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Problems Under The Uniform Single Publication Act

STATUTORY COMMENTS

PROBLEMS UNDER THE UNIFORM SINGLE PUBLICATION ACT

The Uniform Single Publication Act,[1] promulgated in 1952 by the National Conference of Commissioners on Uniform State Laws,[2] is a narrow gateway at the threshold of a broad area of rapidly developing and deeply intriguing legal problems. An awareness of the numerous and constantly expanding media of mass communication which surrounds us should suffice to create an appreciation for the vast amount of harm which could result from a tortious publication by any of them. This increasing possibility for harm has led to an enlargement of the scope of legal protection against improper publications.[3]

Prior to the year 1890,[4] no court had granted relief for the invasion of a right of privacy, but since that time it has become a separate and distinct basis for tort liability and is rejected now in only three states.[5] Other actions such as slander of title, disparagement of property, trade libel, and the like have arisen, thus endowing property interests with a protection similar to that afforded our persons.[6] Considering the possibilities of harm to an individual on the one hand and the inequity to the publisher on the other, it is clear that the questions arising from the application of legal rules with regard to publications are of extreme importance.

The Uniform Single Publication Act is an attempt to cope with

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[1]9C U.L.A. 173 (1952).

[2]These Commissioners, appointed by the governors of their respective states, meet annually to consider acts which have been drafted by committees. Acts are carefully considered by at least two annual conferences before they are approved. Explanation, 9C U.L.A. vii (1952).

[3]One writer, in dealing with a single facet of the problem, lists at least five "kinds of harm" from which the individual must be protected by government restrictions on mass communications. Chafee, Possible New Remedies for Errors in the Press, 60 Harv. L. Rev. 1 (1946).

[4]This is the date of the famous article by Warren and Brandeis which advocated the recognition of a separate right of privacy. Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

[5]Henry v. Cherry & Webb, 30 R.I. 13, 73 Atl. 97 (1909); Milner v. Red River Valley Pub. Co., 249 S.W.2d 227 (Tex. Civ. App. 1952); Judevine v. Benzies-Montayne Fuel & Warehouse Co., 222 Wis. 512, 269 N.W. 295 (1936). The right of privacy has been recognized in twenty jurisdictions and has been limited by statute in three. Some jurisdictions have not ruled squarely on this question. Prosser, Torts 637 (2d ed. 1955).

[6]Prosser, Torts 760 (2d ed. 1955).

some of the difficulties arising from a widely circulated defamatory publication. This act limits a plaintiff to one cause of action for a single general publication of a newspaper, magazine, broadcast, or other communication. It also provides that a judgment in any jurisdiction will bar further action and that the recovery in this one action should include damages for injury in all jurisdictions. The desirability of pin-pointing a primary cause of action in the case of a general defamatory utterance, thereby enabling all concerned to determine correctly when and where the injury occurred, can scarely be denied. The Uniform Single Publication Act, however, does not clearly accomplish this objective.

A question arises in that the act does not purport on its face to regulate the problem of a suit resulting from the circulation of a defamatory item after the statute of limitations has run on the original publication.[7] Suppose, for instance, that a newspaper is sold from stock after the statute of limitations would have barred suit on the original publication of that edition, or that late copies of a magazine are mailed subsequent to the barring of an action on the first distribution. Is a plaintiff permitted to select the particular communication upon which he chooses to sue, or should he be limited to the orginial publication?[8] These hypothetical situations differentiated from an instance in which there is a distinct republication, a new and separate utterance, which clearly gives rise to a new cause of action.[9]

Although modern devices have made the problem more acute, the so-called common law rule has come to us from *Duke of Brunswick v.*

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[7]The applicable sections are as follows:

"§ 1. No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

"§ 2. A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication or exhibition or utterance as described in Section 1 shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication or exhibition or utterance." 9C U.L.A. 173 (1952).

[8]If the former, a shrewd plaintiff is encouraged to delay asserting his right until the moment the suit will be most profitable to him and most vexing to the defendant. Furthermore, an unwary or perhaps completely innocent publisher, receiving no complaint of any alleged libel, might be lulled into committing a new act of publication. Obtaining evidence of a sale of a copy of the offending material shortly before the institution of suit would nullify the effect of a statute of limitations as a statute of repose.

[9]53 C.J.S., Libel and Slander §§ 83-85 (1948).

Harmer,[10] an English case decided over a century ago. The rule of this case has been said to be that every sale or delivery of a single copy is a distinct publication and a separate basis for liability.[11] In short, this is a multi-publication rule. The plaintiff in the case, hearing that certain defamatory statements, printed in a newspaper many years before, were circulating, sent his servant to purchase a copy of the old paper from the printer. Upon the sale of the paper to the servant, the plaintiff sued the printer for libel. The court, unimpressed by the defendant's plea of the statute of limitations, held for the plaintiff, basing its decision solely on the sale to the servant. Some cases have followed this rule.[12] Although it is said to be fully endorsed by the *Restatement of Torts*,[13] it is doubtful whether the *Restatement* contemplates the adoption of such a principle.[14]

Recognizing the differences in the situation involving the Duke of Brunswick in 1849 and that of a modern publisher, the courts have limited the scope of what is meant by a "publication." In *Means v. MacFadden Publications*,[15] for instance, the court held that the sale from newsstands of old copies of a magazine did not constitute a republication, so that the suit was barred because the statute of limitations had run on the original publication of the issue. The court pointed out that if the plaintiff's contention were correct, "the Statute of Limitations would never toll; certainly as long as there was in existence, an issue of these magazines which was capable of being passed about or sold."[16]

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[10]14 Q.B. 185, 117 Eng. Rep. 75 (1848), hereinafter called the Duke of Brunswick case.

