Defamation Via Modern Communication: Can Countries Preserve Their Traditional Policies?

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I. INTRODUCTION

Despite its negative connotation, "forum shopping" in many cases is simply another strategy used by parties to gain an advantage in litigation. Since parties to a cause of action may reside in different cities or the injury may occur in more than one

1. One recent note lists three reasons for the negative connotation associated with forum shopping: (1) Unseemliness of forum shopping; (2) system costs ("[P]laintiffs may deliberately bring actions in circuits that have not ruled on the relevant issues in order to avoid certain defeat in a circuit that ruled unfavorably," thus demanding unnecessary and costly decision-making); and (3) inability of actors to conform their behavior to legal norms." Note, Using Choice of Law Rules to Make Intercircuit Conflicts Tolerable, 59 N.Y.U. L. REV. 1078, 1083 (1984). See COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, reprinted in 67 F.R.D. 195, 220 (1975) (quoting Commission Consultants Gambrell and Dunner who stated that forum-shopping "demeans the entire . . . process"). See also Juenger, Forum Shopping, Domestic and International, 63 TUL. L. REV. 553, 553 (1989) (recognizing that "forum-shopping is generally used to reproach who, in [the judge's] opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit").

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place, a plaintiff may have the opportunity to initiate proceedings in one of several jurisdictions. Given a choice, the plaintiff will "shop" for, or select, the forum with the most favorable substantive and procedural laws. In the United States, procedural rules may afford the defendant an opportunity to move the case to a different forum. This opportunity may limit the plaintiff's forum choices and may provide the defendant with the forum advantage.

Choice of law plays an important role in the parties' forum decision. Choice of law rules govern which substantive laws the forum court will apply. A party must carefully consider the choice of law rules of each jurisdiction in order to determine which jurisdiction will apply the most favorable laws.

Defamation is an area of law that lends itself to these forum selection and choice of law issues. Defamation law serves two countervailing purposes. It protects the right to privacy and it preserves freedom of speech. Each country weighs these policies differently. A plaintiff who has the opportunity to select a forum will attempt to initiate proceedings where this balance is most favorable.

The increase in communication due to advanced technology has led to more complex defamation litigation. For example, the plaintiffs and defendants may be domiciled in more than one country or the defamatory broadcast may be received in several countries. The plaintiff in a defamation action may therefore have a group of countries from which to choose a forum. When a plaintiff initiates proceedings in a country with a comparatively insignificant interest in the case only to take advantage of that

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2. There have been two contrasting value judgments in the law of defamation, one that free publication is socially valuable, but must be kept within civilized bounds, and the other that protection of a person's reputation is of primary importance, and invasion of it has to be justified.


3. Cooper, Defamation by Satellite, 132 SOLIC. J. 1021 (discussing the impact of satellites on defamation law).
country's more favorable substantive laws, the plaintiff is strategizing to the extreme of manipulating. This type of "forum shopping" may not only adversely affect the defendant; it may also undermine the policies and laws of the countries which have a substantially greater interest in the cause of action.

The purpose of this comment is to discuss how application of the appropriate choice-of-law method will preserve each country's defamation laws and policies. First, the comment will compare the defamation laws and policies of the United States, England, and Canada. The defamation section will focus primarily on the public figure plaintiff.4 Next, the comment will describe the choice of law rules in these countries. This analysis will show how initiating an action in one country may, under certain circumstances, undermine the policies and laws of another country. Finally, the comment will show that courts may avoid this negative result in a way that is fair to both parties.

II. THE DEFAMATION LAWS OF THE UNITED STATES, ENGLAND, AND CANADA

The defamation laws of the United States, England, and Canada appear similar because all of them derive from English common law. Each country, however, has developed different burdens and standards in defamation law based on that country's unique policy on privacy and on freedom of the press.

A. The United States

1. Common Law Burdens of Proof

To sustain a defamation action under United States common law, a plaintiff must allege that the defendant communicated to a

4. See infra note 17 and accompanying text (explaining the term "public figure").
5. This comment will focus on the communication of libel. Libel, as defined by the Second Restatement of Torts, is a publication in written or printed words, or by any other communication which has the potentially harmful qualities of written or printed words. RESTATEMENT (SECOND) OF TORTS § 568 (1977).
third party a false, unprivileged statement of fact about the plaintiff that harmed the plaintiff's reputation. In cases involving private plaintiffs, the plaintiff has the burden of proving that the statement was unprivileged, communicated to a third party, about the plaintiff, and harmful to the plaintiff's reputation. Truth and absolute privileges are complete.
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defenses to common law defamation. Should the defendant argue the presence of a qualified privilege, the plaintiff can rebut the defense by proving that the defendant acted with express malice.


When a party allegedly defames a public figure on a matter of public concern, the public figure plaintiff must prove actual malice as an additional element of the cause of action. The plaintiff can prove actual malice by showing that the defendant acted with reckless disregard for the truth of the statement or that the defendant knew the statement was false. New York Times v. Sullivan is the seminal United States defamation case involving a public figure plaintiff.

(a) New York Times: The Case

The New York Times newspaper published an advertisement which criticized Sullivan, Commissioner of Public Affairs of Montgomery, Alabama, for the mistreatment of black students protesting segregation. Several of the allegations were false. The New York Times received the advertisement from a reputable

15. See infra note 7 and accompanying text (describing the qualified privileges).
16. Prosser and Keeton, supra note 6, at 833-34 (defining malice).
17. See Schauer, Public Figures, 25 WM. & MY. L. REV. 905 (1983); Ashdown, Of Public Figures and Public Interest--The Libel Law Conundrum, 25 WM. & MY. L. REV. 937 (1983); Daniels, Public Figure Revisited, 25 WM. & MY. L. REV. 957 (1983) (explaining the term "public figure"). See also Gertz v. Welch, 418 U.S. 323, 344 (1974) (describing "public figures" as those who "usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements. . . .").
18. See generally Ashdown, supra note 17 (discussing the meaning of "public interest").
20. Id. at 287-88.
22. Id. at 256-57.
23. Id. at 258.
advertising agency; the newspaper, however, did not verify the facts before publication. The Alabama Supreme Court held that a defamation suit between private citizens did not require constitutional scrutiny because the fourteenth amendment protects state actions only. The United States Supreme Court reversed.

The United States Supreme Court interpreted the first amendment, as applied through the fourteenth amendment, to protect speech in private defamation actions. The Court held that a public official could not recover damages for defamatory statements without establishing actual malice with "convincing clarity." The Court defined "malice" as "knowledge of falsity or reckless disregard for the truth." Placing the heavy burden on public officials in defamation actions, the Court reasoned, would ensure the "opportunity for free political discussion to the end that government may be responsive to the will of the people. . . ." The Supreme Court decided that since the defendants reasonably relied on a reputable advertising firm for the contents of the advertisement, the plaintiffs could not establish actual malice. The plaintiffs therefore had failed to establish a prima facie case.

24. Id. at 260-61.
25. Id. at 264.
27. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim impose[s] invalid restrictions on their constitutional freedoms of speech and press. It matters not that law has been applied in a civil action and that it is common law only. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised. . . .

Id. at 265.

29. Id. at 279-80.
30. Id. at 269 (quoting Stromberg v. California, 283 U.S. 359, 369 (1931)).
31. Id. at 285-86.
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(b) The Effects of New York Times

While some legal scholars have praised the New York Times holding, others have doubted its precedential value and its fairness. Nonetheless, New York Times has paved the way for a plethora of cases riddled with confusion and complexity.

In Curtis Publishing v. Butts, the Supreme Court extended the application of New York Times to public figures. The Supreme Court reasoned that public figures command "sufficient continuing public interest and ha[ve] sufficient access to the means of counterargument to be able 'to expose through discussion the falsehoods and fallacies' of the defamatory statements." Courts have also narrowed the application of New York Times rule. In Gertz v. Robert Welch, Inc., the Supreme Court distinguished a defamation action brought by a public figure from a defamation action brought by a private figure. The latter merely required proof of negligence to sustain the cause of action.

Courts have adopted various procedural methods in applying the New York Times rule in order to make it more understandable for

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33. "[T]he rule offends the sense of justice because it makes innocent persons bear the harms that have been inflicted upon them by other persons, including those who have acted with negligence or gross negligence." Epstein, supra note 27, at 801.

There should have been a flurry of cases to clarify loose ends in the year immediately following the decision, followed by a period of stable tranquility. The trend has been just the reverse, for without question the law of defamation is far more controversial today than it was a decade ago.

Id. at 783. Adler, Annals of Law: Two Trials, New Yorker, June 23, 1986, at 35 (stating that although New York Times works in the context of New York Times, it is unworkable in other contexts because it is "not very carefully or cogently reasoned. . . . Above all, it did not foresee that, in modern life, it is the press that has, to a degree become unitary, powerful, monolithic, suppressing the very diversity that it was the purpose of the First Amendment to protect. . . .").

34. 388 U.S. 130 (1967).

