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Comparative Analysis of Defamation Law in the United States of America and United Kingdom in Reference to the Trial 'David Irving v. Penguin Books Limited and Deborah Lipstadt'

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ABSTRACT

Defamation is the act of communicating to a third-party false statement about a person that result in damage to that person's reputation. Libel and slander are the legal subcategories of defamation. Generally speaking, libel is defamation in written words, pictures, or other visual symbols in a print or electronic medium, whereas, Slander is spoken defamation and is in a transient form. Defamation is a creation of English law and the classical definition of the term, was given by Mr. Justice Cave in the case of Scott v. Sampson, as a "false statement about a man to his discredit"

The trial 'David Irving v. Penguin Books Limited and Deborah Lipstadt ' revolves around a defamation suit that was filed by David Irving against the defendants for Lipstadt's book titled "Denying the Holocaust: The Growing Assault on Truth and Memory". Irving claimed that the book contained defamatory statements that has harmed his reputation as a historian and called him a holocaust denier. He filed the suit with the Royal High Court in London, though the defendant was from US. England and the United States share a common legal tradition as US was a colony of UK until 1776 and the US preferred to follow their colonisers law when they gained independence. The law of the two nations on defamation was same until 1964. This paper will examine the points of similarities and differences between the two laws, the reason for divergence in their paths and how this divergence causes a chilling effect on freedom of speech and expression taking this trial as a basis of understanding and discussion.

Keywords: *Defamation, freedom of speech and expression, chilling effect.*

I. INTRODUCTION

In all society individuals have a claim to honour and reputation. This is an inherent human right

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which no state can deny. No system of law can fail to take into account this interest and accord protection in case of its breach. In fact, the type of rights guaranteed to an individual in a society and the extent of protection accorded are important indication of democratic equality in a particular country[2]. These Rights are necessary for holistic development of human beings and in larger arena they are mandatory for the overall development of a nation. One such right that is necessary for human beings is protection against loss of reputation in the eyes of rightful members of the society due to act of some other individual. Reputation is the direct result of judgement which the members of a society have formed with regard to a person's character. This judgement is acquired and affected by those instrumentalities which reach the observer's mind. So, if due to act of a third party, this judgement (of reputation), of a particular person, is tarnished in the eyes of members of society, offence of defamation is said to have been committed. In legal terms, Defamation is the act of communicating to a third-party false statement about a person that result in damage to that person's reputation[3].

Defamation can be both in a permanent form or a temporary form[4]. Libel and slander are the legal subcategories of defamation. Generally speaking, libel is defamation in written words, pictures, or any other visual symbols in a print or electronic medium, which means that libel is basically in a permanent form, whereas, Slander is spoken defamation and is in a transient form. Defamation is a creation of English law and the classical definition of the term, was given by Mr. Justice Cave in the case of Scott v. Sampson, as a "false statement about a man to his discredit"[5]

One such case that revolves around defamation is the trial 'David Irving v. Penguin Books Limited and Deborah Lipstadt[6]'. Here a defamation suit was filed by David Irving (Plaintiff) against the defendants Penguin Books Limited, a British Publishing Company and Deborah Lipstadt who is an American national for Lipstadt's book titled "Denying the Holocaust: The Growing Assault on Truth and Memory". Irving claimed that the book contained defamatory statements that has harmed his reputation as a historian as she has called him a holocaust denier in her book. He filed the suit with the Royal High Court in London in the year 1994, though one of the defendants was from US. David Irving intended to benefit out of the pro-plaintiff regime followed in London that is why he chose the English Jurisdiction.

[2] Dario Milo, The Right to Reputation, in Defamation and Freedom of Speech 0 (Dario Milo ed., 2008), https://doi.org/10.1093/acprof:oso/9780199204922.003.0002 (last visited Feb 19, 2024).
[3] Jeremy Waldron, Dignity and Defamation: The Visibility of Hate, 123 Harvard Law Review 1596 (2010).
[4] Jessica R. Friedman, Defamation, 64 Fordham L. Rev. 794 (1995).
[5] Scott v. Sampson, (1882) QBD 491
[6] (2000) EWHC QB 115

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In this research paper, first the evolution and history of defamation laws around the world is discussed with a special focus on U.K and the U.S.A. Then the law of the two nations on the subject are compared and contrasted. Finally, the chilling effects on freedom of speech and expression caused on plaintiffs that belong to the U.S.A or other parts of the world due to the defamation principles followed in the U.K are being discussed. Finally, emphasis is laid on brining harmony between the laws of two jurisdictions.

