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Multiple Publication and online defamation – recent reforms in Ireland and the United Kingdom

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Abstract: The multiple-publication rule, allowing for a new cause of action each time a defamatory statement is published, has applied to non-internet publications for well over a century. Its application to online publications however, has raised particular difficulties. Despite the rule finding judicial favour in most common-law jurisdictions (the US being a noted exception) the legislature in Ireland has recently abandoned it and plans are in place in the United Kingdom to do likewise. On the other hand Australian and Canadian courts have rejected arguments to abandon the rule. This article discusses both the legal and policy related reasoning behind the recent legislative developments in Ireland and the United Kingdom and considers whether these jurisdictions have tipped the balance too far in favour of publishers on the internet.

1. What is the multiple-publication rule?

The multiple-publication rule allows for a new and separate cause of action each time a defamatory statement is published.¹ In the off-line world this has meant that each copy of a book or a newspaper is a separate, actionable case of defamation with its own limitation period. It doesn't necessarily mean that the same litigant can take multiple actions arising from the same defamatory statement (although this has not been completely ruled out) but it does mean that in the case where the rule applies any limitation period will run from the date of the last publication as opposed to the first. The multiple-publication rule was first developed in the English decision of *Duke of Brunswick v Harmer*² where in 1847 the Duke was given a copy of a newspaper that contained material defamatory of him that had been published 17 years previously. The court held that the limitation period of 6 years was reset when the Duke viewed the publication resulting in him not being out of time. In *Godfrey v Demon Internet Limited*³ the rule was applied to the internet. As stated by Morland J in that case,

“In my judgment the defendants, whenever they transmit and whenever there is transmitted from the storage of their news server a defamatory posting, publish that posting to any subscriber to their ISP who accesses the newsgroup containing that posting.”⁴

¹ Publication for the purposes of the law of defamation requires communication of defamatory material to a third party. In cases where the defamatory material is accessible on the internet there is often an inference drawn that the material has been published. In *Gregg v O’Gara* [2008] EWHC 658 for instance, evidence of one other person, other than the plaintiff, accessing the materials by way of an online search was sufficient to show publication.

² (1849) 14 QB 185

³ [2001] QB 201

⁴ *Ibid* at 208-209

A succinct description of the rule as it applies to online publications was provided in the UK Government Consultation Paper on Multiple Publications which describes the rule as follows:

“The effect of the multiple publication rule in relation to online material is that each “hit” on a webpage creates a new publication, potentially giving rise to a separate cause of action, should it contain defamatory material. Each cause of action has its own limitation period that runs from the time at which the material is accessed. As a result, publishers are potentially liable for any defamatory material published by them and accessed via their online archive, however long after the initial publication the material is accessed, and whether or not proceedings have already been brought in relation to the initial publication.”⁵

The principal effect of the multiple publication rule is that the statute of limitations runs from the date of the last publication of the defamatory statement allowing an affected party to sue many years after the statement was first published. In the case of archived materials (particularly relevant in the context of newspapers) an action could follow decades after the original publication of the material.

A limitation period applies in all jurisdictions providing a set period of time in which a claimant can bring an action. In England and Wales the limitation period is 12 months,⁶ in Scotland 3 years,⁷ in Ireland 12 months,⁸ and in Australia 12 months. In Ireland the limitation period can be extended for a period “not exceeding two years”⁹ if the interests of justice so require and the plaintiff would be disproportionately prejudiced by not providing the extension.¹⁰ Similarly, in England, section 32A of the Limitation Act 1980 allows the English courts discretion to extend the limitation period where this is deemed ‘equitable’.

The statute of limitations in Ireland in the case of internet publications runs from the date on which the material could have first been viewed or listened to on the internet, but the provision does not appear to require that it has been (however improbable this is in practice).¹¹ In Australia the date runs from the date of publication, as that jurisdiction applies the multiple-publication rule this runs from the date of the most recent publication.

