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TEMPLARS ThoughtLab

Navigating Online Defamation: Jurisdictional Challenges in a Borderless World

Introduction

In the last week of November 2024, a recent libel judgment of a High Court in England & Wales against a Nigerian came to light and sparked widespread discussions regarding the propriety of an English court assuming jurisdiction to hear and determine a claim against a non-resident and proceeding to issue monetary damages in relation to online defamation claims.

In what follows, this publication examines the jurisdictional issues surrounding online defamation claims by analysing, from a comparative perspective, the approaches of courts in England, Nigeria, Australia and the United States. The publication will also explore the options that are available to a defendant who is sued before a foreign court on account of an online or internet based publication.

The Concept of Jurisdiction

Jurisdiction is the legal competence that a court has to hear and decide matters or issues which are presented to it in a formal way for adjudication.¹ The concept of jurisdiction is therefore the cornerstone of the adjudicatory system. This is the case under Nigerian law as well as in most of the common law world. Thus, there is an unbroken line of Nigerian judicial authorities to the effect that where a court lacks jurisdiction, its proceedings, no matter how well conducted, and the resultant judgment all amount to a nullity.²

¹ *Miscellaneous Offences Tribunal vs. Okoroafor* [200] 18 NWLR (Pt. 745) 295 at 326 para H.

² *Military Governor of Ondo State v. Adewunmi* [1988] 3 NWLR (Pt. 82) 280.

The traditional English Common Law position has always been that English courts have jurisdiction in actions *in personam* against any person who is resident within the court's territorial jurisdiction or who is present within jurisdiction when the originating process is served upon him. Once the defendant is resident or present within the court's territorial jurisdiction - no matter how transient the presence - and is served with the originating process, the court assumes jurisdiction, but not otherwise.³

Under Nigerian law, Nigerian courts exercise jurisdiction over a defined subject matter as provided under the Constitution of the Federal Republic of Nigeria 1999 (the "Constitution"). For example, the State High Courts have jurisdiction over contracts and tort-based claims. Also, Nigerian courts can only exercise jurisdiction within their territories. Thus, where a claim for defamation is brought before the High Court of Lagos State, it must be in relation to a claim which arose within the court's territorial jurisdiction.

However, both English and Nigerian law allow for claims to be brought against non-residents under special circumstances, such as when a cause of action arises within the jurisdiction but involves a non-resident defendant. To do this however, special permission must first be obtained from the court to serve the originating process on the defendant outside jurisdiction.⁴ This is why a High Court in Kano State, Nigeria would have jurisdiction to hear and determine a claim for negligence against an American biopharmaceutical company such as Pfizer for a tort committed in Nigeria. It therefore follows that the appropriate court to exercise jurisdiction in a defamation claim is either the court of the place where the defendant is ordinarily resident or domiciled, or the court of the place where the cause of action arose. This in turn begs the question, where does the cause of action arise in a defamation claim?

Jurisdiction in Online Defamation Cases

Defamation is the act of injuring a person's character, fame or reputation by false and malicious statement.⁵ It is the general term that is commonly categorised as either libel or slander. The ingredients of the tort of defamation are that (i) a statement was published; (ii) the claimant was identified by the statement; (iii) the published statement was demonstrably false; (iv) the publication had a negative impact on the claimant's reputation; and (v) the defendant was responsible for the publication. Defamation falls under the law of tort.

One of the features that distinguishes tort-based claims from cross-border contractual claims is that due to the inherently contentious nature of tort claims, there is no prior agreement between the tort-feasor and the claimant regarding where to bring the claim. Consequently, there is the real potential for the multiplication of the bases of jurisdiction, and it is often difficult for putative defendants to reasonably foresee the court before which they may be sued.

The question of where a defamation claim arises is crucial in determining which court has jurisdiction to hear the claim. The determination is even more complex in the case of online defamation claims. Courts across jurisdictions have addressed this issue differently:



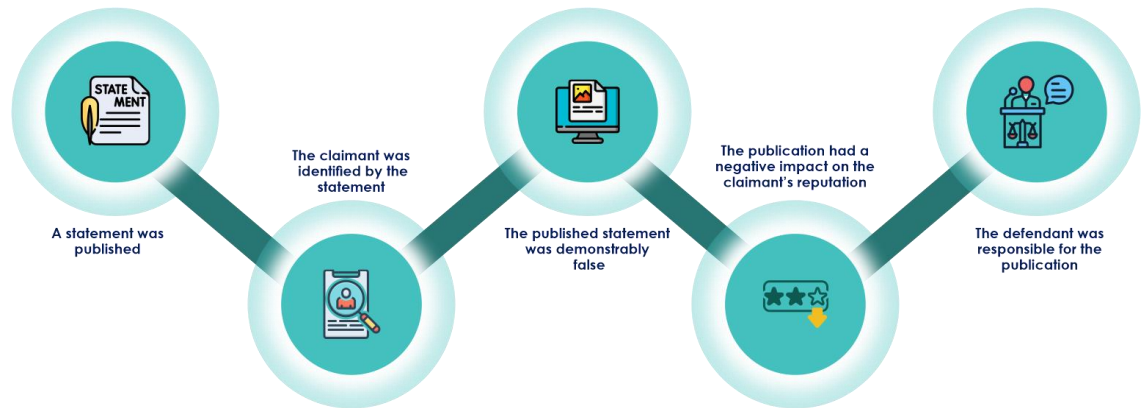
Defamation

the act of injuring a person's character, fame or reputation by false and malicious statement.

