1. The approach to reputation rights in the different jurisdictions has evolved in fundamentally different ways for cultural, political and social reasons. This makes the creation of a rule concerning the choice of law highly problematic.

1.1. The right to freedom of speech in some jurisdictions is a fundamental constitutional right which is upheld for deep-seated cultural/historical/policy reasons e.g. Sweden\(^1\). In such jurisdictions innocent individuals who have been defamed will be denied a remedy in regard to unwarranted/untrue allegations so that publishers will feel little inhibition in what they publish generally (and will therefore hopefully be more likely to publish material which serves the public good by exposing wrongdoers). In other jurisdictions this would be

\(^1\) In Sweden strong freedom of speech laws were introduced after the WWII in reaction to the use in the 1930s of defamation law by fascist political parties to silence dissent. Compare to the background to the introduction of libertarian freedom of speech laws in the US to combat the use of libel laws in the 1960s in order to prevent black voter registration in the Southern states.
regarded as an inexcusable and disproportionate interference with an individual’s Article 8 human right to reputation.

1.2. Fundamentally different approaches to the granting of pre-publication prohibitory injunctions. In England they are nigh on impossible to secure. The law will not permit a judge to act as a censor. Other countries are more willing to carry out a balancing exercise between reputational and freedom of speech rights at the interim stage and therefore to grant such injunctions.

1.3. Similarly, English law, even at the conclusion of a defamation trial at which the Claimant is victorious, will not countenance an order being made to oblige the Defendant to publish any form of retraction or apology. Even in these circumstances editorial freedom must remain untrammelled. Compare to the remedy of droit de réponse in France.

1.4. Taming the beast. In some countries some might think that the domestic press requires greater control than in other jurisdictions. Did different national media cover the McCanns case differently? Have there been problems with phone hacking in other jurisdictions? Might Swedish citizens not
need the protection from the media which English citizens require?

1.5. In a particular jurisdiction the civil law might be relaxed towards the media because the country has a system of state regulation. State regulation might keep the media in check but not adequately protect the reputational right of the defamed citizen.

Is there a problem worth the trouble of solving?

2. There is little evidence in England of forum shopping. For instance, despite the publicity/media propaganda to the contrary, there is limited evidence of foreign claimants choosing to sue in England which supposedly has some of the most pro-claimant defamation laws in the world. Sweet & Maxwell recently conducted an analysis which concluded that in the preceding 12 months 3 Claim Forms had been issued by foreign claimants in London. However, one of those was Boris Berezovsky who is in exile in London and cannot return to Russia for fear of arrest, and one was Roman Abramovitch, who clearly has significant presence and reputation in the jurisdiction.

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² It doesn’t
3. A claimant could currently sue in any EU country in which a libel was published which caused him or her damage. However, there is little evidence that claimants sue in any jurisdiction other than that with which they have the greatest connection, which will usually be where they reside.\(^3\)

4. English law is not in fact particularly claimant-friendly but its reputation as such has not caused other EU citizens who are not resident in the UK to seek to sue in the London court.

**Solutions**

5. Law where the claimant is most damaged by the publication. This has an appeal because usually the most damage will occur where the claimant resides.

Unfairness: it might mean a foreign defendant being put to the cost of defending an action in an unfamiliar jurisdiction as a result of publishing material which, in the defendant’s jurisdiction, would not be actionable: a Swedish newspaper being sued in London.

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\(^3\) Although in 2005 the owners of *The Daily Telegraph* and *The Sunday Telegraph*, Sir David and Sir Frederick Barclay, chose to sue *The Times* for defamation in France (circulation 3,500) rather than this jurisdiction (circulation over 600,000). They could have sued in either. In France the publication of a libel is a criminal offence. Therefore a losing defendant is saddled with a criminal conviction (one of the defendants was the editor of *The Times*). Furthermore, they sought a *droite de réponse* remedy which was only available in France.
6. Law where the most publications take place. This could be a jurisdiction where neither the claimant nor defendant is based. The damage caused by one publication to, for instance, an employer might be greater than publication to 100,000 individuals who do not know the Claimant.

7. Law where the defendant is based. This is attractive because it means that when making editorial decisions re what to publish a newspaper will only need to consider the law with which it is familiar and in regard to which it is likely to have legal advice readily available.

8. Consider the problem where e.g. an English newspaper was forced to defend a claim under a foreign law under which it could be forced to publish a retraction. Or where an English citizen had to sue under Swedish law and therefore could not obtain a remedy which would have been readily available under English law.

William Bennett
5RB
5 Raymond Building’s
Gray’s Inn
London
williambennett@5rb.com
Recent drafts of recital 29 and Article 7

29) Regarding violations of privacy or rights relating to the personality, this Regulation does not prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media. The country in which the most significant element or elements of the damage occur or are likely to occur should be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law should be applicable. The country to which a publication or broadcast is directed should be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors. Similar considerations should apply in respect of publication via the Internet or other electronic networks.

Article 7: Violations of privacy and rights relating to the personality
1. The law applicable to a non-contractual obligation arising out of a violation of privacy or of rights relating to the personality shall be the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur. Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors. This provision shall apply mutatis mutandis to publications via the Internet and other electronic networks.
2. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast shall be the law of the country in which the publisher or broadcaster has its habitual residence.
3. Paragraph 2 shall also apply to violations of privacy or of rights relating to the personality resulting from the handling of personal data.