2. Criticisms of the Multiple-Publication Rule

The multiple-publication rule has attracted a significant amount of criticism. It has been argued that it is unsuited to the modern world where statements can be uploaded to the internet in an instant, viewed in multiple jurisdictions, endlessly republished and exist

⁵ Government Consultation Paper: the Multiple Publication Rule CP20/09 at para 3 (available online at <http://www.justice.gov.uk/consultations/docs/defamation-consultation-paper.pdf> visited on November 1st 2011)

⁶ Section 4A Limitation Act 1980

⁷ Section 18A(1), 4 (b) Prescription and Limitation (Scotland) Act 1973

⁸ Section 11(2)(c) Statute of Limitations Act 1957 as inserted by section 38(1)(a) Defamation Act 2009

⁹ Section 11(2)(c)(ii) Statute of Limitations Act 1957 as inserted by section 38(1)(a) Defamation Act 2009

¹⁰ Section 11(3A) Statute of Limitations Act 1957 as inserted by section 38(1)(b) of the Defamation Act 2009

¹¹ Section 11(3B) Statute of Limitations Act 1957 as inserted by section 38(1)(b) Defamation Act 2009

indefinitely if not removed. The 'chilling effect' of the rule on internet free speech is, in the view of the rule's detractors, disproportionate to the interests being protected.

In particular, concerns have been raised about the application of the rule to archived material, given the public service function performed by such material and the practical impossibility of screening all material archived for any potential defamatory meaning. It has also been associated with the practice dubbed 'forum shopping', whereby plaintiffs in a defamation action chose the jurisdiction most amenable to their action. The possibility of each 'click' amounting to a new publication, the argument goes, facilitates this unsavoury practice. These arguments have been presented and rejected in a number of high profile cases taken in Australia, England and before the European Court of Human Rights. We will now turn to these cases to consider the basis on which the courts decided to retain the rule.

3. Judicial defence of the multiple-publication rule: Australia, England and the European Court of Human Rights

The Australian courts have long defended the multiple-publication rule and have dismissed arguments that it should be abolished. An example of the operation of the rule in an Australian context was demonstrated in the case of *Dow Jones & Co Inc v Gutnick*¹² where the High Court explicitly rejected calls to abolish the rule in favour of the single publication rule. This case involved the publication of statements about an Australian businessman in an online magazine called Barrons published by an American publisher, Dow Jones. The article suggested that the businessman, a Mr. Gutnick, was an associate of a person who was a convicted tax evader and money launderer. More controversially, the article suggested that Mr. Gutnick had also engaged in money laundering. The article was uploaded to the internet by the magazine publishers on the same day as the print version was distributed. Mr. Gutnick was a prominent member of the Jewish community in Victoria who sat on the boards of a number of public companies and was involved in a number of charitable organisations. Although only 1,700 of the 500,000 Barron's online subscribers were based in Australia, this was deemed to be sufficient to show reputational damage there. The publishers appealed the finding against Barron's claiming that the state of Victoria was not the appropriate forum for the dispute. They argued that the state in which the publication was first made (i.e. in New Jersey) should be deemed the place of publication. In this way they argued that the court should adopt a 'single-publication rule'.¹³ In particular, the defendants argued that policy reasons should direct a court to find in their favour as it would be impossible for a publisher to the internet to protect itself against all the laws in every jurisdiction in the world.¹⁴ The court rejected this argument, stating that defamation proceedings sought to strike a balance between both the rights of the publisher and the person who is the subject of the publication and whose rights would be severely constrained by the rule advocated by the applicants.¹⁵ The court held that the scenario depicted by Dow Jones, of having to litigate in numerous states, was not credible. In most cases, abuse of process would prevent a claimant litigating numerous times arising from the same claim. In addition, a claimant is unlikely in the vast majority of cases to have a reputation which

¹² [2002] HCA 56

¹³ *Ibid*, at para [20]

¹⁴ *Ibid*

¹⁵ *Down Jones & Co. Inc. v Gutnick* [2002] HCA 56, at para [23] per Gleeson CJ, McHugh, Gummow and Hayne JJ

can be damaged in numerous states and even if had they would be likely to sue only where the defendant has assets from which any award of damages could be satisfied.¹⁶

Similarly, English courts have rejected a call to abandon the multiple-publication rule. The Court of Appeal most famously rejected calls to adopt a single publication rule in *Loutchansky v Times Newspapers Ltd*.¹⁷ It had earlier upheld the right to apply the multiple-publication rule to internet publications in *Berezovsky v Michaels*.¹⁸ In the *Loutchansky* case *The Times*, an English newspaper, published two newspaper articles in September and October 1999 accusing a Russian businessman of involvement in criminal activity and in particular involvement in the Russian mafia. The applicant sued the newspaper, the editor and two journalists involved in the publication. Following the lodgement of the case, the article continued to be available on the newspaper's archives. The plaintiffs brought a second action on the basis of the internet publications, a case initiated after the limitation period of one year from the date of first publication had expired. In a split trial to deal with the issues the trial court had made a number of orders rejecting *inter alia* an argument by the defendants that the multiple-publication rule should not apply to internet publications.¹⁹

