Defamation Law Reform in Australia: The Multiple Publication Rule

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Australian Attorneys-General are currently conducting a major review into the law of defamation. Australia's uniform defamation laws were enacted in 2005, and much has changed in the past generation in the media and publishing landscape. This is the first of three articles that will consider possibilities for substantive reform of defamation law. This article will suggest that Australia should abandon the multiple publication rule, whereby a new cause of action and new limitation period generally applies on each occasion that defamatory material is "published". Other jurisdictions have reformed this rule, and it is argued that Australian law should do the same.

INTRODUCTION

Reform to Australian defamation law is high on the legislative agenda. Earlier this year the Australian Council of Attorneys-General formed a Defamation Working Party to consider the model defamation law provisions of 2005. The Working Party has issued a discussion paper, posing several questions for consideration in terms of law reform.[1] One of these relates to the question of a single or multiple publication rule. The discussion paper states that the notion of a limitation period for a defamation claim running from the date the material is downloaded (a consequence of the multiple publication rule) is "problematic",[2] before conceding there are arguments on both sides. Law reform on this matter is considered likely.

At present, Australian defamation law continues to apply the multiple publication rule. This means that each time defamatory material is "published", a new cause of action arises. This can effectively mean that a defamation action may be brought many years after the defamatory material was first published, potentially thwarting the intent and rationale of limitation periods in Australian defamation legislation. It is argued the exponential growth of the internet and technology has exacerbated problems with the multiple publication rule. The interplay of the two means that on each occasion defamatory material is downloaded, a new cause of action arises. This can mean hundreds of causes of action could conceivably arise around the world based on the same material, potentially in hundreds of jurisdictions, for alleged defamation against a global figure. The act of re-tweeting could also result in a fresh legal action if the original tweet contained defamatory matter. Difficult issues also arise as to the relevant law to be applied to resolve such cases. As indicated, a working party is currently considering reform to Australian defamation law, including a possible switch to the single publication rule. This switch occurred in the United States more than 60 years ago and in the United Kingdom, the original source jurisdiction of the multiple publication rule which Australian courts apply, reform occurred more than five years ago.

Before considering how various jurisdictions around the common law world have dealt with this precise issue, some broader context is appropriate. The law of defamation must attempt to balance two competing strong interests. The first is the value of free speech. Free speech has been lauded by many scholars and for many reasons.[3] Chief among its arguments include that free speech is absolutely fundamental in a democracy,[4] that free speech is necessary to an individual's development and self-actualisation,[5] that it is

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[1] Council of Attorneys-General, *Review of Model Defamation Provisions: Discussion Paper* (2019).

[2] Council of Attorneys-General, n 1, 15.

[3] John Stuart Mill, *On Liberty* (1859).

[4] Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Harper, 1960).

[5] Stuart Mill, n 3, 101.

necessary in the search for "truth", and that it facilitates the "marketplace of ideas".[6] On the other hand, no one believes that free speech should be absolute; all agree that some limits are appropriate. The law of defamation seeks to recognise the importance of an individual's right to reputation, to be protected from scurrilous accusation, and to some measure of privacy. The law must seek to balance these competing interests.[7]

It will be no surprise to note that functioning democracies will make different decisions as to the appropriate balance between these values. Painting with broad brush strokes, the United States has always strongly favoured freedom of speech, reflected in its *First Amendment*. This has strongly influenced its defamation law, particularly concerning so-called public figures.[8] English law has traditionally tolerated much greater incursion on freedom of speech, with its long history of seditious libel prosecutions[9] where, literally, truth was no defence.[10] The law of continental Europe has strongly defended rights to reputation, initially of the aristocracy but later more generally.[11]

These differences have a deep cultural basis. The United States (US) system of government is characterised by its deep distrust of authority, borne of bitter experience with British rule, and absolute commitment to government by the people, again a reaction to perceived powerlessness in terms of former British rule. The English tradition was a strong Hobbesian government, brooking little dissent or criticism of those in power (though this evolved in the 18th century),[12] and the mainland European tradition of deference to those in power, and traditionally less attachment to democratic ideals. However, one of the consequences of globalisation and the internet is that these differences have narrowed. An indication of the differences is the fact that the US Congress felt it necessary to pass the so-called *Securing the Protection of Our Enduring and Established Constitutional Heritage Act 2010* (US) (*SPEECH Act*), prohibiting the recognition and enforcement in the United States of overseas decisions which unacceptably infringe *First Amendment* freedoms.[13] While differences have narrowed, the United States remains as an exemplar of more extreme protection of free speech than other jurisdictions.