II. EVOLUTION OF LAW OF DEFAMATION

Earliest traces of law of defamation can be found in Roman Law[7]. It dates back to the earliest forms of organised society. For Example- If one man called another man "wolf" or " hare" he was liable to pay three shillings; for a false imputation of unchastity against a woman the penalty was forty-five shillings. If one falsely called another "thief"' or " manslayer" he must pay damages, and holding his nose with his fingers, must publicly confess himself a liar[8]. Whereas in England, before the 1300s, matters of defamation were purely within the jurisdiction of the church as it was considered as a spiritual sin. King's court majorly concerned itself with physical crimes concerned with tangible actions such as theft, assault and murder. They did not recognise right to reputation as a right on the same pedestal with physical acts of violence. It took until the late 1500s when a common law action for defamation appeared with the advent of printing press when defamation in written or permanent form was seen. The king's court changed its earlier stance and held that words could impact honour of a man even more than physical attacks.

De Libellis Famosis[9] is a landmark case in English defamation law that helped to establish the legal principles surrounding defamatory statements. The case was heard in 1606 by the Court of Star Chamber, which was a court that had the power to hear cases involving issues of defamation and scandal. The case involved two individuals, Sir Edward Coke and Sir Francis Michell, who were both members of the legal profession. Michell had written and published a series of anonymous letters that accused Coke of various acts of misconduct, including bribery and corruption. Coke sued Michell for defamation and the case was brought before the Court of Star Chamber. In its decision, the Court of Star Chamber held that the publication of defamatory statements was a serious offense and that individuals who published such statements could be held liable for the harm caused to the reputation of the person targeted by the

[7] 1. Roman law - Property, Possession, Ownership | Britannica, https://www.britannica.com/topic/Roman-law/The-law-of-Justinian (last visited Feb 19, 2024).
[8] Veeder, Van Vechten. 1903. "The History and Theory of the Law of Defamation. I." *Columbia Law Review* 3 (8): 546–73. https://doi.org/10.2307/1109121.
[9] Ibid.

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statements.

As a result of the De Libellis Famosis case, the court established the principle that the publication of defamatory statements was a serious offense that could result in significant legal consequences. This principle was later incorporated idu8ygnto the common law of England and has remained an important principle in English defamation law to this day. Overall, the De Libellis Famosis case played an important role in shaping the development of English defamation law over the centuries that followed.

III. COMPARATIVE ANALYSIS OF LAW OF DEFAMATION IN THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM

The United States and the United Kingdom have shared a common history of legal system because US was a colony of the UK until 1776, when it finally gained independence[10]. The fledgling country adopted the already existing system of laws which was a body of English common law by way of a "reception statute". This is what most counties do when they gain independence as they need time to develop their own system of law and legal governance. Through the reception statute, legal effect to the already existing laws to the extent that they were not expressly rejected or repealed by the US government.

In order to prevail in a defamation lawsuit, the plaintiff must typically demonstrate the following: (1) a false and defamatory statement about the plaintiff; (2) an unprivileged publication to someone else (i.e., a third party); (3) that act of publication has caused harm to the plaintiff's reputation; and (4) actionability of the statement without regard to any special harm brought on by the publication. As far as law of defamation is concerned it was also same in the initial years until the paths diverged in the year 1964. Under the English law, a libel defendant is guilty until proven innocent. Whereas, in the US, more value is given to freedom of speech and expression and a defendant is presumed to be innocent unless proven guilty. This presumption has resulted it in a lot of defamation suits been filed in London by British citizen as well as people from other parts of the world if at least one of them belongs to England. Plaintiffs prefer to sue their critics here because the burden of proof lies on the defendant. The defendant has the primary responsibility of proving his innocence before the court.

