57–8 (DDC 1998); *Remick v Manfredy*, 238 F 3d 248, 255 (3rd Cir 2001).

49 See, eg, *Calder v Jones*, 465 US 781, 788-90; 104 S Ct 1482, 1486–7 (Rehnquist J); *Blumenthal v Drudge*, 992 F Supp 44, 56–7 (DDC 1998); *Remick v Manfredy*, 238 F 3d 248, 258–9 (3rd Cir 2001); *Young v New Haven Advocate*, 315 F 3d 256, 263–4 (4th Cir 2002); *Fielding v Hubert Burda Media Inc*, 415 F 3d 419, 425 (5th Cir 2005).

50 See, eg, *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 480–1 (Lord Goff). See also *Lubbe v Cape Plc* [2000] 1 WLR 1545, 1553–4 (Lord Bingham). For a rare example of an English court declining to exercise jurisdiction over a multistate defamation claim on the ground of *forum non conveniens*, see *Chadha v Dow Jones & Co Inc* [1999] EMLR 724.

51 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 241–55 (Deane J), 264–6 (Gaudron J); *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 556–61 (Mason CJ, Deane, Dawson and Gaudron JJ); *Henry v Henry* (1996) 185 CLR 571, 586–7 (Dawson, Gaudron, McHugh and Gummow JJ); *Regie Nationale Des Usines Renault SA v Zhang* (2002) 210 CLR 491, 503–4 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Puttick v Tenon Ltd* (2008) 238 CLR 265, 276–7 (French CJ, Gummow, Hayne and Kiefel JJ).

52 [2005] QB 946 ('*Jameel*').

53 Ibid 963–71.

54 Ibid 956–7.

55 [2007] 1 WLR 113; [2006] EWHC 1062 (QB).

56 Ibid 120, 123.

Subsequently, the principle in *Jameel* in particular has been applied, to mixed effect.[57] Nevertheless, it provides English courts with an additional ground upon which to refuse to exercise jurisdiction over multistate defamation claims, which is not yet available to Australian courts.

Thus, it is not only the differences between American and Anglo-Australian defamation law which contribute to the tensions about 'libel tourism' but also the differences in relation to conflict of laws rules. If the differences between American and English law are stark, the contrast between American and Australian law on these issues is even starker.

There is another doctrine of private international law which is common, in principle, to American and Anglo-Australian law but differs in substance and which is highly relevant to the issue of 'libel tourism'. Even if a 'libel tourist' obtains a judgment against a foreign defendant in a forum in which the defendant is not ordinarily resident or does not conduct business, there remains the matter of enforcing the judgment. It is a well-established principle of United States and Anglo-Australian conflict of laws rules that a judgment will not be enforced if the judgment contravenes the public policy of the forum.[58] Before *Ehrenfeld v Bin Mahfouz* and the legislative reforms this litigation provoked, United States courts refused to enforce foreign libel judgments on the ground that such judgments were invariably repugnant to the public policy of the United States, specifically the freedom of speech protected by the First Amendment.[59] Whether the legislation enacted in response to *Ehrenfeld v Bin Mahfouz* represents an advance on this position is an important question.

## IV Ehrenfeld v Bin Mahfouz

The case which brought the issue of 'libel tourism' into prominence and prompted the legislative response in the United States was the decision in *Bin Mahfouz v Ehrenfeld*.[60] Khalid Bin Mahfouz was a prominent Saudi businessman with worldwide commercial interests. He and his two sons, Abdul Rahman Bin Mahfouz and Sultan Bin Mahfouz, were officeholders in the National Commercial Bank of Saudi Arabia, a financial institution established by Khalid Bin Mahfouz's father.[61] Rachel Ehrenfeld, an expert on terrorism and a director of the American Center for Democracy, wrote a book, *Funding Evil: How Terrorism is Financed — And How to Stop It*, which was published by the United States publisher, Bonus Books.[62] In her book, Ehrenfeld alleged that the Bin Mahfouz family was involved in the funding of terrorism and that the National Commercial Bank of Saudi Arabia was used as a conduit to direct funds into Al Qaeda.[63] Only 23 copies of the book were sold in the United Kingdom, through online bookstores.[64] The first chapter was also accessible in the United Kingdom because it had been posted on the United States-based

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57 See, eg, *Lonzim Plc v Sprague* [2009] EWHC 2838 (QB); *Davison v Habeeb* [2011] EWHC 3031 (QB). Cf *Al Amoudi v Kifle* [2011] EWHC 2037 (QB). See also *Mahfouz v Brisard* [2006] EWHC 1191 (QB).