This finding was appealed to the Court of Appeal, the appellants arguing that the court should introduce a single publication rule for internet publications. Not to do so, they argued, offended the paper's right to freedom of expression under article 10 of the European Convention of Human Rights. To apply the multiple-publication rule to archived material, they argued, failed to adequately recognise the public service provided by such material. In addition it was argued that the nature of the internet was incompatible with the maintenance of a multiple-publication rule. The court dismissed the appeal with Lord Phillips of Worth Matravers MR, who delivered the court's judgement, stating:

“We do not accept that the rule in the *Duke of Brunswick* imposes a restriction on the readiness to maintain and provide access to archives that amounts to a disproportionate restriction on freedom of expression. We accept that the maintenance of archives, whether in hard copy or on the Internet, has a social utility, but consider that the maintenance of archives is a comparatively insignificant aspect of freedom of expression. Archive material is stale news and its publication cannot rank in importance with the dissemination of contemporary material. Nor do we believe that the law of defamation need inhibit the responsible maintenance of archives. Where it is known that archive material is or may be defamatory, the attachment of an appropriate notice warning against treating it as the truth will normally remove any sting from the material.”

Leave to appeal to the House of Lords was rejected. However, the appellants made a further appeal to the European Court of Human Rights, providing a valuable opportunity for the views of that court to be heard on the compatibility or otherwise of the rule with Convention rights.²⁰ Before the Court of Human Rights the applicants argued that

¹⁶ *Ibid*, at para [65] per Gaudron J

¹⁷ [2002] Q.B. 783

¹⁸ [2000] 1 WLR 1004

¹⁹ *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 536; [2002] QB 321; [2001] 3 WLR 404; [2001] 4 All ER 115

²⁰ *Times Newspapers Ltd (Nos 1 and 2) v United Kingdom* [2009] EMLR 14

adequate protection of their rights under article 10 required the adoption of the 'single-publication' rule, as any other option would have such a significant 'chilling effect' on their right to freedom of expression as to render it unprotected. The focus of the applicant's argument was on the maintenance of archives, which they argued served an important function in a democratic society. The applicants pointed not only to the impossibility of ensuring that archives were free of defamatory material but also to the possibility of the holder of an archive being open to litigation endlessly into the future. The Government for its part argued that the 'multiple' or 'internet' publication rule was a permissible and proportionate interference with the applicant's rights under the Convention. The court in considering the arguments accepted the importance of the press in disseminating information and acting as a 'public watchdog'. On the other hand the court stated that the press also had a responsibility to protect the rights and reputations of the private individuals about whom it wrote. In this case the interference with the rights of the applicants was not held to have been disproportionately interfered with. The court recognised in particular that the applicants could have continued to maintain its archive without fear of litigation had they placed a notice with the archived material indicating that it was the subject of litigation or had been found to contain defamatory comments, a solution offered by the court of appeal in that case. The Court also considered it significant that the actions in this case were initiated within 18 months of the publication taking place, so that the litigants had not been required to defend an action many decades after the first publication had been made. However, the court significantly stated that that,

“The Court would, however, emphasise that while an aggrieved applicant must be afforded a real opportunity to vindicate his right to reputation, libel proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10.”²¹

It appears from the foregoing decision therefore, that the application of the multiple-publication rule is consistent with Convention rights. The decision is not an unqualified acceptance of the rule however, as it casts significant doubt over whether the court would approve of an action being taken many years after the material was first posted to the internet, something which is quite conceivable under the current formulation of the rule.

Rejection of the multiple-publication rule: the United States

The single publication rule states that a plaintiff's cause of action begins when the publication is first made and that any limitation periods will run from the date of that first publication. The rule is most famously applied in America, where it applies in the majority of US states. As far back as 1948 the multiple-publication rule was regarded as being unsuited to the modern era and in particular the possibility of a number of reprints being made of the same material.²² The rule is encapsulated for the purpose of US law in the American Law Institute's Uniform Single Publication Act 1952.

It is set out in §577A of the 2nd Restatement of Torts (197) as follows:

²¹ Ibid at para [48]

²² *Gregoire v GP Putnam's Sons* (1948) 81 N.E.2d 45

'(1) Except as stated in subsections (2) and (3), each of several communications to a third person by the same defamer is a separate publication.

