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Transnational Media Law at the Bar and in the Classroom

Jack M. Weiss*

Good morning, it is a pleasure to be here. As a media lawyer, I must say that it is a particular thrill to be on a panel and not to be talking about Valerie Plame and Judy Miller. It is also a pleasure to see many of my old friends here. Kevin Claremont pointed out to me that our outlines are back to back in the materials that have been distributed this morning. It is the first time our outlines have been back to back since we were in the same study group in law school some thirty-five years ago. At the other end of the spectrum, I see Hari Osofsky. The last time I spoke to Hari, she was a senior in college and thinking about going to law school. She called to ask me what I thought about that enterprise, and, of course, the rest is history.

I've represented news organizations in the practice of law for nearly thirty years. I spent most of my career practicing in Louisiana. I moved to New York about eight years ago when Bob Sack, with whom I co-teach a seminar on media law at Columbia Law School as an adjunct, was named to the Second Circuit. I took Judge Sack's place as the primary outside counsel for Dow Jones & Company and *The Wall Street Journal*, and that was really the reason I moved to New York. Frankly, until I moved to New York, and during my many years of teaching in Louisiana as an adjunct, it never occurred to me to incorporate international materials into my courses. This wasn't simply a matter of parochialism. Eight or ten years ago, there was no compelling need or practical force that drove the incorporation of international materials into the teaching of media law.

That has all changed now, however. I think it is fair to say that the linchpin of that movement has been the near-universal distribution of the content of American publishers on the internet and the resulting explosion of the involvement of those publishers in litigation abroad, particularly in the United Kingdom and former Commonwealth

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countries. Today, virtually every American publisher posts its content on the internet. By doing so, the publisher may well subject itself to the laws of other countries where the content can be accessed on the web. Just to give you an idea of the metrics of this, to the best of my recollection, Dow Jones has been sued for libel three times in the United States during my seven and one-half year tenure in New York. In the same period of time, the company has been sued at least five times abroad, and three of those cases have gone to trial. So, content litigation outside of the United States is very obviously a matter of practical importance. As an adjunct teacher of media law, it seemed to me that if we were to give our students any kind of foundation for what they might expect in this area of practice, we needed to expose them to the international dimension of the problem.

In particular, our focus is the libel law of the United Kingdom and Commonwealth countries and related problems. As you know, London is often described as “the libel capital of the world.” One commentator has referred to what he calls “the vast libel industry” in London. For those you who may not know it, there are actually one or two sections of the High Court in London that are specifically devoted to the trial of libel cases. So, if you are in London and so inclined, you can drop in on one of these sections and actually observe an English libel trial most any day.

English law has relevance to our students for two reasons in particular. First, the U.K.’s substantive law of libel is far less protective of speech than U.S. law, which is limited by the First Amendment principles of *Sullivan*¹ and *Gertz*² and succeeding cases. It is the defendant’s burden in the United Kingdom to prove truth, not the plaintiff’s burden to prove falsity. Libel is a no fault tort, and there is no privilege resembling our *Sullivan* privilege for erroneous statements about public figures or public officials.³ The second reason why I think it is important for our students to be acquainted with these principles of law is that the United Kingdom and other Commonwealth countries apply very aggressive principles of personal jurisdiction in accepting and retaining jurisdiction over these cases. In the *Gutnick* case against Dow Jones,⁴ the High Court of Australia specifically rejected the argument that jurisdiction over internet publication should be limited to the state where the content is created, uploaded, or first published. The court said,

1. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

2. *Gertz v. Welch*, 418 U.S. 323 (1974).

3. *Sullivan*, 376 U.S. at 279-80. *But see* the decision of the House of Lords in *Jameel v. Wall Street Journal Europe*, [2006] UKHL 44 (reinterpreting “responsible journalism” defense and holding that the defense should not be sustained only after the “closest and most rigorous scrutiny”, but applied in a “practical and flexible manner”).

4. *Dow Jones & Co. v. Gutnick* (2002) 210 C.L.R. 575.

in terms hostile to the U.S. media, that to accept that principle would be to relegate non-U.S. “victims of libel” to an extension of “U.S. hegemony” over publishing law. For the most part, United Kingdom and Commonwealth courts only require minimal publication in the foreign state and allow virtually anyone, even non-residents, to sue for libel against non-U.S. publishers. For example, Russian tycoon Boris Berezovsky successfully sued Forbes magazine in London although, of course, he didn’t live in London.⁵ He simply asserted that he had a reputation to protect in England. And more recently, Don King, the boxing promoter and American public figure, has been permitted to proceed with a libel action in London against a New York-based American lawyer who commented on King to two American boxing magazines that then posted the content on the Internet.⁶ We have an American public figure suing another American in the courts of the United Kingdom. As a practical matter, then, media law professors would leave students poorly equipped without exposure to international principles and particularly the jurisdictional reach of U.K. courts.

