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PERSPECTIVE

A remote perspective on Johnny Depp's libel action

By Alexander Rufus-Isaacs

For three weeks in July, the main conference room at the Beverly Hills Bar Association functioned as an extension of England's High Court of Justice where Johnny Depp's libel case against The Sun was being tried. In a room that normally hosts MCLE events and section meetings, around 20 witnesses testified live via video conference directly into the London court room.

The case itself attracted widespread attention. In brief, Depp sued News Group Newspapers, publisher of the British tabloid, The Sun, and its executive editor for libel for publishing an article which accused him of beating his then wife, Amber Heard. Depp claimed that this was false and that he never assaulted Heard. He also filed a libel suit in Virginia against Heard for writing an article in the Washington Post in which she referred to herself as a victim of domestic violence -- she did not name the assailant, but Depp claimed that the article would be understood to be referring to himself.

One of the main differences between defamation law in the U.S. and England is that in the U.S., the burden is on the plaintiff to prove that the allegations in question are false, while the burden in England is on the defendant to prove that the alle-



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Johnny Depp and Amber Heard at the 72nd Venice Film Festival on September 5, 2015 in Venice, Italy.

gations are true. News Group's principal defense was that the allegations in the article were true and that Depp assaulted Heard on 14 separate occasions. The case therefore rested on conflicting evidence as to whether or not the assaults had occurred. In contrast to a U.S. libel proceeding, there was no examination of the journalist's knowledge or state of mind.

In February this year, I had dinner with Louis Charalambous, a friend who was visiting from London. Louis is a formidable media lawyer with Simons Muirhead & Burton, a leading defamation and civil rights firm, which represents News Group. He and his partner, Jeff Smele, were in town to interview witnesses in the Depp case. Many of the assaults were alleged to have taken place in the penthouses in the downtown Los Ange-

les building where Depp and Heard lived when married, and though (with one exception) no one directly witnessed an assault, many people had seen or spoken to Depp or Heard shortly afterwards, or had seen property damage.

Shortly after our dinner, I was retained by News Group to apply for orders under 28 USC Section 1782, which permits parties to a foreign lawsuit to seek an order requiring locally resident witnesses to testify at deposition or trial. We applied for orders requiring four Los Angeles residents to testify by video conference in the trial which was originally scheduled to begin on March 23. Two of these witnesses were police officers who responded to a domestic violence complaint -- they did not oppose the application -- and the other two were Heard's makeup art-

ist and her interior decorator. They both retained counsel and opposed the applications.

The High Court in London had already agreed to the parties' joint request to accept testimony by video conference from remote locations, which included Australia, Bahamas and Chicago, as well as Los Angeles. Rather than a commercial provider, I suggested that we hire the BHBA's facilities, which I frequently use for taking out-of-state depositions by video. Depp's lawyers agreed, and the BHBA was more than happy to accommodate us, despite the anti-social schedule caused by the eight-hour time difference. It had already closed the office and its staff has been working remotely because of the pandemic.

Our first application for a Section 1782 order, which we filed in the Central District, set out the basis for the order and invited the court to set a briefing schedule, but instead, the court simply granted the order. Stress levels increased when we were unable to serve the order on the witness, whom we later discovered was in the Florida Keys. However shortly before the original March 23 trial date, the High Court postponed the trial because of the pandemic and later rescheduled it for July. In May, the witness filed a motion to quash which was denied. The judge was quite rightly concerned for

the witness' safety and to that end, we had already promised to take every reasonable precaution, including having a cleaning service on site at the BHBA to disinfect the witness table and waiting room after every witness.

There was considerable debate about who could be in the room when the witness testified. Under English procedure, which governed the testimony, counsel is not allowed to speak to his or her client while the client is testifying, and counsel for witnesses do not generally have standing to make objections.

Why then did counsel for the witness need to be in the room? Eventually, I agreed with counsel for the witness that she could be in the room in case her client was questioned about a privileged document or matter, and that counsel for both parties, as well as an IT technician if required, would also be in the room. Though we thought that this was a remote possibility, when the witness who was the subject of our second application was testifying, she was cross examined about a document that appeared to be a privileged email between herself and her counsel, who stood up and made an objection to the judge.

In response to our second application, the witness filed an opposition and a telephonic hearing with the judge was arranged. The court was informed and continued the hearing but later granted the order without argument.

The procedure for taking the testimony occupied much of our attention. The High Court has detailed guidelines for taking testimony by video conference. See Annex 3 to Part 32 of Civil Practice Rules, titled Video Conferencing Guidance. Though some of the guidelines are appropriate only for use in the U.K., such as one which requires that the royal coat of arms be placed above the judge's seat, the rest are generally applicable to any trial where witnesses testify remotely.

BHBA's CTO Jose Medina tested the video conferencing systems with the IT department at the High Court and it was decided that a regular internet connection worked best. The BHBA conference room was reconfigured with a large television screen approximately 10' by 6' on one wall, and a slightly smaller screen on another wall. The witness sat at a table directly in front of the larger screen, on which there was a laptop and a connected camera which broadcast the testimony to London. To one side, there were 15 three-ring binders containing the trial exhibits. Three tables were provided for counsel which were spaced well apart from each other. There was a waiting room for witnesses to use before they testified. Everyone wore gloves and masks (except the witness when testifying) and observed social distancing. And before anyone was allowed in the building, their

temperature was checked by security. All in all, it struck me as being much less risky than a trip to the supermarket.

The end result was excellent. The BHBA's director of member services, Genna Kluchnikov, organized everything perfectly and prepared for every eventuality; as a consequence, the BHBA now has a set of holy books on which witnesses can take the oath. And the video connection with London worked flawlessly throughout. The final timetable had 21 witnesses due to testify by video from the BHBA, and though the parties agreed to dispense with some of them, the majority did testify during the 15-day bench trial. On two occasions, the testimony started at 9:00 a.m. London time and lasted all day, which meant a 1:00 a.m. to 9:00 a.m. session for Jose, who was present in person whenever there was testimony, and has a lot of sleep to catch up on. However the majority of the witnesses started testifying either at 6:00 a.m. or 7:00 a.m., and were finished by 9:00 a.m.

I attended on three days and was reminded how trial practice and procedures differ between English and Californian courts. For example, in England, examination in chief is replaced by submission of a witness statement, which is prepared by lawyers and exchanged in advance. When a witness is called to testify, he or she confirms that the statement bears his/her signature

and that the contents are true, and then cross examination begins, followed by a brief re-examination. For bench trials, this works well and saves significant time.

Unusually, both sides retained both a top defamation barrister and a top criminal barrister. In the main, the criminal barristers conducted the cross examinations. There were far fewer objections than one would have expected in a California trial, and the judge, the Hon. Mr. Justice Lindsay Nicol (author of "Robertson & Nicol on Media Law"), managed the case with great expedition and asked insightful questions. We await his decision with interest.

We can expect video testimony to occur much more frequently when trials resume in earnest in this country. I commend the BHBA to anyone who needs such a facility. ■

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