For a long time the United Kingdom was recognised as a very friendly jurisdiction for defamation plaintiffs to bring legal action, due to the fact the plaintiff would need to prove less than elsewhere in order to make out a case, liability was strict rather than fault-based, the fact that the onus was on defendants to show justification, as well as the multiple publication rule.[14] In considering changes to United Kingdom (UK) defamation law which were eventually made in 2013 and which will be discussed below, the Commons Select Committee on Media, Culture and Sport referred to the "humiliation for our system that the US legislators should feel the need to take steps to protect freedom of speech from what are seen as unreasonable incursions by our courts". Then Deputy Prime Minister of the United Kingdom claimed that jurisdiction had become an international "laughing stock" due to its generous defamation laws rather than a model for others to follow,[15] a position that the United Kingdom formerly enjoyed in relation to its legal system.

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[6] *Abrams v United States*, 250 US 616, 630 (1919) (Holmes J, dissenting).

[7] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 599 (Gleeson CJ McHugh Gummow and Hayne JJ); [2002] HCA 56.

[8] *New York Times Co v Sullivan*, 376 US 254 (1964).

[9] *De Libellis Famosis Case* (1606) 77 ER 250; Leonard Levy, *Legacy of Suppression* (The Belknap Press of Harvard University Press, 1960); William Mayton, "Seditious Libel and the Lost Guarantee of a Freedom of Expression" (1984) 84 *Columbia Law Review* 91; Irving Brant, "Seditious Libel: Myth and Reality" (1964) 39 *New York University Law Review* 1.

[10] *Beauharnais v Illinois*, 343 US 250, 254 (1952) (Frankfurter J, for the Court).

[11] Elena Yanchukova, "Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression of European and Post-Communist Jurisdictions" (2003) 41 *Columbia Journal of Transnational Law* 861.

[12] James Fitzjames Stephen, *A History of the Criminal Law of England* (MacMillan and Company, 1883).

[13] *Securing the Protection of Our Enduring and Established Constitutional Heritage 2010* (US) (*SPEECH Act*).

[14] Vincent Johnson, "Comparative Defamation Law: England and the United States" (2016) 24 *University of Miami International and Comparative Law Review* 1.

[15] Gavin Phillipson, "The Global Pariah, the *Defamation Bill* and the *Human Rights Act*" (2012) 63 *Northern Ireland Legal Quarterly* 149, 155.

The discussion that follows below of the approach of each of the jurisdictions studied to the question of a multiple or single publication rule should be seen in the context of the different weighing of free speech as opposed to reputational protection, and the right of each jurisdiction to determine which balance fits best. However, inevitably globalisation and the internet counters these arguments about national sovereignty and presents challenges which call for a re-think in terms of traditional defamation principles. Australia's existing model defamation laws were legislated in 2005. In terms of the internet, this speaks to a different technological world. This alone suggests areas for reform, or at least consideration of it. In what is intended to be a series of articles, this article will consider one of the prime areas considered ripe for reform, the so-called multiple publication rule.

HISTORY – MULTIPLE PUBLICATION RULE IN ENGLAND

The first judgment in which a statement about the possibility of multiple publication in the context of defamation proceedings is the judgment of Bayley J in *R v Mary Carlile* (*Carlile*),[16] involving prosecution against Richard Carlile for spreading allegedly blasphemous libel. In the course of his judgment, Bayley J noted that:

> Not only that the party who originally prints, but that every person who utters, who sells, who gives or who lends a copy of an offensive publication to any other will be liable to be prosecuted as a publisher.[17]

This occurred in the context of proceedings against Mary Carlile for repeating her husband's alleged blasphemies during his criminal trial in a subsequent book of her own entitled "The Mock Trial of Mr Carlile".