This is, by the way, not simply a matter for the top media outlets in the United States. For example, the Lexington, Kentucky newspaper, which happens to be owned by Knight Ridder, was sued in Cyprus by a Cypriot-American doctor who was the subject of a local investigative piece published in the Lexington newspaper.

Other than simply its practical importance, it is also important to teach this material in a media law course because it is interesting and rapidly evolving. I think it is fair to say that U.S. libel law since the decade between *Sullivan* in 1964 and *Gertz* in 1974 has been largely stable and interstitial. There was concern at one point that the Supreme Court might prune back the extent of the First Amendment protection for libel. In fact, in my view, pretty much the opposite has proven to be true. In *Milkovich*,⁷ the court reaffirmed the basic principles of *Sullivan* and *Gertz*. In contrast, the English law of libel is rapidly evolving and in a state of great flux with the adoption of the Human Rights Act in the United Kingdom.⁸ The Act incorporated the European Convention on Human Rights into libel litigation and other legal disputes involving speech in the United Kingdom. The courts of the United Kingdom, even as we speak, are struggling with the meaning of that new important principle. So, by looking at English cases, we give our students an opportunity to look at libel law in flux. Students have a chance to see

5. Berezovsky v. Michaels, [2000] 1 W.L.R. 1004 (H.L.).

6. King v. Lewis [2004] EWHC 168 (Q.B.).

7. Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).

8. Human Rights Act, 1998, c. 42 (U.K.).

judges making choices on the cutting edge of a body of law which has been well established in the United States for quite a long time.⁹

I want to touch briefly on some areas that we incorporate into our course in order to present the kinds of issues and concerns that they provoke. In the course of making this list, I became aware that in teaching media law I have another objective, as you all do, when teaching specialized courses. We not only want to convey the important principles of a particular body of substantive law, but we want to expose our students to universal or general principles that carry on to other areas of law. Example number one: I have to admit that when I was exposed to *New York Times v. Sullivan*, in my first year torts course, I really did not understand its importance. I did not really understand the common law framework against which the case was set. I did not understand, if you will, the run up to *Sullivan*. What better way to expose our students to that common law framework than to have them read a couple of classic English libel law cases. One of the cases we use is *Hulton v. Jones*.¹⁰ It is a case essentially of mistaken identity. A publisher publishes an accurate statement about X not realizing that there is another X with the same name as to whom the statement is defamatory. Under English law, it makes absolutely no difference whether that publication was entirely fault-free; it is still actionable. So, we use *Hulton* as an illustration of the no fault principle in English libel law. We also use it as a springboard to ask what it means for publishers to live under a regime in which fault is not a dimension of the tort of libel.

Now I have always liked to teach *Sullivan* because I find interesting the interplay between state and federal law that is at the heart of the case. I also love the prose of the case. But *Sullivan* is also a classic case for exploring how judges make choices in deciding constitutional cases. What better way again to get at that in a current setting than to expose the students to the current evolution in the United Kingdom of the *Reynolds* “responsible journalism” defense.¹¹ The House of Lords dramatically reinterpreted *Reynolds* in a case involving Dow Jones in 2006. The new decision, *Jameel*, may well revolutionize English libel law as much as *Sullivan* revolutionized American libel law more than forty years ago.

Again, perhaps you find it useful in your first year torts course, if you study defamation, to address the single publication rule. If we covered the single publication rule in first year torts, I confess that I

9. The recent *Jameel* decision (*see supra* note 3) is emblematic of the rapid evolution of modern English libel law.

10. *Hulton v. Jones*, [1910] A.C. 20 (H.L.).

11. *Reynolds v. Times Newspapers*, 2 A.C. 127 (H.L. 1999).

probably did not understand it very well. A wonderful way to address the single publication rule is through exposure to the famous, or perhaps infamous, 1849 *Duke of Brunswick* case.¹² In that case, the Duke sent his manservant to pick up a copy of an article from the newspaper office. He sent his servant on this errand some eighteen years after initial publication of the article. The English court held that delivery of the article to the servant, even so many years later, constituted a new, actionable publication. This highly technical “publication” was held to be actionable notwithstanding that the six-year statute of limitations had long since run; English law treats each publication as a separate and independent act giving rise to a new cause of action. *Duke of Brunswick* is now somewhat in doubt as the result of another evolving line of English case law, but, again, it is a wonderful way to illustrate the differences between our conception of libel law and that of our friends in the United Kingdom.