³ The earliest authorities on the point include *Colt Industries Inc v Sarlie (No. 1)* [1966] 1 WLR 440; *Maharane of Baroda v Wildenstein* (1972) 2 Q.B 283.

⁴ This has been described as "exorbitant territorial jurisdiction".

⁵ See Atake, Gbahabo & Ushiadi "Online Defamation: Just Before You Post It" Templars Thought Leadership Series available at [Templars-Thought-Leadership-Online-Defamation-Just-Before-You-Post-It.pdf](#)



The Question

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1. **England:** The English Common Law rules of jurisdiction in traditional defamation claims was laid down in the ancient case of *Duke of Brunswick v Harmer*⁶ to the effect that each individual publication of a libel gives rise to a separate cause of action, subject only to the applicable limitation period. English courts maintain jurisdiction over online defamation claims where the publication is accessible, and the claimant has a reputation to protect within the jurisdiction. This principle was upheld by the UK House of Lords in *Berezovsky v Michaels*⁷ and the English Court of Appeal in *King v. Lewis*.⁸ Thus, the courts have adopted a broad approach, deeming that any jurisdiction where defamatory material is accessed or downloaded can potentially assume jurisdiction over the proceedings.
2. **Australia:** The High Court in *Gutnick v. Dow Jones* similarly held that online publishers are subject to the laws of any jurisdiction where their material is accessible, emphasising the global reach of internet publications.
3. **United States:** American courts, however, apply a more restrictive standard, requiring the claimant to demonstrate that the publication specifically targeted the forum in which the claim is brought. This "targeting" requirement limits the number of forums in which a claim can be pursued.
4. **Nigeria:** Nigerian courts align closely with the English position. In the case of *Daily Times Nig. Plc v. Arum*,⁹ the respondent alleged that the appellants had made a libelous publication about him online including falsely presenting him as a paedophile, a rapist and a dangerous criminal. The respondent sued in Enugu State where he lives and where he claimed that his friends, relations and colleagues accessed and downloaded the online publication. The appellants challenged the jurisdiction of the Enugu Court to hear the

⁶ *Duke of Brunswick v Harmer* (1849) 14 QB 185.

⁷ *Berezovsky v Michaels* [2000] UKHL 25.

⁸ *King v Lewis* [2004] EWCA 1329.

⁹ *Daily Times Nig. Plc v. Arum* (2023) 17 NWLR (Pt. 1914) 559.

claim, and when the trial court dismissed the objection, the appellants appealed to the Court of Appeal. In dismissing the appeal, the Court of Appeal stated that a major feature of materials placed on the internet is universal accessibility with minimal protocols wherever there is access to the internet. His Lordship added that publishing through the internet or making a publication online implies a desire to make the material so published available globally.¹⁰

Although the Court of Appeal took the view that the mere virtual existence of a publication or passive internet activity is not enough basis for a Nigerian court to assume jurisdiction, the Court however held that the cause of action for libel is complete upon publication and wherever the online publication is accessed or downloaded, the court of such place can rightly assume jurisdiction.

It follows therefore that an English or Nigerian court will assume jurisdiction over an internet based libel claim as long as it can be shown that the publication was accessed or downloaded within the court's jurisdiction. We now turn our attention to the options available to defendants who find themselves faced with an originating process from a foreign court.

Options open to a defendant when faced with a foreign claim

There are a number of options available to such defendant and the decision of what option to take, depends on the entire circumstances of each given case. In either case, however, the most prudent thing to do is to seek legal advice to ensure that the option taken is a well-considered one.

The first option is to enter appearance in protest and contest jurisdiction of the foreign court to hear the claim. Where a court lacks jurisdiction to entertain a libel claim because there was no publication in that jurisdiction, the defendant would be entitled to ask the court to decline jurisdiction and strike out the claim. Even where the claimant can show that the publication was accessed or downloaded in England, and therefore that the English court has jurisdiction, the defendant is entitled, under English law to rely on principle of *forum non conveniens* and request the court not to exercise the jurisdiction it validly possesses and instead stay proceedings in favour of Nigerian courts. To do this, the defendant must show that there is some other available forum e.g., a Nigerian court in which the case may be tried more suitably for the interests of the parties and the ends of justice.¹¹

The second option is for the defendant to submit to the jurisdiction of the English court and defend the suit on the merit. This option is recommended in cases where the defendant has a defence to the claim. There are a number of defences to a claim for libel including justification, fair comment, absolute and qualified privilege, etc. Thus, where a defendant believes that the alleged defamatory publication, subject of the suit is true, the best option would be to enter appearance and defend the claim on the merits. The defendant may also request the court to strike out the claim for being an abuse of process if it can be shown that the claimant has no reputation in England or if the publication is so minimal that damage to the claimant's reputation is insignificant.