58 See, eg, *Oppenheimer v Cattermole* [1976] AC 249; *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1078 (Lord Nicholls), 1109 (Lord Hope).

59 See, eg, *Bachchan v India Abroad Publications Inc*, 585 NYS 2d 661 (1992); *Matusevitch v Telnikoff*, 877 F Supp 1 (DDC 1995).

60 [2005] EWHC 1156 (QB).

61 Ibid [6]–[10].

62 Ibid [12]–[13].

63 Ibid [16]–[18].

64 Ibid [14], [22].

ABC News website,[65] although the number of hits from the United Kingdom it received was unascertainable.[66]

Bin Mahfouz and his sons commenced libel proceedings in the High Court of Justice against Ehrenfeld and Bonus Books. The Bin Mahfouz family had formerly had business interests in the United Kingdom and claimed to be well-known there.[67] Although Ehrenfeld and Bonus Books were duly served with initiating process, they did not appear in the proceedings.[68] Consequently, the claimants obtained default judgment against Ehrenfeld and Bonus Books.[69] Eady J was at pains to set out the opportunities given to Ehrenfeld and Bonus Books and the arguments put forward by the Bin Mahfouz family in anticipation of a defence of justification,[70] seeking to demonstrate how 'flimsy and unreliable' such a defence would have been.[71] His Lordship noted articles in *The Jerusalem Post*, which sought to cast Ehrenfeld as the victim, suggesting that Bin Mahfouz had used his wealth and exploited England's pro-plaintiff libel laws to stifle Ehrenfeld's exercise of free speech.[72] Eady J characterised this article thus:

> The purpose of this exercise is fairly obvious, namely to give the impression that any judgment of the English court is of little significance and does nothing to establish that the allegations are false. That is why it is so important, as the claimants appreciate, to go through such allegations as have been made against them in the past on behalf of these defendants in order to demonstrate their lack of merit. That is why this judgment has gone to such length. It is not a purely formal process and the declaration of falsity which I propose to grant shortly is not an empty gesture.[73]

His Lordship made the declaration of falsity, made permanent the interim injunction and awarded the maximum damages available under the summary procedure in the *Defamation Act 1996* (UK), being £10,000 for each claimant.[74]

Before Eady J handed down his judgment on damages, Ehrenfeld commenced separate proceedings in the United States District Court, seeking declarations that the allegations about Bin Mahfouz were not defamatory under United States law and that Bin Mahfouz's English libel judgment was unenforceable in the United States.[75] Ehrenfeld claimed that the judgment against her had itself tarnished her reputation and had caused her to self-censor her work.[76] At first instance, Casey J found that the court had no personal jurisdiction over Bin Mahfouz, so granted Bin Mahfouz's motion to dismiss the proceedings.[77] An appeal to the Second Circuit of the United States Court of Appeals was certified to the New York Court of Appeals, as the argument as to personal jurisdiction

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65 Ibid [15], [22].
66 Ibid [23].
67 Ibid [7], [11].
68 Ibid [4], [19]–[20].
69 Ibid [20].
70 Ibid [24]–[67].
71 Ibid [73].
72 Ibid [68]–[71].
73 Ibid [72].
74 Ibid [74]–[75].
75 *Ehrenfeld v Bin Mahfouz* (unreported, United States District Court, SDNY, No 04 Civ 9641 (RCC), 26 April 2006); 2006 WL 1096816.
76 Ibid 2.
77 Ibid 6.

turned, in part, on the interpretation of New York's 'long-arm' statute and thus raised an unsettled question of State law.[78] The New York Court of Appeals found that the steps Bin Mahfouz took in New York to serve documents relating to the English libel proceedings did not constitute 'transacting business' in New York so as to allow a New York court to exercise jurisdiction over him under that state's 'long-arm' statute.[79]