35. Id. at 155 (quoting Whitney v. California, 274 U.S. 357, 377 (Brandeis, J., dissenting)).


37. Id. at 347 (holding that, in cases involving private figure plaintiffs, the states could impose their own standard of liability provided they did not impose strict liability).
the jury. Some courts have trifurcated the verdict. In Sharon v. Time Magazine,\textsuperscript{38} for example, the former Israeli Defense Minister General Ariel Sharon brought suit against Time Magazine for an article implicating Sharon in the 1982 massacre of Palestinians in Lebanese refugee camps.\textsuperscript{39} The New York district court instructed the jury to decide three issues, whether: 1) Time's statement that Sharon intended to raid the camps was defamatory;\textsuperscript{40} 2) Time's statements were true;\textsuperscript{41} and 3) Time acted either with knowledge of falsity or with reckless disregard for the truth.\textsuperscript{42} By splitting the verdict into three separate issues, the court avoided the confusion that inevitably arises from applying different standards of proof and vague definitions of law to a single verdict.

\textbf{(c) The Problems with New York Times}

Despite the substantive and procedural developments of New York Times, many commentators have criticized the holding for the problems created in its application. In response to the lower courts' difficulty in determining when to apply the Constitution in defamation cases, the Supreme Court has drawn the line at "public figures." Deciding who qualifies as a "public figure," however, has plagued the courts.\textsuperscript{43} The decision of when to apply constitutional scrutiny is only one of many obstacles the court must overcome. Once the court has determined that the New York Times rule applies, the court must then grapple with the ambiguous language of the case.

One of the problems a court faces in applying the New York Times holding is explaining the meaning of the term "actual malice" to the jury. The jury tends to misunderstand the meaning

\textsuperscript{40} See SMOLLA, supra note 39, at 91 (determined by a preponderance of the evidence standard).
\textsuperscript{41} See id. (determined by a clear and convincing standard).
\textsuperscript{42} See id. (determined by a clear and convincing standard).
\textsuperscript{43} See supra note 17 and accompanying text.}
of "actual malice" and attaches to it the meaning of "ill will" or "bad motive." The Supreme Court in New York Times used "actual malice" as a term of art. Under the New York Times standard, the plaintiff in a defamation action does not need to prove the defendant acted with "ill will," but instead must prove the defendant knew of the falsity or acted with reckless disregard for the truth. Judges applying the New York Times rule must ensure that the jury applies the technical definition and not the common meaning of "malice."

The meaning of "reckless disregard for the truth" has also proved to be problematic. The Supreme Court in St. Amant v. Thompson decided that a plaintiff can establish "reckless disregard for the truth" by showing that "the defendant in fact entertained serious doubts as to the truth of the publication." Although "serious doubts" is a more manageable standard, it is still too ambiguous to be useful as precedent.

Whether the defendant subjectively had "reckless disregard for the truth" or "knowledge of falsity" creates more problems for the jury and ultimately for the plaintiff. For example, in Herbert v. Lando, the Supreme Court held that during pretrial discovery a plaintiff may investigate the publisher's state of mind to establish

44. "The phrase 'actual malice' is unfortunately confusing in that it has nothing to do with bad motive or ill will." Harte-Hanks Communications, Inc. v. Connaughton, ___ U.S. ___, 109 S.Ct. 2678, 2685 n.7 (1989). See Westmoreland, 596 F. Supp. 1170, 1172-73 n.1 (S.D.N.Y. 1984) (suggesting attorneys use "state of mind," "deliberate or reckless falsity," or "constitutional limitation" instead of "actual malice" in front of the jury to avoid confusion with the more common meaning of "malice").


46. See Rosenbloom v. Metromedia, 403 U.S. 29, 52 n.18 (1971) (clarifying the difference between actual malice and common law malice).

47. 390 U.S. 727 (1968).

48. Id. at 731.

49. The U.S. Supreme Court in St. Amant admits that "reckless disregard" for the truth cannot be captured in "one infallible definition." Id. at 730.

a case of reckless disregard for the truth.\textsuperscript{51} This procedure may be unduly burdensome and costly to the plaintiff.\textsuperscript{52}

Many plaintiffs spend great sums of money to absolve their reputations.\textsuperscript{53} When the plaintiff’s primary goal is to clear a harmed reputation, litigation in the United States may not be the best course of action. Should the case be brought in a United States court, a judge’s decision to trifurcate the jury verdict\textsuperscript{54} may actually create more harm to the plaintiff’s reputation.\textsuperscript{55} A special verdict requires that the jury specifically find whether the statement was false. If the jury does not find that the statement was false, the public figure plaintiff’s reputation may further suffer as a direct consequence of the plaintiff’s inability to establish falsehood. Therefore, the special verdicts used by United States courts may actually foil the plaintiff’s strategies to absolve his reputation.

A general verdict may create similar difficulties in the plaintiff’s attempt to clear a harmed reputation. If the jury finds that the plaintiff did not establish actual malice, the jury must decide in favor of the defendant. Even if the jury finds that the statement

\textsuperscript{51} Id. at 160.
\textsuperscript{52} Id. The process of determining the defendant’s state of mind requires hours of document review and production, as well as deposition-taking, “[I]n order to present evidence concerning the defendant’s state of mind at the time of publication, the plaintiff needs access to the interviews, notes, conclusions, and newsroom conversations that form the reporting and editorial processes.” Wissler, Bezanson, Cranberg & Soloski, \textit{Why Current Libel Law Doesn’t Work}, 27 JUDGES J. 29, 30 (1988) [hereinafter Wissler]. This investigation is just as harmful to the defendant. As Epstein explained, “The ability of a well-heeled or determined plaintiff to hound a defendant in discovery is an inescapable fact of life under the present law. It was a smaller risk in common law trials that were conducted on strict liability principles.” Epstein, supra note 27, at 809.

\textsuperscript{53} Seventy-three percent of the plaintiffs reported that immediately after the story appeared they would have been satisfied with a retraction, correction or apology. In fact, what most of the plaintiffs had asked the media to do at that stage was to retract or correct the story or to apologize publicly; only one percent had asked the media to pay damages. The plaintiffs became more interested in money at the time of the suit; but even then, most said they sued to set the record straight, not to obtain money damages.

Wissler, supra note 52, at 30. Actress Carol Burnett stated after winning a large sum in a defamation suit against \textit{National Inquirer}, “[I]f they’d given me one dollar plus cab fare, I’d have been happy because it was the principle.” SMOLLA, supra note 39, at 111.

\textsuperscript{54} See supra notes 40-42 and accompanying text (illustrating a trifurcated verdict).

\textsuperscript{55} This problem will not arise in Canada and Great Britain because those countries do not require the plaintiff to prove the falsity of the statement. See infra notes 67 & 87 and accompanying text.
concerning the plaintiff was false, the general verdict for the defendant will stand. The plaintiff may not be able to convince the public that the jury found the defendant’s statement false.

(d) Potential Benefits under the New York Times Standard

Although defamation law in the United States clearly favors the defendant, the public figure plaintiff may still reap some benefits by initiating an action in the United States. For example: Contingency fees are lawful; the United States has broader discovery rules and higher damages than other countries; and the judgment is easier to enforce.

Even if the plaintiff loses in the United States, the plaintiff might still "cleanse" the reputation that was harmed by the alleged defamatory statement. In the Sharon case, for example, the jury returned a verdict that: 1) Time’s statement was defamatory; 2) the allegations in the defamatory statement were not true; and 3) Time had not acted with actual malice. Although Sharon lost the legal battle because he was unable to prove actual malice, the jury’s finding supported Sharon in the effort to clear his name.

Despite the potential advantages listed above, a public figure plaintiff should attempt to avoid United States defamation law. Damages are worthless if the plaintiff cannot establish a prima facie case of defamation. Proving actual malice with "convincing

56. Juenger, supra note 1, at 560.
57. Id. at 561-62.
58. Desai v. Hersh, 719 F. Supp. 670, 676 (N.D.Ill. 1989). "The data show a trend toward more generous jury awards, and a corresponding trend toward the media settling suits at a substantial cost . . . . [One recent] study showed that thirty out of forty-seven damage awards included punitive damages, and seven of those punitive damage awards were for $1 million or more . . . . [The] prospect of such lucrative awards is likely to entice more potential defamation plaintiffs to bring [suit]." Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. PA. L. Rev. 1, 4-7 (1984).
60. This poses a great risk, however, because litigating to "cleanse" one’s reputation may actually harm the plaintiff’s reputation if the jury decides specifically that the defamatory statements were not false. See supra notes 53-55 and accompanying text.
61. SMOLLA, supra note 39, at 91. The jury did add that it found certain writers negligent and careless in reporting and verifying the information. Id. at 91-92.
evidence” creates a virtually insurmountable obstacle for most plaintiffs. Given the choice of substantive law, a public figure plaintiff would have a better chance of success in jurisdictions where a court would apply English or Canadian defamation law.

B. England

Unlike United States law, English defamation law derives not from a constitution, but from case and statutory law. No express freedom of speech exists in England as exists in the United States. In contrast to the United States courts’ requirement that the statement be “about the plaintiff,” an English court may hold a media defendant liable for a statement even though the media had no reason to believe the statement referred to the plaintiff. Damage to reputation, an element that the public figure plaintiff must prove by a preponderance of evidence in the United States, is presumed under English law. United States defamation law requires the plaintiff to prove the falsity of the statement. In England the plaintiff does not have this burden. The defendant rebuts the allegations by proving the truth of the statement, or by proving that the statement was made in fair comment. Although English law clearly favors the plaintiff and does not provide an

62. Despite the constitutional authority on freedom of speech, the English courts “frequently invoke a common law principle of freedom of speech . . . to limit the scope of other common law rules which inhibit the freedom.” BARENDT, supra note 27, at 29-30 (1987). Defamation under English law is a publication of words or matter to a third person containing an untrue imputation against another’s reputation. GATLEY ON LIBEL AND SLANDER ch. 1, § 1, at 4 (8th ed. 1981) [hereinafter GATLEY].