This approach was adopted in the case of *Duke of Brunswick v Harmer* (*Harmer*).[18] There a newspaper published in 1830 apparently contained material defamatory of the plaintiff. The plaintiff's agent subsequently purchased in 1848 a copy of the newspaper containing the defamatory material. At the relevant time, the limitation period within which to bring libel actions in England was six years. The Court decided that the plaintiff should succeed, and that the defendant's argument based on the limitation period was incorrect. This was because new publication occurred when the agent purchased the newspaper in 1848. The time limit within which an action could be brought in defamation commenced at that time, according to the Court.

This decision obviously has serious consequences for the place of limitation periods in the law generally. The law has traditionally imposed time limits by which (civil) actions against defendants must be commenced. The policy underlying such limitations is well known. It avoids courts hearing stale claims, it helps to ensure that the parties, witnesses etc will have a better recollection of the events in dispute, and it seeks to avoid the stress that might be caused to defendants by what might otherwise be a constant, long-term threat of litigation against them.[19] All of these rationales risk being undermined by the approach adopted in *Carlile* and *Harmer*. In the latter case, the action was taken nearly 20 years after initial publication, and more than 10 years later than the relevant limitation period, yet the plaintiff succeeded in their claim.

On facts such as *Harmer*, one argument in favour of the multiple publication rule might have been that the plaintiff was not aware of the initial defamatory publication until many years after the publication date, and/or that there was no relevant "publication" until the plaintiff became aware that his reputation had

[16] *R v Mary Carlile* (1819) 3 B & Ald 168, 106 ER 624.

[17] *R v Mary Carlile* (1819) 3 B & Ald 168, 169, 106 ER 624, 624.

[18] *Duke of Brunswick v Harmer* (1849) 14 QB 185; 117 ER 75.

[19] *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 551–553: "[T]he discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. For nearly 400 years, the policy of the law has been to fix the definite time limits for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that where there is delay the whole quality of justice deteriorates … as time goes by, relevant evidence is likely to be lost … it is oppressive … to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed … people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them … (and) the public interest requires that disputes be settled as quickly as possible" (McHugh J, with whom Dawson J agreed).

been sullied (damage being the gist of the action for defamation),[20] such that it would have been unfair to apply the statute of limitations to prevent his claim. However, such arguments have progressively lost force with the exponential growth of the internet, vastly increasing the likelihood that defamatory material will come to someone's attention, and that the plaintiff would likely become aware of it somehow.

However, the English courts refused to reform the multiple publication rule in the face of these developments in technology. It was referred to without disagreement by two Law Lords in *Berezovsky v Forbes Inc (No 1)* (*Berezovsky*).[21] So in *Godfrey v Demon Internet Ltd (Application to Strike Out)*,[22] the plaintiff sued an internet service provider who carried on their news service an article that defamed him. The article had been written by a third party. Morland J found that the defendant was a publisher of the defamatory material and, of most importance for current purposes, that they published such material every time it was viewed by one of their customers:

> 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. Thus every time one of the defendant's customers accesses soc.culture and sees that posting defamatory of the plaintiff there is a publication to that customer.[23]

The Court of Appeal considered the matter in *Loutchansky v Times Newspapers Ltd (No 2)*.[24] The relevant law at the time required that defamation proceedings commenced within 12 months of publication. The plaintiff sought to sue a newspaper for an article in its news archive it claimed to be defamatory. The action was commenced more than 12 months from the initial publication of the article. The Court rejected the newspaper's defence that the proceeding was out of time. It continued to accept the correctness of the multiple publication rule:

> It is true that to permit an action to be based on a fresh dissemination of an article published long ago is at odds with some of the reasons for the introduction of a 12 month limitation period for defamation. But the scale of such publication and any resulting damage is likely to be modest compared with that of the original publication. In the present case … the action based on the internet publication is subsidiary to the main action. The change in the law of defamation for which the defendants contend is a radical one. In our judgment they have failed to make out their case that such a change is required.[25]