We also devote a block of material in our course to the jurisdictional issues that relate to international libel law. We compare the aggressive reach of U.K. and Commonwealth forums over these cases to recent U.S. Court of Appeals cases taking a far more restrictive approach to internet jurisdiction as between the states of this country. These cases include *Young v. New Haven Advocate*¹³ in the Fourth Circuit and *Revell v. Lidov*¹⁴ in the Fifth Circuit. This material provides a very nice contrast to what most Commonwealth jurisdictions are doing by way of internet jurisdiction and also provides a very useful opportunity to read and discuss closely *Calder v. Jones*,¹⁵ the leading Supreme Court case on domestic interstate jurisdiction over libel cases.

We also read and discuss the case law reflecting the refusal of U.S. courts to enforce U.K. libel judgments because enforcement of such judgments would conflict with U.S. public policy. The two leading cases are *Telnikoff v. Matusevich*¹⁶ and *Bachchan v. India Abroad Publications Inc.*¹⁷ Those cases have been questioned in the reporters’ notes to the recent American Law Institute project on international jurisdiction and judgments. We have the students read the reporters’ notes and discuss them. You can see that we are dealing with a variety of issues not simply with substantive libel law.

Finally, if time permits, we discuss the efforts of U.S. publishers to

12. *Duke of Brunswick v. Harmer*, (1849) 117 Eng. Rep. 75 (Q.B.).

13. *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002).

14. *Revell v. Lidov*, 371 F.3d 467 (5th Cir. 2002).

15. *Calder v. Jones*, 465 U.S. 783 (1984).

16. *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997).

17. *Bachchan v. India Abroad Publications Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

preemptively fend off foreign libel actions. This includes the lawsuit filed by my own client, Dow Jones, against Harrods, the English department store, in the Southern District of New York. Along these lines, there is another very interesting Southern District case in which a U.S. book author, Rachel Ehrenfeld, sued a Saudi defendant, Khalid bin Mahfouz. Ms. Ehrenfeld sought to secure a declaratory judgment that a default libel judgment entered against her in the United Kingdom would not be enforceable in the United States, even though the U.K. plaintiff has made no effort to attempt to enforce the judgment here.¹⁸ In this line of cases, we encounter additional issues like justiciability and international comity. It is useful for our students to be exposed to these issues although they do not involve substantive media law as such.

I should also note for purposes of completeness that the international law incorporated into our course is not limited to libel law. For instance, the European community actually now arguably recognizes a reporter's privilege to a greater extent than the United States, at least as a matter of federal constitutional or common law.

Now, just a few practical suggestions. In using in English or Commonwealth materials, we have found that the decisions and so called "speeches" of the judges are often quite long and discursive. The decision of the High Court of Australia in *Gutnick*, for example, is an important case, but, in its entirety, it is lengthy read for students. Therefore, we edit these cases or use excerpts from these cases as necessary.

Whenever logistics permit, we have found it very helpful to invite a U.K. libel solicitor or barrister to one of our classes. We also have found generally that there is a distinction between putting these non-U.S. decisions on the table for discussion as background materials and actually analyzing them closely or taking them apart the way we might U.S. domestic precedent. We do not feel entirely comfortable in doing that. We do not teach the cases the same way we might teach a U.S. case. Of course, paper topics are a wonderful opportunity for the students to explore these precedents in more detail if they choose to do so.

Finally, if you're considering using any of these materials in one of your courses, in my view, the best text on U.K. media law is Robertson & Nicol, *Media Law*, published by Penguin Books in London and now in its fourth edition. This book can be ordered from Amazon's U.K. website. Each year, the Media Law Resource Center ("MLRC") in New York publishes an annual fifty-state survey of American libel law. As

18. Ehrenfeld v. Bin Mahfouz, 2006 WL 1096816 (S.D.N.Y. Apr. 26, 2006) (dismissing the action on the ground that the District Court lacked personal jurisdiction over the defendant.)

part of this survey, MLRC includes an annual overview of the U.K. libel law written by very knowledgeable U.K. solicitors who specialize in media law.

As your practitioner guinea pig, it has been a pleasure speaking with you. I hope that my suggestions have been helpful. Thank you.