63. Some scholars suggest that Britain develop a Bill of Rights, containing a constitutional free speech clause, to ensure that Britain will always recognize that freedom. Id. at 304-07.

64. BARENDT, supra note 27, at 181 (stating that this puts great restrictions on freedom of speech).

65. Id. at 178.

66. See supra note 6 and accompanying text.

67. See GATLEY, supra note 62, ch. 11, at 150 (citing Belt, 51 L.J.Q.B. at 361 (law presumes defamatory words are false)).

68. BARENDT, supra note 27, at 178-79 (describing the controversy as to whether fair comment must be “honestly expressed” or whether the standard should be more objective); see generally GATLEY, supra note 62, ch. 15, § 1, at 290 (describing the qualifications for “fair comment” as those “in which the public has a legitimate interest or with which it is legitimately concerned”).
express right to freedom of expression, a defendant in a defamation action still has some protection.

1. The European Convention on Human Rights

A defendant to whom England has denied a right to freedom of expression may seek a remedy under the European Convention on Human Rights (Convention). The purpose of the Convention is to ensure rights and freedoms of the citizens of the Convention members (Contracting Parties). Article Ten of the Convention guarantees freedom of expression, limiting it to restrictions which "are prescribed by law and are necessary in a democratic society for national or safety interest or necessary for the interest of..."
others." The European Court of Human Rights (European Court) provides a vehicle for securing these rights and freedoms.

Before the European Court will hear a case, the Contracting Party must either accept the Court's jurisdiction on its own accord or be compelled to accept jurisdiction. Only the following parties can pursue a remedy in the European Court of Human Rights: (1) The Convention's Commission; (2) a Contracting Party whose citizen is alleged to have had his rights violated; (3) a Contracting Party who referred the case to the Commission; or (4) a Contracting Party against whom the complainant brings the action.

The European Court must follow the procedure prescribed in the Convention. First, the Convention Commission must attempt to settle the case. If the Commission cannot successfully settle the

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72. (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

   (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Id. at § I, art. 10.

73. Id. at § II, art. 19(1) (creating a European Court of Human Rights to "ensure the observance of the engagements undertaken by the High Contracting Parties").

74. A Contracting Party accepts jurisdiction either by "declaring that it recognizes as compulsory ipso facto and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention" or by consent. Convention, supra note 69, at § IV, arts. 46, 48.

75. Id. at § II, art. 19(2) (setting up the European Commission of Human Rights). The Commission is composed of the same number of members as those representing the Contracting Parties. Id. at § III, art. 20. No two members can be nationals of the same state. Id. "The principal function of the Commission is to investigate alleged breaches of the Convention, and to secure, if possible, a friendly settlement of the matter." A. ROBERTSON, HUMAN RIGHTS IN EUROPE 43 (1963). See id. at § III, arts. 25(1), 28(b).

76. Convention, supra note 69, at § IV, art. 48.

77. Id. at § III, art. 28. The Commission can hear a matter only once the parties have exhausted all domestic remedies, according to the international law, and only within a period of six months from the date on which the final decision of the domestic courts was made. Id. at § III, art.
case, then the Commission must draft a report to present to the Court describing the facts of the dispute and indicating whether a breach of the Convention has occurred. The Commission sends the report to a committee of the Council of Europe, which must decide by a two-thirds vote that a violation of the Convention has occurred. Once the Council has attained a two-thirds vote, the court may take jurisdiction over the action. If the Court has jurisdiction under this procedure, then the Court will hear the case.

In Lingens v. Austria, the European Court considered the social need for freedom of expression in a democratic society and determined that there must be an uninhibited expression of opinion. The Court held that the media defendant cannot be expected to prove the truth, because this burden of proof would infringe upon free speech. The Court adopted the same rule as that in New York Times for proving falsity. The burden of proof is on the public figure plaintiff to prove that the defamatory statement was false. Placement of the burden of proof on a public figure plaintiff serves to protect a media defendant in a society which has no express rights to freedom of expression. Thus, the fact that England has no express right to freedom of expression does not leave the defendant completely unprotected.

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26. If the Commission successfully settles the case, then it must distribute a report to the interested countries and to the Council of Europe. Id. at § III, art. 30.
78. Id. at § III, art. 31.
79. The Committee of Ministers of the Council of Europe will review the report. Id. at § III, art. 32.
80. Convention, supra note 69, at § III, art. 32. If the question is properly referred to the Court within three months from the date of the transmission of the report, then no such vote need take place. See id. The Committee of Ministers must then prescribe measures that the Contracting Party must satisfy within a certain period of time. Id. at § III, art. 32(2). If the Contracting Party does not satisfy those measures within the specified time, then the Committee of Ministers must vote by a two-thirds majority on what effect should be given to its original decision. Id. at § III, art. 32(3).
81. The Court is comprised of the same number of members as the number in the Council of Europe; no two nationals may be representatives of the same state. Id. at § IV, art. 38. The judges are elected for a nine-year period on a staggered basis. Convention, supra note 69, at § IV, art. 40. The Court consists of seven judges and an ex officio member. Id. at § IV, art. 43.
83. Id. at 419.
84. Id. at 420-21.
85. Id.
C. Canada

Canadian defamation law is similar to English defamation law. A defendant is liable under Canadian defamation law if he "falsely publish(es] defamatory statements concerning the plaintiff." Like England, Canada makes no distinction between public and private figure plaintiffs. Canadian law presumes that the defamatory statement is false; a defendant who can show that the allegedly defamatory statement can be justified, is privileged, or qualifies as fair comment has successfully defended against the action. However, the plaintiff may rebut the qualified privilege.

86. 8 C.E.D. title 45, part I, § 9, at 38 (Ont. 3rd) (Aug. 1990). The general test for defamation is: "would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" Id. § 2, at 35 (quoting Sims v. Stretch, 52 T.L.R. 669, 671 (H.L.) (1936)). The factfinder must decide whether the statement is defamatory. However, the judge can withhold from the jury any meaning alleged by one of the parties that the judge decides the words cannot reasonably bear. Id. part III, § 62, at 54 (citing Arnott v. College of Physicians and Surgeons of Sask., S.C.R. 538 (1954) (S.C.C.). A plaintiff suing for libel against a newspaper from Ontario or with respect to a broadcast made in Ontario must bring the action within three months of the time the defamed person has knowledge of the defamation. CARTER-RUCK ON LIBEL AND SLANDER 275 (3rd ed. 1985). The notice must specify the name and address of the publisher or the name and address of any owner or operator of any broadcasting station that the plaintiff is suing. Id.


88. An allegedly defamatory communication constitutes a qualified privilege when it "has been made in the discharge of a legal, social or moral duty, or on a matter in which there is a common interest between parties." Id. part X, § 191, at 104 (citing Adam v. Ward, A.C. at 334 (1917) (H.L)). The judge must decide whether the matter constitutes a qualified privilege, as it is a question of law. Id. Statements made during judicial proceedings and executive communications are absolutely privileged. Id. part IX, § 176, at 97.

89. A statement qualifies as "fair comment" if it meets the following elements. First, it must be based on true facts. Id. part VII, § 157, at 87 (citing Whitaker v. Huntington, 15 C.C.L.T. 19 (1980) (B.C. S.C.)). The burden is on the defendant to prove that it is so based. 8 C.E.D. title 45, part VII, § 157, at 87 (Ont. 3rd) (Aug. 1990) (citing Planned Parenthood Nfld/Labrador v. Fedorik, 135 D.L.R.(3d) 714 (Nfld. T.D.) (1982)). Second, the statement must be the honest expression or the real view of the person making the comment. Id. Fair comment only protects opinion, not fact. Id. § 160, at 88-89 (citing Christie v. Geiger, 35 Alta. L.R. (2d) 316 (Alta. Q.B.) (1984)). The "fairness" is determined by honesty, not reasonableness. Id. § 163, at 90 (citing Vander Zalm v. Times Publishers, 4 W.W.R. 259 (B.C. C.A.) (1980)). Finally, the allegedly defamatory matter must be of public interest. Id. § 168, at 91-92 (citing Chernesky v. Armadale Publishers, 1 S.C.R. 1067 (S.C.C.) (1979)).
and fair comment defenses by proving the presence of express malice.  