[11]Prosser, Interstate Publication, 51 Mich. L. Rev. 959, 961 (1953). See also Odgers, Libel and Slander 132, 139 (6th ed. 1929); Newell, Slander and Libel §§ 175, 192 (4th ed. 1924).

[12]Central of Ga. Ry. v. Sheftall, 118 Ga. 865, 45 S.E. 687 (1903); Staub v. Van Benthuysen, 43 La. 294 (1884); Woods v. Pangburn, 75 N.Y. 495 (1878).

[13]"This rule has received the unqualified acceptance of the Restatement of Torts, and there are American jurisdictions in which it is still the last word of the courts." Prosser, Torts 599 (2d ed. 1955).

[14]Section 578 of the Restatement of Torts appears to indicate that a fresh tort is committed each time a libelous article is reprinted or redistributed, but it is unlikely that its writers had in mind the problem involving separate sales of the same defamatory material by the original publisher. Even Prosser admits that "The context makes it clear, however, that the language is directed at the liability of those who repeat defamation, and that no thought was given to the problem of separate sales or communications by the same defendant." Id. at n. 32.

[15]25 F. Supp. 993 (S.D.N.Y. 1939).

[16]Id. at 995. In obtaining the same result, the Supreme Court of Mississippi reasoned: "Since the gravamen of the offense is not the knowledge by the plaintiff nor the injury to his feelings but the degrading of reputation, the right [to bring suit] accrued as soon as the paper was exhibited to third persons in whom alone

A fact situation not unlike that involving the Duke of Brunswick was presented in *Gregoire v. G. P. Putnam's Sons.*[17] Several thousand copies of a book published by the defendant had been sold in 1941 and the following year, but sales had dwindled until only 60 copies were sold in the year preceding July 2, 1946, the date of plaintiff's action. The court held that this action, based on the sale of one or more of these 60 copies, was barred by the one year statute of limitations. It follows that the cause of action must have arisen at some earlier time, perhaps at the time of the original publication or at the time of the last printing.[18] The court clearly repudiated the old multi-publication concept. The majority of American courts now appear to follow this more modern view in problems evolving from statutes of limitations.[19] In the majority of American jurisdictions the multi-publication rule has also fallen into disfavor as applied to questions of venue.[20] Courts following the multi-publication rule allow suits to be brought in any county or district in which the newspaper or other publication was circulated, regardless of where the paper was printed or the parties resided.[21] There developed, however, a "tendency of the courts to place a practical limitation upon the exercise of the plaintiff's right under the common law rule."[22] In cases where it appeared to be convenient, and not otherwise improper, a change of venue to the county of publication was allowed.[23] In one instance the court allowed the defendant's motion to consolidate sixty-two separate suits, one from each county of the state, into a single suit in the county where the paper was published, commenting that plaintiff's action appeared to be "merely vexatious and vindictive."[24] This situation clearly falls within the uniform act.

In the face of increasingly confusing jurisdictional and substantive

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such repute is resident. The tort is then complete even though the damage may continue or even accumulate." Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. 2d 344, 347 (1943).

[17]298 N.Y. 119, 81 N.E.2d 45 (1948).

[18]One view is that any affirmative act of re-creating the defamation, such as a reprinting, should create a new cause of action. See Note, 20 Texas L. Rev. 640 (1942). Under this concept, a cause of action would have arisen at the last printing.

[19]Prosser, Torts 599 (2d ed. 1955).

[20]Ibid.

[21]Haskell v. Bailey, 63 Fed. 873 (4th Cir. 1894); Vitola v. Bee Pub. Co., 66 App. Div. 582, 73 N.Y. Supp. 273, 277 (1st Dep't 1901) (dictum); Annot., 37 A.L.R. 908 (1925).

[22]Annot., 37 A.L.R. 908, 909 (1925).

[23]Griffin v. Olean Times Pub. Co., 126 N.Y. Supp. 1102 (Sup. Ct. 1911); MacCormac v. Tobey, 109 App. Div. 581, 96 N.Y. Supp. 302 (1st Dep't 1905); Nicholson v. Lothrop, 3 Johns. R. 139 (N.Y. 1808).

