

**RESPONSE TO CONSULTATION DRAFT OF
DEFAMATION AND MALICIOUS PUBLICATIONS (SCOTLAND) BILL 2017**

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SCOPE AND CONTEXT

This contribution is specifically focussed on the proposed text of **section 18 on Jurisdiction** in the draft Defamation and Malicious Publications (Scotland) Bill 2017. This aspect of the Bill is important for a number of legal and policy reasons:

- (1) The need for parties to have certainty and predictability rules in determining when Scottish courts are competent;
- (2) Jurisdiction rules must reflect substantive laws of delict - defamation (noting the primary purpose of this Bill), breach of confidence and privacy;
- (3) Jurisdiction rules should support and strike an appropriate balance between different human rights, specifically the right to a fair trial (Article 6, ECHR),¹ right to respect for private and family life (Article 8, ECHR) and the right to freedom of expression (Article 10, ECHR)²;
- (4) Jurisdiction rules should be technology reflective and neutral. According to the UK's Office for National Statistics, "social networking" use increased by 21% from 45 % in 2011 to 66% in 2017³;
- (5) Brexit will remove the distinction between EU and non-EU domiciled defenders and requires careful review for disputes post-Brexit. In the case of the former, Regulation 1215/2012 (Brussels I Bis) applies to EU defenders. In the case of non-EU defenders, Schedule 8 to the Civil Jurisdiction and Judgments Act 1982 applies on a broadly equivalent basis to Article 5(3) Brussels I Regulation;
- (6) Following on and noting comments from the earlier consultation, a policy decision must be made regarding the future operation of jurisdiction rules. For defenders from both EU and EEA states, three options appear to be the most viable. One option appears to be retention

¹ Case T-486/11 *Orange Polska SA v Commission* (CJEU, 17 December 2015), 95 ; *Jameel v Dow Jones* [2005] EWCA Civ 75, 55.

² Consultation response from the Senators of the College of Justice, at p.181 ; D Mangan and L Gillies (eds), *The Legal Challenges of Social Media*, Elgar, 2017; *Delfi AS v Estonia*, [GC] App no 64569/09 [2015] ECHR 586.

³ Office for National Statistics, "Internet access and Individuals 2017," 3 August 2017, Point 7, p.8, available at <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2017#email-remains-the-most-common-internet-activity>

of existing jurisdiction rules in Brussels I Bis by analogy with the Lugano Convention. The second option would be to extend Schedule 8 to the Civil Jurisdiction and Judgments 1982 Act to EU defenders. The third option would be to amend the scope of s.18 of the proposed Bill to include EU defenders. Such a policy must operate across the various jurisdictions of the UK in a consistent manner and be reflective of current and future UK policy in civil judicial cooperation.⁴

CROSS-BORDER JURISDICTION: A KEY LEGAL ISSUE

The contributor's research has contributed to the jurisdictional aspects of cross-border internet torts and delicts in two key respects. The first aspect concerns the CJEU'S extension of the criteria for establishing jurisdiction under Brussels I (Article 5(3)) cases concerned with breach of personality rights on the internet through the publication of newspaper articles on multiple websites across a number of jurisdictions. In *C-509/09 eDate Advertising GmbH v X* and *C-161/10 Olivier Martinez and others v MGN Ltd*,⁵ the Court of Justice extended the scope of Article 5(3) to claims for breach of personality. Central to Advocate General Villalon's view and the subsequent CJEU's decision for breach of personality and defamation on the internet was the need to establish a close link or correlation between the pursuer's (ergo victim's) 'centre of interests' and the centre of gravity of the dispute. Given the increasing range of social media platforms available to users on an annual basis, this view still holds today. The CJEU held that rather than trying to establish jurisdiction on the basis of sufficient distribution throughout a particular location or multiple locations, the pursuer's centre of interests can operate as a supplementary basis for jurisdiction. Whilst not without its critics, the key benefit of the centre of interests criteria as a supplementary basis of jurisdiction is to support substantive delict and human rights laws, offer the pursuer an alternative to the place of damage and enable the defender to determine (predict) where the other party's centre of interests may be located. Depending on the policy option selected and the status of CJEU decisions in future, such an approach could be taken by the courts in interpreting a future s.18.

The author's second aspect focussed on the approach of the English courts and specifically the recent judgment in *Ahuja v Politika Novine I Magazini DOO*⁶ in asserting jurisdiction over a non-EU

⁴ On which see Department for Exiting the EU, "Providing a Cross-Border Civil Judicial Cooperation Framework," August 2017, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf and the European Commission, "Position Paper on Cross Border Civil and Commercial Matters," 13 July 2017, available at https://ec.europa.eu/commission/publications/position-paper-judicial-cooperation-civil-and-commercial-matters_en.

⁵ [2012] 3 WLR 227.