1. Policy

Canada's Charter of Rights and Freedoms\(^\text{94}\) (Charter) is similar to the United States Bill of Rights.\(^\text{92}\) The effect of its language, however, renders it less like freedom of the press under United States law and more like English defamation law.\(^\text{93}\) Freedom of the press in Canada originally derived from case law.\(^\text{94}\) In 1961, the Canadian government passed a dominion statute, guaranteeing freedom of the press.\(^\text{95}\)

A dominion statute, however, does not have authority over the entire Canadian federal system.\(^\text{96}\) In *Gay Alliance Toward Equality v. Vancouver Sun*,\(^\text{97}\) the British Columbia Supreme Court alluded to Section 1(f) of the Dominion Statute which guarantees freedom of the press,\(^\text{98}\) but did not clarify whether this statement

\(\text{90. Id. part I, § 9, at 38 (citing Moore v. Salter, 37 Nfld. & P.E.I.R. 128 (Nfld. Dist. Ct.) (1982)). The plaintiff must prove that the defendant had a motive other than to express his real opinion. 8 C.E.D. title 45, part VIII, § 170, at 94 (Ont. 3rd) (Aug. 1990) (citing Chemesky, 1 S.C.R. 1067 (S.C.C.)). The burden is on the plaintiff to prove express malice. Id.}

\(\text{91. CANADIAN CHARTER OF RIGHTS AND FREEDOMS ANNOTATED (1982) [hereinafter CHARTER].}

\(\text{92. Compare the Convention, part I, § II ("Everyone has the following fundamental freedoms: [F]reedom of thought belief and expression, including freedom of the press and other media of information.")) with U.S. CONST. amend. I ("Congress shall make no law ... abridging the freedom of speech, or of the press . . .").}

\(\text{93. See infra notes 104-06 and accompanying text.}

\(\text{94. Doody, Freedom of the Press, the Canadian Charter of Rights and Freedoms, and a New Category of Qualified Privilege, 61 CAN. B. REV. 124, 131 (1983) (citing Reference re: Alberta Legislation, 2 D.L.R. 2d 343 (1961) ("Albert Press Bill case") (guaranteeing freedom of the press, considered "implied in a democratic society").) "Even the Alberta Press Reference, which is generally considered to be the classic statement concerning freedom of expression in Canada, did not establish that freedom of expression had an independent existence which could not be abrogated or abridged by Parliament." Beckton, Freedom of Expression—Access to the Courts, 61 CAN. B. REV. 101, 102 (1983).}

\(\text{95. Doody, supra note 94, at 131 (citing R.S.C. 1970, app. III).}

\(\text{96. Id. at 131 (1983) (describing the weak effect of the Dominion Statute "The Canadian Bill of Rights").}

\(\text{97. Id. at 132 & n.32 (citing 97 D.L.R. (3d) 577 (S.C.C.) (1979)).}

\(\text{98. Id. at 131 (citing R.S.C. 70, § 1(f)).}

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was dictum or precedent. Therefore, Section 1(f) still may not be binding.


In 1981, Canada adopted its first constitution, the Canadian Charter of Rights and Freedoms. Section Two of the Charter guarantees freedom of speech. Section thirty-two states that the Charter applies only to “the Parliament and government of Canada” and the “legislature and government of each province.” Despite this limiting provision, some have argued that the Charter and its provisions for freedom of expression should apply to private actions as well as to actions initiated by the government and legislature. Case law in the lower Canadian courts seems to indicate, however, that a more substantial tie to “state action” must exist in order to be able to invoke the freedom of speech provision of the Charter. Coates v. Citizen, decided after adoption of the Charter, gives persuasive though not binding proof that the Charter was intended to have the same effect on private defamation actions as the Constitution in the United States:

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100. CHARTER, supra note 91.
101. “Everyone has the following fundamental freedoms; ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of information.” Id. at § 2.
102. Id. at § 32.
103. See Doody, supra note 94, at 149-50. Doody bases his rationale on the fact that the Charter is a constitution, thus encompassing much more than the language. Id. He also argues that individuals are bound by a general law, so there is no reason to specify the application of individual rights. Id. Finally, Doody analogizes Canadian freedom of speech to the United States freedom of speech standards in New York Times v. Sullivan, explaining that the New York Times standard is necessary in a democratic system. Id.

In Constitutional Law of Canada, Peter W. Hogg compares the development of case law and the Charter with New York Times v. Sullivan and the Constitution. HOGG, CONSTITUTIONAL LAW OF CANADA 678 (1985). He asserts that New York Times may be interpreted as government or state action because the state court’s order awarded damages to the plaintiff. Id. Applying this analysis to the Charter’s freedom of speech provision would imply that the Charter’s guarantee applies to any action brought in court which involved private activity. Id.
While in the United States a public official must prove ‘actual malice’ on the part of the press in an action for defamation, in Canada, the onus shifts to the defendant once the plaintiff has established the impugned statement is defamatory. This reflects the Canadian view that the press should receive no special protection in the law of defamation.\textsuperscript{105} The Nova Scotia Supreme Court explained that since a defamation action involves two private citizens and the Charter covers only state actions, in most defamation cases the Charter does not apply. However, the court decided that this case invoked the Charter because the plaintiff was challenging the constitutionality of a defamation statute.\textsuperscript{106} Because the Charter guarantees freedom of speech, but does not apply to private actions, Canadian defamation law appears to be more similar to English law than to United States law.

In conclusion, the United States, Canada, and England uniquely balance the rights of privacy and freedom of expression in their defamation laws. Placing a harsh burden on the public figure plaintiff to prove a prima facie case, the United States courts heavily emphasize freedom of speech. England tilts decidedly in favor of the right to privacy. However, the European Court of Human Rights, to which England is a signatory, applies the same policy as \textit{New York Times}. England therefore appears to have conflicting policies: A national policy which favors right to privacy, and an international policy which carefully protects freedom of speech. Canada also has conflicting policies behind its defamation laws. Although Canada has adopted a constitution guaranteeing freedom of speech, the lower courts have applied this guarantee only to state actions. The differences in law and policy between the United States, Canada, and England raise interesting legal issues, particularly in situations involving more than one jurisdiction.

\textsuperscript{105} CHARTER at § 2(b): 240010 (citing and summarizing Coates v. Citizens, 85 N.S.R. (2d) 146).

\textsuperscript{106} Id. at § 32(1): 90060 (citing and summarizing Coates v. Citizen, 10 A.C.W.S. (3d) 112 (N.S.S.C.) (1988)).
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III. JURISDICTION AND CHOICE OF LAW

A. Introduction

Thus far, this comment has analyzed the present state of defamation law in the United States, England, and Canada. Each country has a distinct policy, a unique balance between freedom of expression and the right to privacy. Modern technology, however, has created a world where defamatory statements originating in one country may be disseminated thousands of miles away.\(^\text{107}\) When transnational defamation occurs, what law should apply? For example, if the plaintiff resides in England, the defendant resides in the United States, and the defendant published the defamatory book in Canada, which country’s laws should the court apply? By applying one country’s substantive laws over another, the court may be denying a party protections guaranteed by the other country’s laws. Two recent cases illustrate the problems created by discrete policies in a modern world.

1. “Spycatcher”

Although neither a defamation nor a “forum shopping” case, “Spycatcher”\(^\text{108}\) demonstrates that activities in one country may...
infringe upon the effectiveness of laws or judgments rendered in another country. Wright, former Assistant Director of MI5, wrote a book which revealed secrets about the British Secret Service.109 Wright planned to publish the book, Spycatcher, in Australia.110 In June 1986, two English newspapers, the Guardian and the Observer, published articles recounting Wright's allegations concerning the secret service.111 The British Attorney General brought suit against Wright in Australia to prevent publication of the book.112 The British government argued that Wright had a lifelong obligation of confidence to the British Secret Service.113 An Australian court denied the injunction; the Attorney General lost his appeal in the higher courts.114

The English High Court temporarily enjoined the two British newspapers from disclosing any further information directly or


Some of the information in Spycatcher, if true, disclosed that members of MI5 in their operations in England had committed serious breaches of domestic law. The bugging of foreign embassies is an example. Unlawful entry into private premises is another. Most serious of all is the allegation that members of MI5 embarked, albeit unofficially, on activities designed to destabilize the administration of Mr. Harold Wilson [former British Prime Minister].


indirectly obtained from Wright.\textsuperscript{115} Other British newspapers printed details of Wright's book during the following year.\textsuperscript{116} A New York publisher then printed \textit{Spycatcher} in its entirety in the United States; the book quickly became a U.S. best seller.\textsuperscript{117} The two newspapers which originally printed excerpts of Wright's book applied for the injunctions to be lifted, and based their reasoning on the fact that the material had already been circulated worldwide following the U.S. publication.\textsuperscript{118} The House of Lords upheld the High Court's decision to lift the injunctions.\textsuperscript{119}

This case demonstrates England's attempt to preserve its policy of right to privacy. The court penalized other newspapers which printed \textit{Spycatcher} excerpts even though they were not specifically enjoined from printing material on Wright; the purpose of the penalty was to deter future publishers from engaging in similar acts.\textsuperscript{120} In a further effort to preserve its policy, the English Parliament recently passed two acts, the Official Secrets Act 1989\textsuperscript{121} and the Security Service Act 1989,\textsuperscript{122} both of which increase protection of, and restrict freedom to, information relating

\begin{itemize}
\item \textsuperscript{116} Her Majesty’s Att’y Gen. v. Newspaper Publishing, Court of Appeal (Civil Division), (Transcript: Association) (1990).
\item \textsuperscript{117} \textit{See} \textit{N.Y. Times}, Mar. 8, 1988, at C 13, col. 1. \textit{See also id.}, Oct. 14, 1988, at A5, col. 1 (stating that \textit{Spycatcher} had remained on the \textit{New York Times Book Review's Best Sellers List} for ten weeks and that the book has sold 1.4 million copies in 40 countries).
\item \textsuperscript{118} Att’y Gen. v. Guardian Newspapers (No.2), Court of Appeal (Civil Division), 3 All E.R. 545 (1988), 2 W.L.R. 805 (1988) (Scott, L.J.).
\item \textsuperscript{121} Official Secrets Act 1986 (c 6), May 11, 1989.
\item \textsuperscript{122} Security Services Act 1989 (c 5), Apr. 27, 1989.
\end{itemize}
to the security services. These actions suggest further restrictions on speech in the future. 123

Despite these attempts to preserve English policy, the fact remains that the British government failed to keep the Secret Service information from being disseminated into England. 124 England’s policy of restricting freedom of speech for purposes of national security 125 was undermined by other countries’ policies of unrestricted freedom of speech. 126 The “Spycatcher” case shows the effects of one country’s laws on another. The case also demonstrates the tremendous amount of time and money that can be expended to uphold traditional policies. 127 As the judges in these cases indicated in their opinions, the courts have a difficult,

125. “[I]n my opinion a democracy is entitled to take the view that a public servant who is employed in the security service must be restrained from making any disclosures concerning the security service and that similar restraints must be imposed on anybody who receives those disclosures knowing that they are confidential. . . .