(A) Diverging paths of the laws of the two countries-

Much of American law is derived from the English common law tradition. One primary subject

[10] William B Stoebuck, Reception of English Common Law in the American Colonies, 10 WILLIAM AND MARY LAW REVIEW.

upon which the laws of England and the United States markedly diverge is defamation and, most interestingly, the burden of proof in such cases. Although there are instances in criminal law, both in the United States and England, where a burden of proof can shift from the plaintiff to the defendant, the English common law tradition always lays down an initial burden of proof on the plaintiff, except in defamation cases. England's defamation statute has always required the defendant to prove his innocence. Upon originally adopting English common law following American independence, U.S. defamation law shared this position. Ultimately, however, the United State chose to abandon it. History may reveal why England and the United States adhere to different standards for the burden of proof in the context of defamation cases.

The Supreme Court of United States changed the defamation jurisprudence of the country in **New York Times v Sullivan**[11]. It is celebrated for its significant impact on American defamation law and for its strong defence of freedom of speech and the press. Sullivan was in charge of overseeing Montgomery, Alabama's police department where he was elected as one of the commissioners. Sullivan filed a civil libel lawsuit against four individual petitioners and the New York Times after claiming that, claims in a full-page advertising had libelled him. The advertisement claimed that Montgomery police had terrorized protesting students and had harassed Martin Luther King. Sullivan claimed that even though his name wasn't included in the advertising, the word "police" was a reference to him. At that time, a publication was considered "libellous per se" under Alabama law if the words had the potential to harm the target person's reputation or bring him into disrepute.

American defamation law generally allowed public officials to sue for defamation based on any false statement, even if the statement was made in good faith and without actual malice. This made it difficult for the press and other critics to engage in robust debate and criticism of public officials without fear of costly and chilling lawsuits and freedom of speech was indirectly curtailed.

In its ruling, the Supreme Court established the **"actual malice" standard**, which requires public officials to prove that a defendant acted with "knowledge of falsity" or "with reckless disregard for the truth" in order to prevail in a defamation suit[12]. The Court held that this standard is necessary to protect the First Amendment's guarantees of freedom of speech and the press[13], and to ensure that public officials are subject to the same level of scrutiny and criticism

[11] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[12] defamation, LII / Legal Information Institute, https://www.law.cornell.edu/wex/defamation (last visited Feb 19, 2024).
[13] The Constitution, The White House, https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/ (last visited Feb 17, 2024).

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as other members of society. It was opined that Alabama defamation law has a "chilling effect" on freedom of speech of the people and is violative of First Amendment Rights[14].

The impact of the New York Times Co. v. Sullivan decision has been significant. It has expanded the scope of protected speech under the First Amendment, and has made it more difficult for public figures to successfully sue for defamation. The actual malice standard has been extended to other types of public figures, such as celebrities and politicians, and has been applied to other areas of law, such as invasion of privacy. Overall, the case has had a profound and lasting impact on American defamation law, and has helped to protect the rights of free speech and the press for all Americans. According to the court, requiring a plaintiff to bear the burden of demonstrating the veracity of his factual claims in order to avoid litigation would chill speech. Even those who firmly felt their message to be genuine, according to the court's logic, would choose to keep quiet in order to avoid expensive legal disputes. The Court came to the conclusion that such a restriction is irreconcilable with a free society that values the free exchange of ideas. So, in a stricter sense, now, the Plaintiff has the burden of proof.

It is rightful to say that now American law of defamation is pro-defendant as against its counterpart, the English law of defamation which is pro-plaintiff. Under English law, the falsity of a defamatory statement is presumed, and truth is a defence to be pleaded and proved by the defendant. In contrast, in the United States, there is generally no presumption that a defamatory statement is false. Rather, the plaintiff must prove the falsity of the charge. Additionally, unlike in American law, where plaintiffs must demonstrate that the defendant acted with actual malice, British law makes defamation a strict liability tort. So, in the United States, authors and publishers can produce books and news articles without having to worry about the consequences on their legal standing. Americans believe that the freedom to express oneself without fear of repercussions is vital. Americans cannot comprehend not being able to enjoy these liberties since it is a fundamental component of their heritage and culture. On the contrary the English laws are less welcoming to freedom of speech and expression. American companies, journalists, and other persons benefiting from American First Amendment law will become defendants in British defamation litigation until British laws become liberal and more open to free speech. Media organizations that use the Internet and other channels of communication to reach a global audience must choose whether to run the risk of being sued for libel in order to share information, stories, and news. Speech in the United States will be stifled as a result of the conflicting defamation laws. The defendant's burden of establishing truth is allegedly the flaw