## V The American Legislative Response to 'Libel Tourism'

Bin Mahfouz's libel proceedings against Ehrenfeld prompted a swift legislative response in the United States. In 2008, New York enacted the *Libel Terrorism Protection Act* (also known as 'Rachel's Law').[80] The legislation has two effects. The first seeks to overcome the effect of the New York Court of Appeals' decision in *Ehrenfeld v Bin Mahfouz*, by conferring on the courts of New York personal jurisdiction over a claimant who has obtained a defamation judgment against a New York resident or an entity with assets in New York, so as to allow the courts to grant declaratory relief in relation to the defamation judgment. In order to grant such declaratory relief, the publication which was the subject of the defamation judgment must have been published in New York or the defendant to that defamation judgment has assets in New York or would need to take actions in New York to comply with the defamation judgment.[81] The second renders unenforceable by courts in New York a foreign defamation judgment unless it is determined that the place where the defamation judgment was obtained provided at least as much protection for freedom of speech and freedom of the press as the United States and the New York Constitutions.[82] Given that courts of New York could already refuse to recognise and enforce foreign judgments on the ground that they were repugnant to public policy[83] and that United States courts had already demonstrated their willingness to treat judgments inconsistent with the First Amendment protections of freedom of speech as repugnant to public policy,[84] it is arguable that the latter reform was redundant. The *Libel Terrorism Protection Act 2008* (NY) was passed unanimously. Indeed, the unanimous passage of legislation directed at eradicating 'libel tourism' at a state and a national level in the United States has been a feature of all such votes, reaffirming the strength of Americans' commitment to free speech.

After the passage of the *Libel Terrorism Protection Act 2008* (NY), a number of other states enacted or proposed their own 'libel tourism' legislation, including Illinois, Florida, California, Arizona, Hawaii, Maryland, New Jersey, Tennessee and Utah.[85]

The problem of 'libel tourism' has also been addressed by national legislation. In 2008 and 2009, there were bills on this issue presented to the United States Congress and Senate,

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78 *Ehrenfeld v Bin Mahfouz*, 489 F 3d 542 (2nd Cir 2007).

79 *Ehrenfeld v Bin Mahfouz*, 881 NE 2d 830 (NY 2007). For an earlier and equally unsuccessful attempt at obtaining similar relief, see *Dow Jones & Co Inc v Harrods Ltd*, 237 F Supp 2d 394 (SDNY 2002), aff'd 346 F 3d 357 (2nd Cir 2003).

80 *Libel Terrorism Protection Act 2008* (NY) S 6687/A 9652. For an explanation of the use of the term, 'libel terrorism', see Tara Sturtevant, 'Can the United States Talk the Talk and Walk the Walk when it Comes to Libel Tourism: How the Freedom to Sue Abroad Can Kill the Freedom of Speech at Home' (2010) 22 *Pace International Law Review* 269, 291–2.

81 *Civil Practice Law and Rules* (NY) §302(4)(d).

82 Ibid §5304(8).

83 Ibid §5304(4).

84 See above nn 58–9 and accompanying text.

85 See, eg, *Code of Civil Procedure* (Ca) §§1716(c)(9), 1717(c); *Florida Statutes* (Fla) §§55.605(2)(h), 55.6055; *Code of Civil Procedure* (Ill) §2-209(b-5).

which were ultimately not enacted. The most controversial aspect of the second bill was the proposed creation of a federal cause of action allowing any United States citizen sued for defamation in a foreign country to bring proceedings in the United States District Court, not only to secure the non-recognition of the foreign defamation judgment but also to allow the United States citizen to claw back the damages, as well as the costs. In addition, the bill contained a provision allowing the Court to award the United States citizen treble the damages awarded under the foreign defamation judgment if it formed the view that the foreign defamation proceedings were brought to suppress First Amendment rights. Such a cause of action, if enacted, would have been a significant challenge to comity. Academic commentators in the United States had a mixed reaction to this aspect of the proposed reforms.[86]

The form of the legislation ultimately enacted to address 'libel tourism' lacked this contentious provision. In 2010, the United States Congress and Senate unanimously passed, and President Barack Obama signed into law, the *Securing the Protection of our Enduring and Established Constitutional Heritage Act* (known as the '*SPEECH Act*'). The SPEECH Act provided that a foreign defamation judgment was not to be enforced by a domestic court unless the defamation law applied in the foreign defamation judgment provided at least as much protection as the First Amendment of the United States Constitution and the Constitution of the state in which it was sought to be enforced or unless the defendant would have been found liable for defamation by a domestic court.[87] In addition, it provided that a foreign defamation judgment not be enforced by a domestic court unless that court was satisfied that the requirements for personal jurisdiction in that state were met.[88] It further created a cause of action for declaratory judgment. Any United States person against whom a foreign defamation judgment had been obtained could bring an action in the United States District Court, seeking to have the foreign defamation judgment declared repugnant to the Constitution and laws of the United States.[89] Since its passage, the *SPEECH Act* has already been applied to ensure the non-recognition of at least one foreign defamation judgment.[90]