126. If the publication of this book in America is to have, for all practical purposes, the effect of nullifying the jurisdiction of the English courts to enforce compliance with the duty of confidence both by interlocutory and by permanent injunction, then, as [counsel for the Attorney General] ruefully observed, English law would have surrendered to the American Constitution. There the courts, by virtue of the First Amendment, are, I understand, powerless to control the press. Fortunately, the press in this country is, as yet, not above the law, although like other powerful organizations they would like that to be so, that is until they require the law’s protection.

Id. (Lord Ackner).

I would stress that I do not base this on any balancing of public interest nor on any considerations of freedom of the press, nor on any possible defences of prior publication or just cause or excuse, but simply on the view that all possible damage to the interest of the Crown has already been done by the publication of Spycatcher abroad and the ready availability of copies in this country.

if not impossible, task of upholding national policies when worldwide media is involved.  

2. Pindling v. NBC

Like the "Spycatcher" case, Pindling v. NBC raises issues involving conflicting policies. In 1983 and 1984, NBC aired programs in the United States that tied Pindling, former Bahamian Prime Minister, to drug dealers. NBC affiliates broadcast the

128. [I]n the United States, . . . over a million copies have been distributed and . . . dissemination of the information contained therein has taken place on a worldwide scale. Anyone in this country who wants the book can obtain a copy. Thousands of people have read the book. In these circumstances, whatever duty newspapers and others may originally have had to refrain from disclosing the information contained in the book, the information has lost its confidential or secret character and the newspapers' duty has evaporated and gone.

Att'y Gen. v. Guardian Newspapers (No. 2), Court of Appeal (Civil Division), 3 All E.R. 545 (1988), 2 W.L.R. 805 (1988) (Scott, J.). The case has also served a useful purpose in bringing to light the problems which arise when the obligation of confidence is breached by publication abroad. . . . Consideration should be given to the possibility of some international agreement aimed at reducing the risks to collective security in the present state of affairs . . . Some degree of comity and reciprocity in this respect would seem desirable in order to promote the common interests of allied nations.


130. Id. at 61. Plaintiff's Statement of Claim at 6-7, Pindling v. NBC, Supreme Court of Ontario, District of York (17549/84) (1984). Plaintiff's Statement of Claim, supra, at 8 (alleging that the statement broadcast "[w]as understood to mean that the [p]laintiff had taken bribes from drug smugglers, that he had used his position as Prime Minister to his own advantage and to protect drug smugglers, that he was dishonest and corrupt, and that he was guilty of criminal acts and therefore unworthy to hold the office of Prime Minister"). The broadcasted statement included the following language: "A Justice Department Intelligence report says Vesco [an alleged drug dealer] has been . . . allegedly paying approximately $100,000 per month to Bahamian officials, including the Prime
programs to the U.S.-Canadian border.\textsuperscript{131} Canadian cable companies furthered the programs to Canadian televisions.\textsuperscript{132}

Pindling initiated defamation proceedings against NBC in the Bahamas. NBC did not appear; the Bahamian court did not award Pindling the $2 million compensatory and $2 million punitive damages he sought.\textsuperscript{133} Pindling then brought an action against NBC in Canada.\textsuperscript{134} F. Lee Bailey, a lawyer for Pindling, conceded that one reason he brought suit in Canada rather than the United States was that "there is no future for a public figure [in a U.S. defamation action]".\textsuperscript{135} Based on this reasoning, Pindling initiated proceedings in a country in which the defendants did not intentionally broadcast the programs.\textsuperscript{136}

The "Spycatcher" and Pindling cases present interesting issues involving overlapping national policies. The next section will analyze these issues in the context of conflicts of law. In each case, the forum court faces two fundamental questions: Does the forum court have jurisdiction to hear the case and what law applies?

\textsuperscript{131} Pindling, 49 O.R. (2d) at 61. Plaintiff's Statement of Claim, supra note 130, at 7.

\textsuperscript{132} Pindling, 49 O.R. (2d) at 61.

\textsuperscript{133} Id. See Wall St. J., June 6, 1989, at B1, col. 3.

\textsuperscript{134} Id. at 58. See WALL ST. J., Oct. 11, 1989, at B8, col. 2.

\textsuperscript{135} The real advantage to the plaintiff in bringing the action in Ontario is that it is not necessary to establish "actual malice". Actual malice would have to be proved in the United States, that is that NBC broadcast the programmes with knowledge of their falsity, or with reckless disregard of whether they were true or false.

B. Personal Jurisdiction

1. United States

In order for jurisdiction to lie in a United States court, maintaining the suit in the forum must not offend "traditional notions of fair play and substantial justice." The defendant must have "minimum contacts" with the forum. The U.S. Supreme Court has explained the "minimum contacts" requirement in several cases. If the defendant "purposefully avails itself of the privilege of conducting activities within the forum State," then that party has established the requisite "minimum contacts" with that state. A defendant must "reasonably anticipate being haled" into the forum court. A defendant who "purposefully directs" a product to a state through the "stream of commerce" also has established "minimum contacts" with that state.

In addressing the minimum contacts issue in the context of a defamation action, the lower courts initially found that the strong policy of freedom of speech requires a "defendant [in a defamation action to] have a closer relationship to the state than would otherwise be required." The U.S. Supreme Court in Calder v. Jones rejected this argument and held that the first amendment does not require that a special relationship exist between the defendant and the state.

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137. Because this comment does not directly involve the issue of jurisdiction, it will not explore the law of personal jurisdiction in depth.
139. Id.
141. World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980). To determine "reasonableness," the courts examine certain factors, including: "The forum's State's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." Id. at 292.
145. "[T]he potential chill on protected First Amendment activities stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive laws concerning such suits. . . . To reintroduce those concerns at the jurisdiction stage would be a
Keeton v. Hustler\textsuperscript{146} illustrates the significance of personal jurisdiction in a defamation action. In Keeton, the plaintiff brought a defamation suit in a New Hampshire state court against Hustler magazine. New Hampshire was the only state where the statute of limitations had not run.\textsuperscript{147} Although only 15,000 copies of the magazine were sold per month in New Hampshire, the Keeton court found personal jurisdiction because Hustler magazine had continuously and intentionally exploited the New Hampshire market.\textsuperscript{148}

The Keeton case provides an array of intriguing jurisdictional issues. If a party circulates 100 copies of a magazine in California and the magazine’s general circulation is five million copies a month, will a California court have the requisite “minimum contacts?” If Hustler magazine knows that its magazines are being resold in another country, has Hustler “purposefully availed” itself in that country? Or, applying the facts of Pindling, if NBC affiliates picked up the NBC program, broadcast it on the U.S.-Canadian border, and Canadian televisions picked up the program, did NBC “purposefully direct” the program in the “stream of commerce” to Canada? A court may very well find jurisdiction in each of these situations because the defendant has, either through its own intentional actions or, knowingly through the acts of others, created a market in the jurisdiction.

A related jurisdictional issue is forum non conveniens. A United States court which is empowered to exercise jurisdiction may choose not to exercise that power under certain circumstances. If the action would be more convenient in another jurisdiction for all parties involved, the court may grant a defendant’s motion to dismiss on the ground of forum non conveniens.\textsuperscript{149} The factors form of double-counting.” Calder, 465 U.S. at 790.


\textsuperscript{147} Id. at 773.

\textsuperscript{148} Id. at 781.

\textsuperscript{149} The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. These statutes are drawn with a necessary generality and usually give a plaintiff a choice of courts, so that he may be quite sure of some place in which to pursue his remedy. But
United States courts use to determine whether a case should be dismissed and retried in a more convenient forum include: (1) The relative ease of access to evidence; (2) the convenience to the witnesses; (3) whether another court could more easily compel witnesses unwilling to attend the trial; (4) the cost to the parties and the court; (5) public interest; and (6) local interest. The court must weigh these factors when deciding if a case would be more conveniently heard in another forum. A United States court may not hear the merits of a case if the court determines either that the forum does not have significant contacts with the cause of action (jurisdiction) or that the forum is not convenient (forum non conveniens).

2. Personal Jurisdiction in England and Canada

England and Canada base jurisdiction in tort actions on whether the tort was committed in the forum. In defamation cases, the English and Canadian courts decide where the tort was committed.
by reference to where the allegedly defamatory statement was published or communicated. In England, Order 11, which governs jurisdiction over parties not domiciled in the country, states, ""[S]ervice of a writ [necessary to reach defendants outside] the jurisdiction is permissible with leave of the Court . . . if the action begun by the writ is founded on a tort committed within the jurisdiction.""