'(2) A single communication heard at the same time by two or more third persons is a single publication.

'(3) Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.

'(4) As to any single publication, (a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in the one action; and a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.'

While the Restatement was drafted with print and other conventional media in mind, in the case of *Firth v State of New York*²³ the New York Court of Appeals decided that the one year statute of limitation applicable in that state should run from the date of the first posting of defamatory matter upon an internet site.²⁴ As stated in that case the application of the single publication rule to the internet was particularly important as otherwise

“...there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet which is, of course, its greatest beneficial promise.”

Since the introduction of the ‘single publication rule’ in the US the issues of jurisdiction and multiple suits has become somewhat confused. It now appears that where the rule applies the correct jurisdiction to hear the case is the location of publisher,²⁵ or in the case of internet publication, the server of the publisher.

The rule does not apply to ‘republication’ of the material where that republication is intended to appeal to a new audience. In the case of internet publications in the case of *Sundance Image Technology, Inc v Cone Editions Press, Ltd*²⁶ it was held that republication might arise when a new header if applied to old content made to attract a new audience. Similarly in the *Firth* case it was stated that

“The justification for this exception to the single publication rule is that the subsequent publication is intended to and actually reaches a new audience.”

²³ (2002) 775 NE 2d 463

²⁴ *Dow Jones & Co. Inc. v Gutnick* [2002] HCA 56 at para [30]

²⁵ Restatement of the Conflict of Laws (2d) (1971) §150

²⁶ 35 Media L Rep 2451 (SD Ca, 2007)

Recent Reforms: Ireland and the United Kingdom

In Ireland the multiple-publication rule was abolished by the introduction of the Defamation Act 2009. The legislation was introduced following a report by the government appointed Legal Advisory Group of Defamation 2003 which advocated a number of changes, including the introduction of a 'single publication rule'. They were guided by the US provisions and also the discussions underway in the United Kingdom (see below) to adopt a similar change. The focus for protection was again was on the liability of those who maintain archives. It was expected that the potential to extend the limitation period would protect those who were unaware of the existence of the defamatory material until a much later date, as it transpired the Irish legislation allows for a maximum period of only two years. The principal provision of relevance to the single-publication rule is section 38(1)(b) of the Defamation Act which states

“For the purposes of bringing a defamation action within the meaning of the *Defamation Act 2009*, the date of accrual of the cause of action shall be the date upon which the defamatory statement is first published and, where the statement is published through the medium of the internet, the date on which it is first capable of being viewed or listened to through that medium”.

As stated above, the limitation period for actions in Ireland is one year, with the possibility of extending the period to a maximum of two years. In addition, the Irish provision allows for only one cause of action in respect of a multiple-publication unless the “interests of justice” require otherwise.²⁷ No guiding principles are provided in the Act potential to give rise to significant hardship on the part of litigants. Should a defamatory statement be posted on the internet a number of years could conceivably go by without it attracting significant attention. If for some reason it becomes more popular and reaches a wider audience after the latest possible period for bringing an action expires (two years after it first being posted) the litigant is left without a remedy in the Irish jurisdiction. In addition, should the action be taken in time and the material found to be defamatory there is nothing prohibiting a publisher from maintaining the material on an internet site as no further actions can be taken on the basis of the same material.

In a move consistent with that which has taken place in Ireland the English legislature, at variance with the findings of the English courts as described above, has moved to bring about the introduction of a single-publication rule in England and Wales. In March of 2011 a Bill and Consultation paper was published proposing to amend the current defamation and in particular for our purposes to abolish the 'multiple' or 'internet' publication rule. The provisions were published in a climate of political hostility to perceptions of an overly liberal defamation regime.²⁸ The Bill is based on an earlier Bill of Lord Lester's and a number of earlier reports. The Bill and Consultation paper in its foreword explains the motivation behind its introduction as concern that the current defamation laws were not striking the correct balance between freedom of speech and freedom of expression and was having a negative 'chilling effect' on debate. What they have proposed is a form of a single publication rule, which falls short of that which

²⁷ Section 11 of the Defamation Act 2009

²⁸ See for instance speech of deputy Prime Minister Nick Clegg in January 2011 discussed here www.journalism.co.uk/news/clegg-outlines-plans-to-reform-embarrassing-uk-libel-law/s2/a542208/ accessed on January 4th 2012

applies in the US and is not as sparse as the Irish provision. In section 6 of the Bill it describes the rule as applying when a person publishes a statement to the public and subsequently republishes that statement or one which is 'substantially the same', whether or not to the public, the statute of limitations will run from the date of the first publication. In a provision reflective of that which applies in the US the single-publication rule will not apply where the subsequent publication or the manner of the subsequent publication is "materially different" to that of the first publication.²⁹ The matters to which the court is to refer in considering whether the publication is 'materially different' are laid out in a non-exhaustive list in section 5 of the Bill and are as follows:

- “(a) the level of prominence that a statement is given;
- (b) the extent of the subsequent publication.”