The legislation ultimately passed was not as extreme as some of the proposed measures. It may be viewed as making explicit what was already understood about the non-enforceability of foreign defamation judgments by United States courts. The creation of a federal cause of action to allow United States citizens to seek declaratory relief, to ensure their protection of their First Amendment rights within the United States, is the most significant aspect of these reforms. Such a cause of action, and the balancing of competing interests it reflects, does not seek to export or superimpose the exceptional approach to freedom of speech adopted by United States constitutional law on other jurisdictions with

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86 For support, see Staveley-O'Carroll, above n 4, 290 (double); Sturtevant, above n 80, 294–6; Bernstein, above n 21, 223–4. For criticism, see, eg, Daniel C Taylor, 'Libel Tourism: Protecting Authors and Preserving Comity' (2010) 99 *Georgetown Law Journal* 189, 219–21; Doug Rendleman, 'Collecting a Libel Tourist's Defamation Judgment?' (2010) 67 *Washington and Lee Law Review* 467, 486–7; Robert L McFarland, 'Please Do Not Publish This Article in England: A Jurisdictional Response to Libel Tourism' (2010) 79 *Mississippi Law Journal* 617, 666. See also Hartley, above n 11, 34 (while the non-enforcement of foreign defamation judgments is acceptable, the cause of action for treble the damages awarded might 'invite retaliation').

87 28 USC §4102(a)(1).

88 Ibid §4102(b)(1).

89 Ibid §4104(a)(1).

90 *Investorshub.com Inc v Mina Mar Group Inc* (unreported, United States District Court, Northern District of Florida, Tallahassee Division, Case No: 4:11cv9-RH/WS, Judge Robert L Hinkle, 20 June 2011).

markedly different protections of the same value.[91] Nonetheless, the legislation, both at the state and at the national level, against indicates the strength and depth of Americans' commitments to their constitutional variant of freedom of speech.

## VI The United Kingdom Legislative Response to 'Libel Tourism'

It is not only in the United States that there has been a legislative response to the issue of 'libel tourism'. The United Kingdom's recent libel law reform process has sought to introduce measures designed to discourage 'libel tourism' as well. In significant measure, this has been motivated by the legislative initiatives in the United States but has also been stimulated by a recognition in the United Kingdom itself that 'libel tourism' is a problem.

In 2009, English PEN and Index on Censorship produced an influential joint report, *Free Speech Is Not For Sale: The Impact of English Libel Law on Freedom of Expression*.[92] In their report, the authors made a number of recommendations which, if adopted, would have had the effect of minimising the differences between American and English defamation law, as well as discouraging 'libel tourism'. They recommended the overturning of the presumptions of falsity and damage;[93] the abolition of the 'multiple publication' rule and its replacement with a 'single publication' rule;[94] and the requirement that a case could only brought in England if the claimant established that 10 per cent of the total number of copies of a publication were distributed there or, in the case of an internet publication originating from a foreign jurisdiction, that the publication had been promoted or advertised in England or Wales.[95] This latter reform was designed to overcome 'the international embarrassment of the UK being used as an international libel tribunal', as well as seeking to 'introduce a more equitable system for hearing libel cases in an age of global communication'.[96] This report was influential in initiating the current libel law reform process and English PEN and Index on Censorship have been important in maintaining the process' momentum.

