Forum-Shopping: From Russia with Love
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form of intervention which supervision represents, and that the more draconian care order (which authorises removal of the child from the family) should be available only on proof of the allegations against the parent. This would require primary legislation to amend the Children Act, but it is not inconceivable that the Government might be forced down this road in order to comply with the European Convention on Human Rights. The argument was indeed presented by the appellants that the actions of the local authority, in continuing the care proceedings and leaving A in foster care after it realised that the case against the parents could not be proved, was a violation of their rights to family life under Article 8(1). This was cursorily dismissed by Lord Nicholls on the basis that the steps taken were “no more than those reasonably necessary to pursue the legitimate aim of protecting A from further injury” and were thus within the exceptions set out in Article 8(2). It seems entirely likely that parents and other primary carers will continue to invoke the Convention whenever there is a suggestion of compulsory action but the evidence against them is inconclusive. In this, as in other areas of family law, the courts are increasingly going to be called upon to resolve the clash between the fundamental rights of individual family members protected by the Convention—in this case the child’s fundamental right to protection and the parents’ fundamental right to family integrity. Where the harm has already occurred to the child, as it had in the case of A, the message of Lancashire seems to be that it is legitimate to give priority to the former, whereas where it has not, as in the case of B and in the case of the younger girls in Re H, priority must be given to the latter. But is this not also open to the objection that we ought not to have to wait for serious harm to befall a child before taking protective measures?

Andrew Bainham

Forum-shopping: from Russia with Love

Recent years have witnessed considerable controversy over the principles that determine when a court has jurisdiction to hear claims against foreign publishers who circulate defamatory material in several jurisdictions, including England. This is the situation that arose in the recent decision of the House of Lords in Berezovsky v. Michaels [2000] 1 W.L.R. 1004. In 1996 Forbes Magazine, a company incorporated in the United States, published an article
about certain activities in Russia of two prominent businessmen, Mr. Berezovsky and Mr. Glouchkov, who were resident in Russia. The magazine containing the article was primarily circulated in the United States, but did have an English circulation accounting for approximately 0.2% of its global circulation. In 1997 Mr. Berezovsky and Mr. Glouchkov issued proceedings in England alleging that the article contained defamatory material. The claimants, however, limited their claims to the damage done to their reputations in England as a result of the magazine's English publication. The issue before the House of Lords was whether the claimants should be given permission to serve their claim form on the publisher out of the jurisdiction, pursuant to R.S.C. Order 11, rule 1(l)(f), now C.P.R Part 6.20(8). At first instance Popplewell J. had refused such permission, but had subsequently been overturned by the Court of Appeal ([1999] E.M.L.R. 278: judgment of the court delivered by Hirst L.J.). The House of Lords by a majority (Lords Hoffmann and Hope dissenting) dismissed the appeal and held that permission should be given for the trial of the action to proceed in England.

The House did not consider whether the case before it fell within the jurisdictional head in C.P.R. Part 6.20(8), but only whether England was the forum conveniens for the trial of the action. Their Lordships were unanimous in reiterating the basic principle that, in determining the appropriate forum, citation of authority involving similar facts is to be discouraged, as each case will turn upon its own facts (Spiliada Maritime Corporation v. Cansulex Ltd. [1987] A.C. 460 at 465 per Lord Templeman). It is, therefore, unsurprising that the minority disagreed with the majority about the weight to be attached to the various factors connecting the claimants, and the dispute generally, with England. The speeches do, however, contain a point of considerable importance: the House had its first opportunity to approve the principle that, in relation to actions based on a tort, the place where the tort was committed is presumed to be the forum conveniens for the trial of the action. Lord Steyn, for the majority, considered two aspects of this presumption. First, His Lordship considered the weight to be attached to the presumption and approved Goff L.J.'s statement in The Albaforth [1984] 2 Lloyd's Rep. 91, 96, that "if the substance of the tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the courts of that jurisdiction are the natural forum". According to this approach, the place where the tort was committed will not simply give an indication of where the case ought to be heard, but will be determinative of that issue.
The second issue considered by Lord Steyn was how to determine, for the purposes of applying the presumption, where a "multi-jurisdictional" libel had been committed. Before the Court of Appeal, the defendant had submitted that, in the case of "multi-jurisdictional" torts, the court should treat the wrongful acts taking place in the various jurisdictions as giving rise to a single "global tort". In order to determine the place where that "global tort" had been committed, for the purposes of the presumption, the court should ask where "in substance" that tort arose (see Metall und Rohstoff AG v. Donaldson, Lufkin and Jenrette Inc. [1990] 2 Q.B. 391). This argument was, however, rejected by both Hirst L.J. in the Court of Appeal and Lord Steyn in the House of Lords on the ground that each publication of an article gave rise to a separately actionable tort and that, as a result, each act of publication should be examined separately to determine where it had been committed.