⁶ [2015] EWHC 3380 (QB).

defendant in a claim for defamation or privacy via social media. The paper ⁷ argued for the inclusion of human rights in each stage of the English court's assessment in deciding whether to grant service out. To sue a non-EU-domiciled defendant in tort in the English courts, three requirements for service out must be satisfied; a serious issue is raised, ⁸ the claim falls within one of the grounds under the Civil Procedure Rules and the claimant has suffered "significant damage."⁹ The paper concluded that given the requirements for serious harm under section 1 of the Defamation Act 2013, and the need to establish that England is clearly the most appropriate forum under section 9(2) 2013 Act, ¹⁰ the English courts should ensure that Article 6 ECHR is part of the court's assessment when deciding to grant service out. A balance requires to be struck in considering the meaning and presumption of 'significant damage' ¹¹ for the purposes of s.9(2) 2013 Act.

COMMENTS ON PROPOSED S.18 OF THE BILL

The Bill provides a helpful definition of defamation as a "published statement which has caused or may cause serious harm to another party." It also clarifies the need for 'serious financial loss' for non-natural parties.

However, the crucial issue with section 18 is that its scope is limited to non-EU defenders. This might not be a policy problem per se if the UK chooses to adopt Lugano in place of Brussels I Bis and agrees with the EFTA as to the jurisdiction of its court. Clarity on the post-Brexit position is urgently required. There should also be cross-reference to the relevant provisions of an amended Schedule 8 to the Civil Jurisdiction and Judgment Act 1982.

Key to the effective operation of jurisdiction will be s.18(2). The pursuer must demonstrate that Scotland is clearly the most appropriate forum. This reflects the position under s.9(2) of the 2013 Act applicable in England and outlined in the previous section. There are two basic requirements. First, the claim must satisfy one of the procedural gateways (tort). This is where s.9(2) will filter out vexatious and spurious claims. The second requirement, following *Spiliada Maritime v Cansulex*,¹² is that England is the most appropriate for trial in the interests of the parties and for the ends of justice. The effect of the Defamation Act 2013 is that the requirement for serious harm may impact

⁷ Gillies, in Gillies and Mangan (eds), note 2 above.

⁸ *Cooke v MGN Ltd* [2014] EWHC 2831 (QB); *Vidal-Hall v Google Inc* [2015] EWCA Civ 311; Joshua Folkard, 'Privacy and Conflicts in the Court of Appeal' (2016) 132 LQR 31.

⁹ *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 437; *Sobrinho v Impresa Publishing SA* [2016] EWHC 66 (QB).

¹⁰ *Ames v Spamhaus Project Ltd* [2015] EWHC 127 (QB).

¹¹ In *Jameel*, the court dismissed a libel claim as a result of an article on a website which had been viewed by fewer than six people, one of whom was the claimant, within the English jurisdiction; *Jameel v Dow Jones* [2005] EWCA Civ 75.

¹² [1987] AC 460 (HL).

on getting over the procedural hurdle. If this is achieved, it is argued that the court's assessment of *forum conveniens* analysis should include the extent to which the claimant has the right to access a fair trial under Article 6 ECHR.

An interesting proposal is contained in s.18(3). It provides that a claim can be brought where there has been reference to a statement. In the internet era, this would cover statements and references to statements contained in a tweet, a re-tweet, a sub-tweet, a 'like', comment or a post. This would appear to maintain the multiple publication rule, which entered the internet era from *Godfrey v Demon Internet Limited*,¹³ in that every individual publication constitutes a delict. It does suggest a departure from the single publication rule in the 2013 Act.

Again, in a similar fashion to English jurisdiction, s.18(4) confirms that a defender may submit a plea of *forum non conveniens*. Here it is argued that if the claimant can raise an issue of Article 6 ECHR with the court at the first stage of *forum conveniens*, there is a counter-argument that the defender in asserting the plea may equally seek to argue Article 6 in that another court of competent jurisdiction (to coin the English term) is clearly more appropriate.

The questions that s.18 does not answer, not perhaps needs to, is what jurisdiction rules will remain or apply in a post-Brexit Scottish court? Until such time the UK leaves the EU, Article 7(2) Brussels I Bis enables a claim for delict or quasi delict to be brought in the place where the harmful event occurred or where the harmful event may occur and the centre of interests criteria remains a valid basis for a claim. The inclusion of jurisdiction rules in s.18 is an opportunity to clarify the post-Brexit position in cases involving EU defenders.

In the internet era where injunctions, including super injunctions, have been issued by the English courts, the position of Scots law and clarity on its adjudicative jurisdictional competence is welcomed.

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August 2017

¹³ [1999] 4 All ER 342, *Beresovsky v Forbes Inc* [2000] 1 WLR 1004, *Loutchansky v Times Newspaper Ltd* (Nos. 2-5) [2002] WB 783.