Also in 2009, the Secretary of State for Justice, Jack Straw, established a Libel Working Group to consider libel law reform, specifically identifying in its terms of reference 'libel tourism' as a problem requiring attention. The Libel Working Group consulted widely among the legal profession, the media, academia and non-governmental organisations.[97] It was unable to reach a consensus as to whether 'libel tourism' was a real problem, which was perhaps unsurprising, given its diverse composition.[98] As part of its report, it published the best evidence it has relating to 'libel tourism'. Of the 214 defamation claims filed in the High Court of Justice of England and Wales in 2009, 34 cases were identified as having a foreign connection. Interestingly, all of those claims involved at least one party

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91 See, eg, Mark D Rosen, 'Exporting the Constitution' (2004) 53 *Emory Law Journal* 171, 232; David F Partlett, 'The Libel Tourist and the Ugly American: Free Speech in an Era of Modern Global Communications' (2008) 67 *University of Louisville Law Review* 629, 658–60. However, cf Lee C Bollinger, *Uninhibited, Robust and Wide-Open: A Free Press for a New Century* (Oxford University Press, 2010).

92 Jo Glanville (ed), *Free Speech Is Not For Sale: The Impact of English Libel Law on Freedom of Expression* (2009) The Libel Reform Campaign <http://www.libelreform.org/our-report#>.

93 Ibid Recommendation 1.

94 Ibid Recommendation 3.

95 Ibid Recommendation 4.

96 Ibid 9.

97 Ministry of Justice, *Report of the Libel Working Group* (2010) 3.

98 Ibid [3]–[10], Conclusion.

who was located within the European Union.[99] Rather than legislation, the Libel Working Group recommended that 'libel tourism', to the extent that it was a problem, should be addressed by tightening the form and the application of procedural rules relating to service out of the jurisdiction, so as to minimise abuses of process and to ensure that proceedings have a real and substantial connection to England and Wales.[100]

Rather than reforming procedural rules, though, subsequent reforms have focused on a legislative solution. In 2010, Lord Lester of Herne Hill, a Liberal Democrat peer, introduced a private member's bill on defamation. As part of the bill, concerns about 'libel tourism' were addressed. Lord Lester's proposed reforms sought consciously to augment the existing common law position in England following *Jameel*, allowing a court to strike out defamation proceedings where the claimant fails to establish the publication has caused or is likely to cause substantial harm to the plaintiff's reputation.[101] In addition, they also introduce the concept that no harm is caused within the United Kingdom by matter published elsewhere unless the publication in the United Kingdom causes substantial harm to the claimant's reputation, taking into account the extent of the publication elsewhere.[102] In the explanatory notes, Lord Lester explained the import of this reform:

> This means that a claimant would have no cause of action in this jurisdiction where the defamation had been widely published elsewhere and the impact of publication in this jurisdiction was insignificant. The outmoded presumption is no longer enough to found the cause of action.'[103]

Lord Lester's private member's bill was superseded by the general election in May 2010. The Conservative and Liberal Democrat parties both committed, in their respective election manifestos, to libel law reform. The Conservative Party specifically committed to discouraging 'libel tourism'.[104] The Coalition Government, formed between the Conservatives and the Liberal Democrats, introduced a draft defamation bill in March 2011. In his written ministerial statement, the Lord Chancellor, Kenneth Clarke, identified taking action against 'libel tourism' as one of the key purposes of the bill. Having released the draft bill, the government undertook a consultation. In particular, the Joint Committee on the Draft Defamation Bill received written and oral evidence between April and July 2011. In its report, released in October 2011, it made some recommendations modifying the relevant clauses[105] but these were largely rejected by the government in its published response to the report.[106]

In May 2012, libel law reform was announced as a key government initiative in the Queen's Speech at the State Opening of Parliament.[107] On the following day, the Defamation Bill 2012 (UK) received its first reading to the House of Commons. The relevant clause only permits a court to exercise jurisdiction in a claim against a person not domiciled in the European Union if the court is satisfied that, of all the places where the

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99 Ibid Annexure B.
100 Ibid Conclusion.
101 Defamation Bill 2010 (UK) cl 12.
102 Ibid cl 13.
103 Defamation Bill 2010 (UK) Explanatory Notes [144].
104 *Invitation to Join the Government of Britain: The Conservative Manifesto 2010*, 79; *Liberal Democrat Manifesto 2010*, 93.
105 Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill* (2011) [56].
106 *The Government's Response to the Report of the Joint Committee on the Draft Defamation Bill* (2012) 15–17.
107 Cabinet Office, *The Queen's Speech 2012 — Briefing Notes*, 9 May 2012, 40–1.

matter was published, England and Wales is the most appropriate place in which to bring the action.[108] At the time of writing, the bill has passed the House of Commons and is currently before the House of Lords.