Lord Steyn's approach to the presumption has two consequences. First, the victim of defamation who limits his claim to the damage suffered in a particular jurisdiction will have complete freedom to sue in the jurisdiction most favourable to his case and will be able to use that judgment as a weapon in subsequent litigation in other jurisdictions. Second, a claimant who limits his claim to the damage suffered in England will always be able to show that the tort was committed in England and, as a consequence, be able to take advantage of the presumption that England is the forum conveniens. It would appear to be difficult to rebut this presumption. As Lord Hoffmann recognised, this approach will encourage "forum shoppers in the most literal sense". The effect of the decision in Berezovsky is to equate the approach to be adopted under C.P.R. Part 6.20(8) with that adopted by the European Court of Justice in Shevill v. Presse Alliance SA [1995] 2 A.C. 18 in the context of Article 5(3) of the Brussels Convention 1968. The decision in Shevill has equally been criticised for encouraging forum-shopping (see Reed and Kennedy, "International Torts and Shevill: the ghost of forum shopping yet to come" (1996) L.M.C.L.Q. 108). Whilst the charge that the Brussels Convention encourages forum-shopping must sometimes be accepted as the corollary of the application of its unashamedly rigid jurisdictional rules, it ought not to be possible to level such a criticism at a jurisdictional system based upon the exercise of a discretion designed to discover the most appropriate forum. Lord Hoffmann may, however, have identified the potential solution: to treat the fact that the tort had been committed within the jurisdiction as no more than one factor that should be taken into account when
balancing the various factors connecting the dispute with England (see Schapira v. Ahronson [1999] E.M.L.R. 735 at 745 per Peter Gibson L.J.). This may be the only available way of preventing England from becoming an international libel tribunal for the rest of the world.

Christopher Hare

A NEW SYSTEM OF CIVIL APPEALS AND A NEW SET OF PROBLEMS

The decision itself in Tanfern Ltd. v. Cameron-MacDonald [2000] 1 W.L.R. 1311 (C.A.) hardly merits attention (held: the court lacked jurisdiction to hear the instant appeal). But Brooke L.J.'s judgment, endorsed by his colleagues, contains an analysis of the new system of civil appeals which took effect on 2 May 2000. He rightly describes these as "the most significant changes in the arrangements for appeals in civil proceedings in this country for over 125 years".


Three principles govern the new appellate scheme: finality, proportionality and the efficient allocation of scarce judicial resources (especially hard-pressed Lords Justices of Appeal). The second and third principles are articulated in the remarkable "Overriding Objective" in C.P.R. Part 1. These principles underpin the following changes.

The Court of Appeal's law-making role will be enhanced because important appeals can now proceed directly to that court rather than being heard on appeal within the county court or High Court (C.P.R. 52.14 and Access to Justice Act 1999, s. 57). Civil appeals, including those to the Court of Appeal, now require permission in nearly all cases (C.P.R. 52.3(1)). A civil appeal, at whatever level it is heard, will be restricted normally to a review of the relevant decision rather than a re-hearing (C.P.R. 52.11). Exacting criteria now govern the grant of permission for second appeals, that is, appeals within the county court or High Court followed by recourse to the Court of Appeal (C.P.R. 52.13). Furthermore, as under the old law, the appeal court will not normally receive oral evidence, nor evidence which was not before the lower court (ibid.).