Canada's Ontario Rule of Practice 25, applied in the Pindling case, has a similar provision. Ontario Rule of Practice 25 finds in personam jurisdiction over a foreign defendant if the defendant committed the tort in Ontario. The Ontario Supreme Court in the Pindling case applied the reasoning used in Jenner v. Sun Oil, a case involving defamation by radio. The Canadian High Court in Jenner held that the media defendant committed the tort in Ontario, where the broadcast was heard. The Jenner court explained the rationale behind its holding in a hypothetical. A person standing south of the U.S.-Canadian border who utters by modern sound amplification a defamatory statement heard and understood north of the border cannot deny the commission of a tort in Canada. Using this rationale, the Pindling court held that Ontario had in personam jurisdiction over NBC.

The Canadian and English courts, like those in the United States, may decline to exercise their jurisdictional powers if the
forum is not convenient. Factors such as convenience to the parties and witnesses and the accessibility to evidence may also play a role in the court's discretionary decision.

The Canadian and English courts have also taken other approaches to the inconvenient forum issue. Some of these courts follow the St. Pierre v. South American Stores (Gath & Chaves) case which held that if continuance of the action would be oppressive, vexatious, or abusive to the defendant's due process, and if continuance would cause an injustice to the plaintiff, then the plaintiff's action should be stayed or set aside. Other Canadian and English courts have followed the approach from MacShannon v. Rockwear Glass. A court applying this test would first analyze whether another jurisdiction exists that would serve justice more conveniently. Next, the court would decide whether a stay would deprive the plaintiff of a legitimate or personal juridical advantage.

Ontario courts have combined these two tests. In the Pindling case, the counsel for NBC argued forum non conveniens, and requested a stay of the proceedings in Canada. Defense counsel maintained that the plaintiff had brought the action in Canada not because of its substantial connections, but merely because it served the plaintiff's own ends. NBC's attorneys further argued that NBC had not done business in Ontario. The

161. 4 C.E.D. title 28, part IV, § 39, at 28-89 (Ont. 3rd) (July 1990). McLEOD, supra note 151, at 133. Other considerations include the effect of the proceedings on witnesses and the extent to which foreign law is applicable. Id.
162. 1 All E.R. 408 (1937) (Scott, L.J.).
163. Id. (burden is on defendant to prove both of these conditions).
164. 1 All E.R. 625 (1978).
165. Id. at 812. See Pindling, 49 O.R. (2d) at 65 (citing the following cases as applying this test: Plibrico (Can.) v. Suncor, 35 O.R. (2d) 781, 27 C.P.C. 5 (H.C.) (Osler J.) (1982); BP Can. Holdings v. Westmin Resources, 32 C.P.C. 300 (Ont. H.C.) (Henry J.) (1983)).
167. Pindling, 49 O.R. (2d) at 61.
168. Id. at 66.
169. Id. at 62.
Ontario Supreme Court rejected these arguments and refused the stay. Applying both the *St. Pierre*\textsuperscript{170} and *MacShannon*\textsuperscript{171} tests, the court required the defendant to prove that the Ontario action would be "oppressive, vexatious or abusive of the process of the Court." The defendant could prove this abuse by showing that there was another forum where justice could more conveniently be served and that the stay would not deprive the plaintiff of legitimate personal or juridical advantage in Ontario.\textsuperscript{172} The Ontario Supreme Court reasoned that although NBC did not directly broadcast in Ontario, its "affiliates"\textsuperscript{173} did broadcast into Ontario. The court recognized that the plaintiff acquired a juridical advantage by bringing suit in Canada rather than in the United States, where the plaintiff would have the substantially greater burden of proving knowledge of falsity or reckless disregard for the truth.\textsuperscript{174} On these bases, the court dismissed the motion to stay the proceedings.

In the *Pindling* opinion, Justice Montgomery quoted from Justice Wright in *Brewer v. Hadley Manufacturing Co.*,\textsuperscript{175}

> [W]e should be mindful of the sovereignty and jurisdiction of others and of the graceful comity and civility which it would be pleasant to see universal among all called upon to be Judges. But this seemly and literally courtly urbanity must take second place to our doing justice in cases fairly brought before us by the citizens of our land and Province, and by others. To do this is our surpassing purpose. If this purpose guides us in exercising our discretion under Rule 25 we shall have no cause to apprehend hurt feelings nor resentment in other jurisdictions by those there dedicated to the same noble ends.\textsuperscript{176}

By applying the proper choice of law method, perhaps the courts can balance both justice and comity and civility."

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\textsuperscript{170} *See supra* note 162 and accompanying text.
\textsuperscript{171} *See supra* note 164 and accompanying text.
\textsuperscript{172} *Pindling*, 49 O.R. (2d) at 65.
\textsuperscript{173} NBC’s 'affiliates' were all located in the United States: Detroit, Buffalo, Rochester, Plattsburg, Syracuse, and Erie. *Id.* at 61.
\textsuperscript{174} *Id.* at 65.
\textsuperscript{175} 2 O.R. 756 (1969).
\textsuperscript{176} *Pindling*, 49 O.R. (2d) at 64 (quoting *Brewer*, 2 O.R. at 761).
C. Choice of Law

After establishing jurisdiction, the court must analyze the choice of law rules to determine which laws will apply. Choice of law rules vary greatly from jurisdiction to jurisdiction. Due to often conflicting policies among jurisdictions, choice of law rules may significantly affect the outcome of a case. For example, a plaintiff may be tempted to initiate an action in one jurisdiction because of its favorable substantive laws. However, upon closer inspection of the forum choice of law rules, the plaintiff may decide not to initiate the action in that jurisdiction because its rules mandate the application of another state’s or country’s laws. Conversely, choice of law rules may work to the parties’ benefits. A plaintiff may initiate an action in a forum because its choice of law rules require the application of another state’s laws that are more favorable to the plaintiff. If a plaintiff initiates the action in a United States court, the defendant may take advantage of the choice of law rules by removing the case to a court which would apply another forum’s laws that are more advantageous to that defendant.

1. United States

Although the United States Supreme Court did not examine the choice of law issue in the Keeton opinion,177 the facts suggest a thought-provoking analysis of choice of law. If a party publishes an insignificant number of magazines in one country and neither of the parties are domiciled in that forum, should the forum court apply laws of its jurisdiction? If the forum court does apply forum law, can the plaintiff also recover for the harm incurred in all other countries? What if the choice of law rules of the country with the favorable laws require the application of another country’s laws? How can a court ensure that it is preserving the balance between freedom of speech and right to privacy? The choice of law rules of the First Restatement Conflict of Laws, the interest analysis

177. Pielemeier, supra note 2, at 381 (citing Keeton, 465 U.S. at 778).
approach, and the Second Restatement Conflict of Laws attempt to answer these difficult questions.

(a) First Restatement

Courts following the First Restatement Conflicts of Laws apply the law of the place of the tort, or "where the last event necessary to make an actor liable for an alleged tort" occurred. The benefits of the test lie in its apparent simplicity and rigidity. This rule requires no weighing of factors or balancing of underlying policies, only a factual determination of where the "last event" of the alleged tort took place. Unfortunately, this approach is not as simple as it first appears.

A defamatory statement may harm the plaintiff's reputation in more than one state. The First Restatement does not dictate which state's law would apply. Courts in jurisdictions that follow the First Restatement have dealt with this problem in different ways.

Some jurisdictions allow a plaintiff to recover damages for the harm incurred throughout the United States. Other courts divide the damage among the jurisdictions where the plaintiff's reputation was harmed. If a forum court follows this approach, it will apply each jurisdiction's laws to its respective
division of harm." Although it ensures the application of each state's policies with regard to the harm incurred in that state, this application of the *First Restatement* creates great confusion. For example, how does a court properly "divide" harm? Is harm based upon the number of publications, on the reputation of the plaintiff in a particular state, or both?

In addition to these procedural difficulties, the *First Restatement* presents difficulties in application. What does the "last event necessary to make an actor liable" mean in the context of a defamation case? This term usually refers to the place of the injury, but even the definition of the "place of injury" remains vague in the context of multistate defamation. The "place of injury" could suggest the place where: (1) The defendant composed or edited the statement; (2) the plaintiff is domiciled; (3) the plaintiff incurred reputational harm; or (4) the defendant published or broadcast the statement. For example, in the *Pindling* case, did the injury occur in: (1) The United States where NBC broadcast the defamatory statement; (2) the United States and Canada where the program was received; or (3) the Bahamas, the domicile of Prime Minister Pindling? Because the *First Restatement* does not accommodate these complex issues, courts have carved public policy exceptions to this rule. These public policy loopholes permit the forum court to manipulate the law in its favor.

(b) *Interest Analysis*

In response to the weaknesses of the *First Restatement*, Brainerd Currie developed a choice of law method which incorporated the

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182. *Id.*  
policies of the interested jurisdictions. He explained the problems under the present system:

[The apparatus designed for the handling of real problems of conflict of laws ... provides no more than the illusion of a solution for the real problems. Where the legitimate interest of two states are in genuine conflict, the system does not reconcile them, nor determine which is important nor even permit the state in a position to do so to pursue its own interests. It simply strikes down the one interest or the other, indiscriminately, arbitrarily, on the basis of fortuitous and irrelevant circumstances. Ultimately, the survival of such a system can be attributed only to the fact that few people care very much whether such matters are handled intelligently or not. . . .]