Thus, in addition to the refinements of principle already undertaken by English courts, the legislature has intervened to act on 'libel tourism'. Rather than necessarily responding to an empirically demonstrated need for reform, this initiative flows from principle — both a concern to protect freedom of expression and to preserve comity. It might be hoped that the English reforms go some small way, if not to overcoming the transatlantic divide on this issue, then at least to diffusing tensions.

## VII 'Libel Tourism' in Australia: The Case of *Evony v Everiss*

Although the United Kingdom is considered the principal forum for 'libel tourism', Australia is perceived as being another popular destination by United States commentators.[109] Unlike the United Kingdom, though, Australia has not yet acted to address the threat of 'libel tourism'; its defamation laws remain more favourable to plaintiffs and its conflict of laws rules are more protective of its courts exercising jurisdiction.

In addition to the celebrity claimants who have threatened or commenced defamation proceedings in Australia, there have been other instances which might be classified as 'libel tourism', particularly on the broader definition of that concept. An example of a case which proceeded to final judgment is *Cullen v White*.[110] In this case, the plaintiff, Trevor Cullen, sued the defendant, William White, a United States resident, for defamation in the Supreme Court of Western Australia.[111] Cullen and White had previously worked at the Divine Word University in Papua New Guinea.[112] White was hostile towards Cullen, which manifested itself in several websites operated by White and a series of emails sent by White to Cullen's colleagues first at the University of Queensland and later at Edith Cowan University.[113] White alleged that Cullen was a paedophile; had committed academic fraud; had falsified his academic credentials; was a 'dangerous felon'; had committed blackmail; and had falsely pretended to be a priest.[114] Although White was served with notice of the writ in the United States, he did not appear in the proceedings, so default judgment was entered against him.[115] Thus, Newnes M only had to assess Cullen's damages. His Honour accepted that White's publications harmed Cullen's reputation as an academic, interfered with his future employment prospects and caused him considerable distress, anguish and annoyance.[116] As a result, Newnes M awarded Cullen A$70 000 compensatory damages.[117]

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108 Defamation Bill 2012 (UK) cl 9.

109 See, eg, Raymond W Beauchamp, 'England's Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech' (2006) 74 *Fordham Law Review* 3073, 3076; Taylor, above n 86, 192; Sturtevant, above n 80, 281–2; McFarland, above n 86, 629; Andrew R Klein, 'Some Thoughts on Libel Tourism' (2011) 38 *Pepperdine Law Review* 375, 376.

110 [2003] WASC 153 (3 September 2003).

111 Ibid [1].

112 Ibid [4].

113 Ibid [6]–[7].

114 Ibid [8].

115 Ibid [1].

116 Ibid [19].

117 Ibid [20].

In addition, his Honour awarded Cullen A$25 000 exemplary damages,[118] as White had engaged in 'a campaign of deliberately offensive vilification' motivated by his 'conscious desire … to cause the plaintiff the maximum amount of damage, hurt and embarrassment'.[119] Given that White is a United States resident, it is unlikely that Cullen will ever be able to enforce the judgment. Instead, Cullen will have to rely on the reasons for judgment as sufficient vindication of his reputation.

More recently, there has been a clearer and even more controversial example of 'libel tourism' in the case of *Evony LLC v Everiss*. The plaintiff, Evony LLC, was a company incorporated in Delaware, which was in the business of online gaming. The defendant, Bruce Everiss, was a United Kingdom resident who operated a blog, 'Bruce on Games'. On his blog, Everiss was highly critical of Evony, alleging, inter alia, that Evony was associated with fraudsters, that it was exploitative of its players and that it engaged in the practice of 'gold farming' (being the process whereby poorly paid workers in countries like China play the games in order to earn currency within the game, which is then sold to players for real-world currency, in violation of the rules of game).[120] Evony did not sue Everiss in the United States or the United Kingdom but rather commenced proceedings in the Supreme Court of New South Wales. It was unclear why Evony elected to sue Everiss in New South Wales. As Everiss told Radio National's program, *The Law Report*, in an interview about the case: 'Well, I've never physically been to Australia, but I'm a keen scuba diver so I would dearly love to visit Australia.'[121]