[14] U.S. Constitution - First Amendment | Resources | Constitution Annotated | Congress.gov | Library of Congress, https://constitution.congress.gov/constitution/amendment-1/ (last visited Feb 19, 2024).

in British law, according to critics of the British method of libel prosecution. and that it is unfair because during litigation "the dice are heavily loaded in the plaintiff's favour[15].

How Plaintiff friendly British Defamation laws can have a "chilling effect" on Freedom of speech in The United States with reference to the case 'David Irving v. Penguin Books Limited and Deborah Lipstadt'

The trial 'David Irving v. Penguin Books Limited and Deborah Lipstadt' revolves around a defamation suit. As seen earlier the defamation laws of the two countries follow different course of action, Under the English jurisdiction, plaintiff has to establish a prima facie case that- 1) The alleged defamatory comments were published by the defendant, 2) they were directed at the plaintiff, 3) and they had a defamatory purpose. The burden of proof shifts on the defendant if the plaintiff establishes a prima facie case. Justice Gray (the judge who tried the case) found that statements in Lipstadt's book were libellous of Irving. He was of the view that the book accused him of being "a Nazi apologist and an admirer of Hitler, who has resorted to the distortion of facts and to the manipulation of documents in support of his contention that the Holocaust did not take place"[16]. That means Irving was able to establish a prima-facie case of defamation. Now it was on the defendants to prove their innocence before the court of law. The defences available are justification, truth or fair comment. The Defendants chose to take the defence of justification or truth and said that "Irving is discredited as a historian by reason of his denial of the Holocaust and by reason of his persistent distortion of the historical record so as to depict Hitler in a favourable light"[17]. Since the burden of proof in English libel cases falls on the defendant, Penguin and Lipstadt had to demonstrate that Irving intentionally misrepresented history and that the data and evidence at his disposal at the time of writing his books could not support his conclusions. They had to show that all of the claims Irving complained about were substantially true in their common and natural sense in order to provide justification.

The defendants won the lawsuit by demonstrating the veracity of the claims made in the book through the testimony of experts who reviewed Irving's writings, speeches, and the supporting documentation. One such expert witness who examined the truth of the statements written by Richard Evans. He examined the works of Irving from 1960 to present. It was not concerned with whether holocaust occurred or not but as to whether Irving distorted history or not and if he could be considered as a credible historian. After examining everything in detail, Richard

[15] Michael Socha, Double Standard: A Comparison of British and American Defamation Law, 23.
[16] ("Trial Judgement: Mr Justice Gray" n.d.)
[17] ibid

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Evans comes to the conclusion that "Irving is essentially an ideologue who uses history for his own political purposes; he is not primarily concerned with discovering and interpreting what happened in the past, he is concerned merely to give a selective and tendentious account of it in order to further his own ideological ends in the present."[18] He also lists out various points which prove that Irving's claim that he is a historian is bogus. There were other expert witness reports also, but this was the major one which helped in establishing that Irving has distorted historical facts and whatever Lipstadt has written in her book is true and the defendants were able to establish the defence of justification. The Court came to the conclusion that the Defendants were successful in proving that "Irving was a racist, an anti-Semite, and a Holocaust denier who deliberately misrepresented historical evidence to exonerate Hitler"[19].