The goal of interest analysis is to distinguish between conflicts in which more than one jurisdiction has a legitimate interest in the application of its laws ("true conflicts") and conflicts in which, upon closer examination, only one jurisdiction has a legitimate interest in the application of its laws ("false conflicts"). Currie proposed that the courts quickly dispose of these conflicts in a fair and efficient manner. In a "true conflict," the forum court may apply its own laws. In a "false conflict," however, the court should apply the law of the interested jurisdiction. Many scholars have commented and criticized this choice of law theory. The facts of the Pindling case provide an illustration of Currie's interest analysis method.

Assume that New York-based NBC did not know and had no reason to know that Canadian television received the broadcast; NBC had no control over the Canadian broadcast of its programs. Pindling brings an action in a Canadian court for the defamatory...


187. Other possible outcomes exist under Currie's theory in addition to true and false conflict: Apparent true conflicts and the "unprovided for" case. See People v. One 1953 Ford Victoria, 48 Cal. 2d 595, 311 P.2d 480, 12 Cal. Rptr. 266 (1961); Ervin v. Thomas, 264 Or. 454, 506 P.2d 494 (1973).

statements heard on Canadian television. A court applying interest analysis would first examine the relevant laws.

Under Canadian law, a public figure plaintiff must prove that the defendant communicated a defamatory statement about the plaintiff to a third party. Canadian law presumes that the defamatory statement is false. The recently-adopted Canadian Charter grants freedom of speech but only enforces that provision in a state action. By placing a relatively light burden of proof on the public figure plaintiff and by limiting the freedom of speech guarantee to state actions, Canadian defamation law tilts in favor of the public figure’s privacy. Canada’s interest in the Pindling action would be to protect the Bahamian prime minister’s right to privacy in Canada.

New York law, on the other hand, requires the public figure plaintiff not only to prove that the defendant falsely communicated a statement which harmed the plaintiff’s reputation, but also to prove with “clear and convincing clarity” that the defendant committed this act with “actual malice.” These heavy burdens on the public figure plaintiff reflect a strong policy in the United States to protect speech and the media. New York would have an interest in the Pindling action because placing liability on NBC for statements broadcast in the United States but uncontrollably received in Canada would infringe upon NBC’s right to free speech in the United States.

In sum, both Canada and New York would have a legitimate interest in the action. Applying Canadian law, the forum court would probably hold NBC liable for defamation. The New York state courts would require Pindling to meet such a heavy burden that he may not be able to make a prima facie case. Thus, the application of the two interested jurisdictions’ laws result in conflicting liabilities. In this “true conflicts” situation, the forum court may apply its own law.

Now, assume that NBC broadcast the program in the United States with knowledge that the broadcast would penetrate the Canadian border; NBC had received endorsements for its program on Canadian television. Pindling brings an action for the defamatory statement made on Canadian television. Canadian
interest would once again lie in favor of Pindling's right to privacy in the Canadian broadcast. The United States, however, would no longer have a legitimate interest in the cause of action, because NBC could have freely broadcast in the United States without reaching Canadian televisions. This "false conflicts" situation would require the forum court to apply Canadian law.

At first blush, interest analysis appears to be an ideal choice of law method because it analyzes the legislative policies of all jurisdictions involved. But how can the forum court know determinatively the legislative policy of another jurisdiction? Oftentimes legislatures do not have a single mind; the legislators each had different reasons for passing the law. This problem gives the forum court another escape valve: characterization of other countries' legislative policies. Courts applying the interest analysis method can manipulate the policies in favor of their jurisdiction. The First Restatement's inflexibility and interest analysis' flexibility have, ironically, led to the same problems.

(c) Second Restatement

The Second Restatement provides the guidelines lacking in the interest analysis and the necessary policy considerations missing from the First Restatement. The Second Restatement states that the court should apply the laws of the "the state which, with respect to [the defamation], has the most significant relationship to the occurrence and the parties." The Second Restatement gives concrete rules dictating which jurisdiction's laws presumptively apply to specific situations. The Restatement created these presumptions because, in most situations, that jurisdiction will have

189. In Kell v. Henderson, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (1965), aff'd 26 A.D.2d 595, 270 N.Y.S.2d 552 (1966), for example, both the plaintiff and the defendant were domiciled in Ontario. Plaintiff's car also was registered in Ontario. Id. at 648. While the plaintiff was on a trip from Ontario to New York, the plaintiff sustained injuries in an auto accident. Id. Since New York law does not have a guest statute, this situation creates a "false conflict." Id. at 650. However, the court recharacterized the policy behind the New York law as deterring negligent driving on its roads. Id. In so doing, the court created a "true conflict."

190. RESTATEMENT (SECOND) CONFLICT OF LAWS § 150(1) (1971).
a significant relationship to the cause of action. In multistate defamation, for example, the Second Restatement presumes that the state with the most significant relationship will be the state where the defamed person was domiciled at the time of the communication, if the defamatory statement was published in that state.\footnote{Id. at § 150(2). If the defamed party is a corporation, courts applying the Second Restatement will presume that the state with the most significant relationship will be the state where the corporation has its principal place of business at the time of publication, if the matter was published in that state. Id. at § 150(3). When there is a single aggregate communication to a large number of persons at one time, the plaintiff has only one cause of action from that communication. Id. at § 150, comment c.} However, if another jurisdiction has a more significant relationship to the action under the Second Restatement, the forum court will apply that jurisdiction's laws.\footnote{Id. at § 150, comment b.} A court determines which state has the "most significant relationship" by considering practical and policy factors. In tort cases, the practical factors include, but are not limited to: "(a) [T]he place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicil, residence, nationality, place of incorporation, and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered."\footnote{RESTATEMENT (SECOND) CONFLICT OF LAWS § 145(2) (1971).} If the practical factors do not determine which law should apply, then the court will consider the policies of interested jurisdictions. Policy considerations include: Relevant policies of the forum and other interested jurisdictions; the protection of justified expectations; and basic policies underlying the particular field of law.\footnote{Id. at § 6(2).}

The Second Restatement lacks the rigidity of the First Restatement; instead of creating a body of rules, it provides an "approach." Unlike interest analysis, the Second Restatement begins with a presumptive rule of law. If a weighing of contacts and policies rebuts the presumption that the defamed person's domicile is the place with the most significant relationship, then the Second Restatement takes a similar approach as interest analysis. The court under both of these approaches looks at the facts, the
laws, and the policy and determines which jurisdiction has the most significant interest in the action.

The Second Restatement appears to be the best choice of law method to apply in defamation cases. This "most significant relationship" approach provides structure without being too mechanistic. The following describes how application of the Second Restatement will lead to equitable results when: (1) The defendant broadcast the statement from within the forum country; (2) the defendant broadcast the statement from outside the forum country; and (3) the defendant broadcast the statement through a third party.

The court would first consider the interest of the place where the plaintiff was domiciled at the time of the defamation. If, as in Pindling, the defendants did not broadcast, and no other contacts exist, in that jurisdiction, the forum court should decide which jurisdiction has the "most significant relationship" to the parties and the occurrence. In making this determination, the court should consider the following. If the plaintiff is an individual, the court should decide where the individual has established a reputation. If the plaintiff is a corporation, the court should consider where the corporation is doing business and to what degree. If, for example, the corporation has a subsidiary in a particular country with which it has only a tenuous relationship, the harm in that country may not be sufficient to consider the subsidiary a contact. The court should also determine where the defendant is domiciled. If a group of these contacts are all in one country, then the forum court should probably apply that country's laws.

The court must also weigh the interests of the countries involved. The court should pay deference to the policies of other jurisdictions. For instance, in the "Spycatcher" case, the Australian court should have strongly considered the effect that the case may have had on British security. By taking matters such as security into consideration, the most sensitive defense secrets of a country can expect protection in the courts of other countries.195

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If the defendant corporation did not actually broadcast or publish in a particular jurisdiction, but the defendant knew or should have known that the defendant’s acts alone would cause the broadcast to reach that jurisdiction, then those acts would constitute a strong contact in that jurisdiction. For example, in the *Pindling* case, NBC’s “affiliates” broadcast defamatory statements from border cities in the United States. Television viewers in parts of Ontario received these broadcasts. As Justice Montgomery illustrated in his hypothetical, one cannot expect to broadcast at the border of one country and be immune from the laws of the other country. Therefore, in the *Pindling* case, in which conventional televisions received the affiliates’ broadcasts, the Canadian court should consider this contact and apply its own law. Before determining unequivocally that the law of the forum applies, however, the court must weigh other factors.

The court should consider the affiliate’s location and transmittal capacity with respect to the border. If the television broadcast is weak in the forum country, then that country will have fewer contacts. If the contacts appear to be strong in both countries, the forum court should turn to the policy factors in section six of the *Restatement*. The forum court should also weigh any evidence tending to prove that the media derived substantial benefit from its own broadcast in Canada. For example, if NBC receives a large number of endorsements from Canadian corporations, then the forum court should tilt the balance in favor of applying Canadian law. This substantial benefit would estop NBC from denying that the broadcasts into Canada were unintentional.