Should the Bill be adopted in its current form it will lead to the adoption of a restricted form of the single-publication rule in the UK. The rule will only apply for instance to publications by the same publisher, it appears not to cover situations where a subsequent publication is made by a different 'person', even if the material is the same. Such publications will be seen as a 'new publication' which will be capable of being litigated. Presumably however, the subsequent publisher is covered by the single publication rule from the time that publication is made available to the public.

The proposals have not been without their critics. Mullis and Scott for instance have argued that the abolition of the rule will tip the balance too far in favour of the right to freedom of expression to the detriment of the right to one's reputation. In particular they argue that such a move would not provide an adequate protection of the right to reputation as provided for in the European Convention on Human Rights.³⁰ Instead they advocate the retention of the rule and in an earlier response paper outlined a defence of 'non-culpable' publication which could operate alongside the multiple-publication rule. This they argue, would protect online sources such as legitimate archivists while still protecting against unscrupulous publishers. As they very legitimately point out, and which would also apply in the Irish context, there is nothing to stop a publisher from maintaining a site with a defamatory statement once the limitation period has expired, regardless of the harm done to the reputation of those affected, should the single publication rule be implemented.³¹ In addition, they state that this would also mean that the publisher would have no incentive to remove the offending material, as the risk of litigation would have passed.³² Despite these concerns the Parliamentary Joint Committee has reported favouring the adoption of the provisions of the Bill as they relate to the single-publication rule.³³ It is expected that the UK Government will publish a response and a more substantive Defamation Bill in early 2012.

²⁹ Section 4 Defamation Bill 2011

³⁰ Mullis and Scott, *Something rotten in the State of Libel – a rejoinder to the clamour for reform of defamation*, 2010, at 48, available at <http://www.collyerbristow.com/FileServer.aspx?oID=1461&IID=0>, accessed on December 1st 2011

³¹ *Ibid* at 49

³² *Ibid* at 20

³³ HL Paper 203, HC 930-I

Conclusion

There is no doubt but that the multiple-publication rule has its detractors. Arguments of libel-tourism, a chilling-effect on internet speech, the threat of endless litigation in endless jurisdictions all have their basis in real fears. It is submitted however, that these concerns are exaggerated and although no doubt sincerely held, are not supported by the facts. The extent to which 'libel tourism' occurs for instance, is questionable. As has been reported elsewhere in the English courts in 2010 only three cases (out of 83) involved a foreign claimant and defendant which does not support the view that it is a widespread problem.³⁴ As for the threat of endless litigation the statistical evidence is not there to show that cases have been taken many years after the initial publication. In all of the cases discussed above for instance (including the US cases) the litigation was initiated within two years of the initial internet publication. And, as pointed out by the court in *Dow Jones* discussed above, a plaintiff will not be entertained if they have not suffered damage to reputation in the jurisdiction where relief is sought and nor are they likely to sue in a jurisdiction where the defendant does not have assets to honour any judgement against them. On the other hand, there are serious concerns about the changes recently introduced in Ireland and are likely to be introduced in England and Wales. Reduction in limitation periods coupled with the introduction of a single-publication rule for internet publications will mean that litigants will have to act quickly in order to remove any defamatory material from the internet. In addition, in Ireland, once the material has been litigated there is nothing preventing a publisher from leaving the material online. In England, this protection is also provided to the publisher who was the subject of the initial litigation (but not it appears, to subsequent publishers). It is arguable that these recent reforms are in danger of tipping the balance too far in favour of publishers, in particular internet publishers and may themselves be subjected to unfavourable attention from the European Court of Human Rights. It remains to be seen whether this will be the case.

³⁴ See for instance Afia & Hartley *Tipping the Balance* New Law Journal, 18th March 2011 available at www.schillings.co.uk/index.php?action...type=PDF&id=199 accessed on December 4th, 2011