If on the other hand, had the trial been instituted in the U.S. by David Irving he would have to face several First Amendment obstacles. First, the burden of proving that defamation occurred and he suffered damages as a result of that defamation had been on Irving as laws in US are not pro-plaintiff. Second, Irving would be considered a public figure as he was a writer with many books authored by him and also a lecturer, he would have enjoyed greater access to channels of communication. He would have to go through the "actual malice" test as laid down in New York Times v. Sullivan[20]. Under the actual malice test, a public figure who brings a defamation claim against the defendant must prove that he published a false statement with "knowledge of its falsity" or with "reckless disregard for the truth". In other words, the plaintiff must show that the defendant knew the statement was false or had serious doubts about its truthfulness, but published it anyway. Actual malice, requires a showing of either deliberate falsification or reckless publication despite the publisher's awareness of probable falsity[21].

On the issue of Hitler and the Holocaust, Irving has given numerous lectures and discussions in addition to authoring more than 30 books. He had a lot more access to effective communication channels and would undoubtedly be treated as a public figure in a libel case in the United States. Irving would have the burden of demonstrating that Lipstadt made fraudulent claims and that she and Penguin Books published them knowing they were untrue or with reckless disregard for whether they were true. Actual malice requires more proof than is often required in civil cases, which is proved by preponderance of evidence. The plaintiff must prove with clear evidence that the defendant knew the statements were untrue or that the defendant had

[18] "Evans: David Irving, Hitler and Holocaust Denial." n.d. *Holocaust Denial on Trial* (blog). Accessed February 18, 2023. https://www.hdot.org/evans/
[19] Justice Gray's observation in the case
[20] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
[21] Curtis Publíg Co. v. Butts, 388 U.S. 130, 153 (1967)

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subjective reservations about the statements' veracity in order to establish actual malice. Then a question would have arisen as to Lipstadt's state of mind and if she intentionally did everything to defame Irving. To substantiate his claim for damages in the London High Court Irving claimed that Lipstadt was the head of a conspiracy to damage his reputation as a historian and silence him. He claimed that Lipstadt was a "prime mover" and that her book was a part of Sinister International Campaign to discredit him and that she was acting in league with Anti-Defamation League, the Board of Deputies of Jews and other organisations intent on targeting him[22]. But all these are mere speculations and cannot serve as a proof of actual malice. Most likely, he would not have been able to establish "actual malice" and lost to the defendants. Thirdly, expert witnesses were called on to give their report if Irving has distorted historical facts or not and if he is a historian, had the case been instituted in US, witnesses would have been called upon to prove that Deborah Lipstadt acted with "actual malice" Thus, if he would have chosen American Jurisdiction over the English Jurisdiction the trial would have proceeded differently, burden of proof and standard of proof would have been completely different due to the differences in system of legal jurisprudence of the two countries.

IV. CONCLUSION

Plaintiffs can readily establish a prima facie case of libel under English defamation law. The burden of proof then shifts to the defence if the plaintiff makes a prima facie case. As a result, libel plaintiffs from all over the world try to benefit from England's plaintiff-friendly libel rules. Many foreign libel litigants decide to file a lawsuit in England in order to benefit from the country's plaintiff-friendly defamation laws. Because the High Court has jurisdiction to hear libel claims arising over any work published in England, these cases are being tried in England in accordance with English law. This might have been a possible reason as to why Irving chose the English Jurisdiction. Irving was permitted to sue Lipstadt but ultimately he lost. In United States also he might not have been able to get past the actual malice test as discussed.

Speech in the United States continues to be stifled by the conflicting defamation laws (have a chilling effect). As a result of plaintiffs wanting to take advantage of the pro-plaintiff system in place in Britain, journalists and media organizations that distribute their content online are now parties in defamation actions there rather than in America. In the United States, speech that is considered free speech may be viewed as defamatory in Britain. In order to prevent defamation lawsuits in Britain, journalists may modify their stories' content out of fear of breaking British

[22] "Trial Judgement: Mr Justice Gray." n.d. Holocaust Denial on Trial (blog). Accessed Februry 16, 2023. https://www.hdot.org/judge/

law. Speech may be profoundly affected by the chilling effect.

To protect the fundamental human right to freedom of speech, a fair approach between the two jurisdictions is required. Even in the twenty-first century, British laws still have a chilling effect on the right to free speech. Any resolution should err on the side of defending the freedom of speech, the most significant fundamental right that every nation cherishes, in a dispute between two countries that value fundamental freedoms.

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