He did not use Evony's defamation proceedings against him as a pretext to visit Australia. In the same interview, Everiss stated that his blog's fourth largest readership was in Australia but his largest readership, based in the United States, accounted for approximately 80 per cent of his total readership. Presumably, Evony elected to sue in New South Wales to take advantage of what are perceived to be the jurisdiction's plaintiff-friendly defamation laws, subject to one reservation, and the more restrictive approach in Australia to *forum non conveniens*.[122] The reservation was an important one and presented a significant obstacle to Evony being able to sue in New South Wales: under the national, uniform defamation laws, the right of corporations to sue was severely curtailed, with only corporations employing fewer than 10 full-time employees having standing to sue.[123] Thus, in order to pursue its claim in New South Wales, Evony needed to demonstrate that it employed fewer than 10 full-time employees internationally. Evony claimed its workforce complied with that limitation, notwithstanding the extent of its worldwide operations. Another significant aspect of Evony's claim was that, unlike *Dow Jones v Gutnick*, where Gutnick limited his claim to the damage to his reputation in Victoria, Evony claimed

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118 Ibid [23]. Exemplary damages are now not available for defamation under the national, uniform defamation laws. See *Defamation Act 2005* (WA) s 37 and the equivalent provisions in the other Australian jurisdictions. See also Rolph, above n 46, 242.

119 Ibid [22].

120 Bobbie Johnson, 'US Games Company Sues British Blogger', *The Guardian* (online), 11 December 2009 <http://www.guardian.co.uk/technology/2009/dec/11/evony-sues-british-blogger>.

121 ABC Radio National, 'Libel Tourism', *The Law Report*, 10 November 2009 (Bruce Everiss) <http://www.abc.net.au/radionational/programs/lawreport/libel-tourism/3081868>.

122 ABC Radio National, 'Libel tourism', *The Law Report*, 10 November 2009 <http://www.abc.net.au/radionational/programs/lawreport/libel-tourism/3081868>.

123 See *Defamation Act 2005* (NSW) s 9 and the equivalent provisions in the other Australian jurisdictions. See also Rolph, above n 46, 215–20; David Rolph, 'Corporations' Right to Sue for Defamation: An Australian Perspective' (2011) 22 *Entertainment Law Review* 195.

damages in the New South Wales proceedings for the damage done to its reputation internationally, as its solicitor informed *The Law Report*.[124]

The matter went to hearing, at which an application was made on behalf of Everiss that the proceedings be stayed because the Supreme Court of New South Wales was *forum non conveniens*. After two days of hearing, however, the matter was abruptly settled. According to a statement released by Evony, it reached the decision to settle after criticism of its defamation proceedings by its users. However, *The Guardian* newspaper reported that Evony's case had begun to break down in important respects as a result of cross-examination of its witnesses.[125]

Although *Evony LCC v Everiss* did not proceed to final judgment, it does indicate that overseas litigants are aware of the potential advantages of suing for defamation in Australian courts. It also suggests that they might not be aware of some of the restrictions that exist under Australian law. On balance, Australian courts are a reasonably attractive venue for 'libel tourists'. Given the globalised and networked nature of modern communications, 'libel tourism' might be a phenomenon Australian courts will have to deal with increasingly. It is also worth addressing in future defamation law reform processes.

## VIII Conclusion

'Libel tourism' raises difficult, seemingly insoluble, issues, based on fundamental differences as to the appropriate balance between freedom of speech and the protection of reputation and the applicable principles governing jurisdiction. Empirically, it may not be a significant phenomenon but it has warranted some form of response in order to address the tensions in Anglo-American relations. Whether a legislative solution is efficacious is doubtful — the differences in defamation law and conflict of laws rules between these two legal systems are well established and unlikely to change in the near future, and rapid developments in internet technologies will continue to provide opportunities for multistate defamation. However, recent developments in the United Kingdom in relation to jurisdiction, both at common law and under statute, may reduce slightly the appeal of English courts as a destination for 'libel tourists'. Other jurisdictions may then prove to be a more attractive prospect for such litigants. Australia's defamation laws and its principles governing jurisdiction are more sympathetic to 'libel tourists' than English law now is. Despite its geographical isolation, Australia may yet have to grapple with the problem of 'libel tourism'.

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124 ABC Radio National, above n 122.

125 Charles Arthur, 'Evony Drops Libel Case Against British Blogger Bruce Everiss', *The Guardian* (online), 31 March 2010 <http://www.guardian.co.uk/technology/2010/mar/31/evony-libel-case-bruce-everiss>.