In the *Pindling* case, the defendants broadcast through its affiliates into Ontario. The Canadian cable companies furthered the broadcast to other parts of Canada. The forum court should again consider whether the defendant received a substantial benefit from the cable companies’ broadcasts and whether the media

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196. *See supra* note 132 and accompanying text.
197. *Pindling*, 49 O.R. (2d) at 60 (describing means by which NBC programming to reach parts of Ontario). *Id.* (NBC’s affiliates broadcast programs into Ontario).
198. *See supra* note 158 and accompanying text.
199. *See supra* notes 129-30 and accompanying text.
defendant authorized the broadcast. If the defendant did receive a substantial benefit or authorized a broadcast into the forum country, the law of the country from which the statement was broadcast may not provide protection. Because this substantial benefit would link the defendant significantly to the forum, the law of the forum country would probably apply. If the defendant neither acquired a benefit nor authorized the broadcast, the forum country should only find jurisdiction over the defendants and apply its own law to the extent of the harm from its original broadcast.

This analysis suggests the use of the Second Restatement approach in defamation cases. The Restatement’s strength lies in its structure and its flexibility. Complex defamation actions require both of these elements in a choice of law rule. The presumption creates a “fallback provision” not provided in interest analysis. In the Second Restatement, if more than one jurisdiction has a significant relationship to the action, the law of the defamed party’s domicile will apply. The practical and policy factors ensure that a court will not apply the law of the jurisdiction which has very little interest in the case. These safeguards preserve national policies by requiring courts to apply the law of the country with a substantial interest in the cause of action.

2. Choice of Law in England and Canada

In England and Canada, if the defamation occurs in the forum, the law of the forum will automatically apply. When the tort occurs completely outside the forum, the choice of law rule is complex and uncertain. English and Canadian courts have

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200. MCLEOD, supra note 151, at 527. Szalatnay-Stacho v. Fink, K.B. 1 (C.A.) (1947), demonstrates the inadequacies of this mechanical rule. In the Stacho case, even though all of the parties were foreign citizens, resident and domiciled abroad, because the tort was committed within the forum, the lex fori applied. See MCLEOD, supra note 151, at 195 (discussing the Stacho case). NORTH, CHESHIRE’S PRIVATE INTERNATIONAL LAW 288 (9th ed. 1974).

201. In applying the law to any given case, a court will use the choice of law rules only for substantive law. MCLEOD, supra note 151, at 197 (citing Can. Accept. Corp. v. Matte, 9 D.L.R. (2d) 304 (Sask. C.A.) (1957)). The “substantive law” usually constitutes the determination of the “actual matter of dispute between the parties”. Id. at 198. For procedural laws, the court will apply the law of the forum (lex fori). Id. at 197. It is difficult to distinguish between substantive and procedural laws. Id. (citing Leroux v. Brown, 12 C.B. 801 (1852) and Bernkrant v. Fowler, 55 Cal. 2d 588, 360
traditionally applied the *lex fori* (law of the forum) or *lex loci delicti* (law of the place of the wrong) to tort actions. Judges and other scholars have criticized these choice of law methods for several reasons. These rules are mechanical; they do not take into account the interests of the conflicting jurisdictions. Like the *First Restatement Conflict of Laws* in the United States, application of the *lex loci delicti* begs the question: "where is the place of the wrong?" As described above, "the place of the wrong" in a defamation action could mean the place of publication, one of the parties' domiciles, or the place where the statement was heard or read. These problems have caused English and Canadian courts to reject the *lex loci delicti* as a complete answer to choice of law questions.

The Queen's Bench in *Phillips v. Eyre* complicated the choice of law issue. The *Phillips* court stated that, "[A]s a general rule in order to found a suit in England for a wrong alleged to be committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the place where it was done." English courts have interpreted the *Phillips* language to mean that in every action brought in England arising out of a foreign tort, the plaintiff must prove that the defendant violated both the *lex loci delicti* and the law of England. To illustrate, in the *Pindling* action, if Pindling had brought his defamation action in England, he would need to prove that he has a cause of action for defamation in that country. In addition, Pindling would need to

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202. See McLEOD, supra note 151, at 527-30. When the tort is committed within the forum, the courts automatically apply *lex fori*, regardless of whether the parties involved are resident and domiciled elsewhere. *Id.* at 527. Therefore, conflicts of law mainly involves situations where the tort is committed outside of the forum. *Id.*

203. *Id.* at 529.

204. *Id.* at 530.

205. L.R. 6 Q.B. 1 (1870).

206. *Id.*

207. NORTH, supra note 200, 267-68 (9th ed. 1974).
prove that NBC violated U.S. law. Only if Pindling meets these two requirements would the English courts hear his case. Canada has adopted a modified version of this rule. Canadian courts have applied the traditional rule of Machado v. Fontes. According to Machado, the plaintiff may bring a cause of action in England only if the defendant “is neither actionable nor punishable by the lex loci delicti.” Under this approach, Pindling could bring the action in England only if he could not sustain the action in Canada or the United States, if indeed these countries were the “places of the wrong.”

The English courts have construed the Phillips case as relating to both jurisdiction and choice of law. The opinion in Boys v. Chaplin demonstrates the split of opinion on this topic. Justice Willes interpreted the word “actionable” in the first sentence as “cognizable or triable,” relating strictly to jurisdiction. Lords Donovan and Guest suggested in their opinions that both arms of the rule involve jurisdiction only, and that choice of law remained an open issue.

The majority of English courts have accepted the view that Phillips related to choice of law. These courts differed, however, on what choice of law rule to apply. Lord Pearson contended that “the substantive law of England plays the dominant role, determining the cause of action, whereas the law of the place where the act was committed plays a subordinate role, in that it may provide a justification for the act and so defeat the cause of action - but it does not in itself determine the cause of action.” Thus, English law would apply unless the wrongful act is justifiable under the law of the place of the wrong. The problem with this interpretation lies in its inflexible adherence to lex fori.

208. McLEOD, supra note 151, at 555 (quoting Going v. Reid Bros. Motor Sales, 35 O.R. (2d) 201, 204-05 (1982)).
210. See NORTH, supra note 200, at 275.
211. See id. at 276 (quoting Lord Donovan from Boys, A.C. at 383, and Lord Guest from Boys, A.C. at 381).
212. See id.
213. See id. at 279 (citing Chaplin v. Boys, A.C. at 398).
This method encourages forum shopping; the plaintiff will initiate the action in England if English law is more favorable.

In order to avoid the mechanical problems of *lex fori* and *lex loci delicti*, a majority of the justices in the Boys case suggested that the court apply a "flexible" approach to determine which law applies. None of the lords, however, clearly defined the "flexible approach." They merely criticized their current system as an encouragement to forum shop. Lords Hodson and Wilberforce maintained that the court should adopt Dr. Morris' proper law of the tort approach. Under this theory, as originally formulated, the court should apply, "the law which, on policy grounds, seems to have the most significant connection with the chain of acts and consequences in the particular situation."' Morris later refined his theory to apply the law of the jurisdiction with the most significant and real connection to the facts. Morris' theory was the harbinger of the American *Restatement Second Conflicts of Laws.*

Lords Hodson and Wilberforce in fact suggested the application of the *Second Restatement* in their "flexible approach." Other members of the House of Lords rejected this suggestion; they feared that application of such a rule will create too much flexibility. Some suggested that the "proper law of the tort" and the *Second Restatement* should only apply to special situations. If the court in future cases accepts this view, then defamation should qualify as one of these special situations.

Unlike the mechanical *lex fori* or *lex delicti*, the proper law of the tort approach takes into account all possible contacts and the policies of interested states. The same analysis of *Pindling* as applied under the *Second Restatement* would apply here; if NBC had knowledge that NBC affiliates were broadcasting the program on Canadian televisions, that knowledge could count as a Canadian contact; if only three televisions received the broadcast, Canada's contacts would be very weak. Although this choice of law method.

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215. *Id.*
216. *Id.*
does not have the guidelines provided under the Second Restatement, the proper law approach does have the benefit of flexibility needed to ensure that the court applies the laws of an interested jurisdiction. If the court applies the laws of an interested jurisdiction, the court can preserve the delicate balances between freedom of speech and right to privacy from manipulative forum shoppers.

Despite the benefits of the proper law approach, this choice of law method may not survive. Canada has outrightly rejected the proper law approach in favor of the lex fori.\(^{218}\) In England, a majority of the Boys court also rejected the proper law of the tort’s application, without providing a better alternative.\(^{219}\) Because of the “place of the wrong” ambiguity and the differing balances between freedom of speech and right to privacy, the flexible proper law of the tort theory would undoubtedly be the most appropriate choice of law method for multinational defamation cases.

The above discussion illustrates the great complexity in choice of law. The diverse approaches of interest analysis, the First Restatement, the Second Restatement, lex loci delicti, and lex fori show how parties can greatly benefit by the use of one approach over another. A successful argument in the determination of choice of law could mean the difference between a losing and a winning suit. This is especially true in defamation because the substantive laws and policies among the countries are so diverse. The flexibility of the Second Restatement in the United States and the proper law of the tort approach in England suggests that courts should apply these choice of law methods to multinational defamation actions. The rules and policies advanced from these choice of law methods may help to preserve traditional national policies.

\(^{218}\) Id.

\(^{219}\) Boys, A.C. 356.
Advances in communication have caused publishers, editors, and authors to become more concerned about defamation law in other countries and their rights in defamation litigation. Each country balances right to privacy and freedom of expression differently. The United States Constitution guarantees freedom of speech. U.S. citizens rely on this guarantee. England and Canada protect the right to privacy by giving less freedom to the press. Their citizens rely on this protected right. If "forum shopping" undermines national rights in any manner, these rights will slowly lose their meaning. By requiring the country whose laws apply to have a substantial relationship to the cause of action, the courts will ensure the preservation of these vital rights and guarantees.

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