Court Lacks Jurisdiction

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¹⁰ The Court of Justice of the European Union expressed similar sentiment in the case of *eDate Advertising v. X and Olivier Martinez and Robert Martinez v. MGN* [2011] ECR I-10269 when it held that the placing of a content online on a website must be given a different consideration from the traditional forms of defamation cases because the defendant must be taken to have intended, in principle, to ensure the ubiquity of the content.

¹¹ See the judgment of Lord Goff in the case of *Spiliada Maritime Corporation v Cansulex Limited* [1987] AC 460 which is leading authority for the principle of *forum non conveniens*.

Failure to defend the claim renders the defendant liable to an adverse decision in default of defence. The only downside is the initial cost of defending the suit, especially the fees for legal representation. It should however be noted that one of the benefits of the choice of English courts as a preferred forum for international disputes is because of their favourable costs regime which ensures that an unsuccessful claimant must bear liability on a full indemnity basis for the costs incurred by the defendant in defending a frivolous claim. This is something Nigerian courts need to seriously consider.

A defendant may also elect to ignore proceedings in a foreign court. The major reason why defendants elect to ignore proceedings in a foreign country is the prohibitive cost of defending such proceedings. However, this, as we have seen, is a risky option that should only be adopted upon receipt of sound legal advice.

The option of ignoring the proceedings should never be adopted in a case where the defendant has assets within the jurisdiction of the foreign court, otherwise such assets can easily be seized to satisfy the judgment debt. The option is also not advisable where the defendant has plans of visiting the country. Under English law, disobeying or ignoring a court order can render a person liable in contempt of court and ultimately arrest and detention. Any person who elects to ignore court proceedings must therefore avoid future contact with such jurisdiction.

Another reason why the decision to ignore foreign proceedings should not be taken lightly by a defendant is that where a foreign money judgement is obtained against the person, such judgment is registrable and enforceable under Nigerian Law.¹² Thus, it may be prudent for any party sued in a foreign court to seek legal advice before ignoring such proceedings.

Under section 3 of the Reciprocal Enforcement of Judgments Ordinance 1958, the six grounds on which a foreign judgment shall not be registered in Nigerian are (i) where the court that delivered the judgment (the original court) lacked jurisdiction to entertain the claim; (ii) where the judgment debtor was neither carrying on business nor ordinarily resident within the jurisdiction of the original court and did not voluntarily appear or otherwise submit to the jurisdiction of the original court; (iii) where the judgment debtor was not duly served with the originating process; (iv) where the judgment was obtained by fraud; (v) where there is an appeal against the foreign judgment; and (vi) where the foreign judgment should not be enforced on grounds of public policy.

It therefore follows that a defendant may justifiably choose to ignore the proceedings in a foreign court where the court lacks jurisdiction to entertain the claim or where the defendant not carrying on business or being ordinarily resident within jurisdiction did not voluntarily appear or submit to jurisdiction. As noted at the outset, where a court lacks jurisdiction to entertain a claim, and proceeds nonetheless, any decision that emanates from such proceedings is a nullity and liable to be set aside. A lack of jurisdiction or non-appearance may therefore serve as a defence to enforcement proceedings brought in the jurisdiction where the defendant resides or has assets.

¹² *The judgement may be registrable and enforceable in Nigeria by virtue of the Foreign judgements Reciprocal Enforcement Act and the Reciprocal Enforcement of Judgement Ordinance.*

Concluding Remarks

It was in *Smith Kline & French v. Bloch*¹³ that the Lord Denning MR famously noted that, “as a moth is drawn to the light, so is a litigant drawn to the United States.” Ironically, the same can now be said of international libel litigants and English courts, with London now derisively referred to as the libel capital of the world.

This publication has highlighted the approach of courts to the question of jurisdiction in online defamation claims. Where a defendant publishes a defamatory article online about a claimant to people in different countries, each publication would be considered as a separate cause of action which would have arisen in the different countries, thereby giving the claimant a right of access to the courts of any of the countries to bring his claim against the defendant. The burden of proof however lies on the claimant to show that the publication was accessed or downloaded in the jurisdiction in which the claim is brought.

Where a defendant is faced with foreign defamation proceedings in relation to an online publication, a number of options are available to such a defendant. It is however necessary for such defendant to make informed decision. The first step towards that is to seek legal advice.

Disclaimer: This article has not considered the merits or otherwise of the libel claim determined by the English court. It is not a legal opinion. When faced with a foreign claim, you must still seek legal advice on the way forward in respect of each individual case.

¹³ *Smith Kline & French v Bloch* [1982] EWCA Civ J0513-1.