[24]Percy v. Seward, 6 Abb. Pr. 326, 327 (N.Y. 1858).

problems and a general dissatisfaction with the old rule, the courts of some states, notably New York and Alabama, have developed a rule stating frankly that the publication of a single edition of a newspaper does not create numerous causes of action each complete in itself, but rather that a single cause of action for the defamatory publication is created, with the extent of the newspaper's circulation going to the question of damages.[25] In *Age-Herald Pub. Co. v. Huddleston*,[26] the Supreme Court of Alabama distinguished between the "damage or hurt" incurred by the wide circulation of the paper, and the "injuria," or legal wrong which "caused" the "damage or hurt."[27] The court reasoned that the legal wrong occurred in the county of original publication and that publications in other counties, although contributing to the overall damage, merely increased the graivty of the original injury. This established a single publications rule for Alabama without the necessity of statute.

In the New York case of *Wolfson v. Syracuse Newspapers*,[28] no theory was propounded in justification of the change from the old rule. The court, apparently feeling that the desirability of the single publication rule outweighed the handicap of meager authority, blandly quoted a criminal decision, which in itself represented a sharp departure from the common law, to the effect that "in publication of a defamatory article in a newspaper publicly circulated there is but one publication, and that at the place where the newspaper is published."[29]

The courts of some states have seemingly thus far escaped without haing had to rule upon this problem. In *Hartmann v. Time, Inc.*[30] the Third Circuit Court of Appeals commented upon the "distinct cleavage" in the libel laws of the various states and noted that it could find

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[25]Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1921); Wolfson v. Syracuse Newspapers, 254 App. Div. 211, 4 N.Y.S.2d 640 (4th Dep't 1938).

[26]207 Ala. 40, 92 So. 193 (1921).

[27]The court goes on to say, "These old common-law principles undoubtedly had their origin in relation to the single acts of individuals, in a primitive society, and cannot, either as a matter of principle or common sense, be applied without qualification to the the publication of modern newspapers." Id. at 196.

[28]254 App. Div. 211, 4 N.Y.S.2d 640 (4th Dep't 1938).

[29]Id. at 642. Actually two cases are cited by the court, but the first, Fried, Mendelson & Co. v. Edmund Halstead, Ltd., 203 App. Div. 113, 115, 196 N.Y. Supp. 285, 287 (1st Dep't 1922), relies upon United States v. Smith, 173 Fed. 227 (D. Ind. 1909), for the statement quoted. The Smith case involved a criminal action brought in Indianapolis against a paper printed there. The court held that the defendants must be prosecuted in Indiana rather than in Washington, D. C., where several copies had been mailed, but the rationale of the case does not appear to be based on a single publication concept. See Annot. 37 A.L.R. 908, 914 (1925); Annot., 49 L.R.A. (N.S.) 941, 942 (1914).

[30]166 F.2d 127 (3d Cir. 1947).

only a "chemical trace" indicating the substantive law of Pennsylvania, which it was bound to apply. The plaintiff in this case alleged that the publishers of *Life* magazine had libeled him by publications throughout "the Commonwealth of Pennsylvania, throughout the United States, in most of the civilized countries of the world and to the armed forces of the United States overseas."[31] The case presented a complicated situation encompassing problems of jurisdiction, statutes of limitations and conflicts of laws, which go beyond the scope of this comment, but which graphically illustrate the inadequacies of present law in this field. The conflict of laws rule of the forum[32] required that the law of many jurisdictions be considered,[33] and so the court of appeals returned the action to the district court with directions to ascertain the law of each of these jurisdictions.

Clearly, if every sale, delivery, or communication of defamatory matter constitutes a separate publication as indicated by the *Duke of Brunswick* case,[34] the publisher of a nation-wide communication might find himself confronted with at least fifty separate suits, one for each state including Alaska, and the District of Columbia, not to mention possible causes of action arising in the territories.[35] The English court that formulated the multi-publication rule was concerned with only one jurisdiction, and with publications in a society quite different from ours today. If every sale of a newspaper or magazine, or as a parallel, every radio or television broadcast, or movie showing, could give rise to a separate cause of action today, the results would be farcical.[36]

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[31]Id. at 131.

[32]This was a diversity of citizenship case, so the federal court applied the law, including the conflict of laws rules, of the state in which it was sitting. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).

[33]The action of libel is transitory and as such may be brought beyond the jurisdiction wherein the cause of action arose. A knotty conflict of laws question arises in connection with the choice of the jurisdiction whose law is to be applied. For discussion of this phase of multi-state libel, see Prosser, Interstate Publication, 51 Mich. L. Rev. 959 (1953); Notes, 28 N.Y.U.L. Rev. 1006 (1953); 35 Va. L. Rev. 627 (1949).

[34]14 Q.B. 185, 117 Eng. Rep. 75 (1849).

[35]Prosser, Interstate Publication, 51 Mich. L. Rev. 959, 960 (1953). Annie Oakley, the famous woman sharpshooter, brought 50 suits against 50 different newspapers, all based on the same libelous utterance carried over their wire service. She is said to have recovered judgments ranging from $500 to $27,500 in 48 of them. Id. at 969.

[36]"It scarcely needs pointing out that it is potentially disastrous today, when a periodical such as *Life*, is distributed ot some 3,900,000 individual readers, and the *Hooper* rating indicates that a single radio program is heard by as many as ten million listeners. The sum total of the causes of action which might thus arise would be more than three times as great as the estimated number of all the reported law decisions in the English language, and the lifetime of this generation would not suffice to try them." Id. at 961.