The accession of the United Kingdom to the *European Convention on Human Rights* led to some argument that the multiple publication rule violated Article 10's violation of freedom of expression, amounting to a disproportionate restriction on the freedom. Similarly, those arguments were usually rejected,[26] although the European Court found that in some cases, the bringing of a defamation action many years after initial publication could breach Article 10.[27]

The English courts appeared to be prepared to disown the actual decision arrived at in *Harmer*, the essential source of the single publication rule, on the basis of the court's inherent jurisdiction to avoid abuse of its processes. Thus, in *Jameel v Dow Jones & Co Inc* the English Court of Appeal noted that:

> We do not believe that *Duke of Brunswick v Harmer* could today have survived an application to strike out for abuse of process. The Duke himself procured the republication to his agent of an article published many years before for the sole purpose of bringing legal proceedings that would not be met by a plea of limitation … (the Duke) acquired a technical cause of action but we would today condemn the entire exercise as an abuse of process.[28]

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[20] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 606 (Gleeson CJ McHugh Gummow and Hayne JJ, with whom Gaudron J agreed); [2002] HCA 56.

[21] *Berezovsky v Forbes Inc (No 1)* [2000] 1 WLR 1004, 1024 (Lord Hoffmann, who said the multiple publication rule was "settled"), 1026 (a position with which Lord Hope agreed); [2000] EMLR 643.

[22] *Godfrey v Demon Internet Ltd (Application to Strike Out)* [2001] QB 201; [1999] EMLR 542.

[23] *Godfrey v Demon Internet Ltd (Application to Strike Out)* [2001] QB 201, 208–209; [1999] EMLR 542.

[24] *Loutchansky v Times Newspapers Ltd (No 2)* [2002] QB 783; [2002] EMLR 14.

[25] *Loutchansky v Times Newspapers Ltd (No 2)* [2002] QB 783, 818 (Lord Phillips for the Court); [2002] EMLR 14.

[26] *Loutchansky v Times Newspapers Ltd (No 2)* [2002] QB 783, 817 (Lord Phillips, for the Court of Appeal); [2002] EMLR 14.

[27] *Times Newspapers Ltd v United Kingdom (3002/03)* [2009] EMLR 14.

[28] *Jameel v Dow Jones & Co Inc* [2005] QB 946, [56]; [2005] EWCA Civ 75.

It is interesting that the UK courts were willing to effectively declare that the original case was actually wrongly decided, but at the same time refuse to overturn the only legal principle for which the case retained any importance – the single publication rule, which then in turn spread to each of the other jurisdictions studied in this article.

In the context that the courts had at the same time declared the case wrongly decided but refused to overturn its legal basis, pressure slowly built for legislative reform to the rule it created. The Law Commission in its report recommended reconsideration of the multiple publication rule, partly on the basis that it could undermine the limitations period legislation.[29] A 2010 Report of the Libel Working Group (Ministry of Justice) recommended abolition of the multiple publication rule. The Ministry of Justice's *Draft Defamation Bill: Consultation* (2011)[30] suggested that the existing multiple publication rule was not suitable for the internet age, suggesting adoption of the single publication rule, with some exceptions.

The UK Parliament passed the *Defamation Act 2013* (UK). Section 8 effectively abolishes the multiple publication rule for the purposes of limitations periods. It states that where a person publishes a statement, and then subsequently publishes a statement that is substantially the same, then for the purposes of the limitations period, publication is deemed to have occurred (only) on the first of those occasions. This only applies where the material is substantially the same, and it is published by the same publisher. Further, it does not alter the courts' power to extend limitations periods in particular cases. However, in practice, it is rare that such discretion is exercised.[31] These exceptions reflect those which appeared in the 2011 consultation draft.[32] The reforms have attracted both praise[33] and criticism.[34]

MULTIPLE PUBLICATION RULE IN AUSTRALIA

Decisions at State level have accepted the multiple publication rule, adopting the English position on point.[35] It is implicit in one early High Court judgment.[36] Two Australian Law Reform Commission Reports had recommended abolishing the multiple publication rule, but neither had been acted upon.[37] Leading defamation scholars have criticised it.[38]

The High Court of Australia expressed agreement with it in *Dow Jones and Co Inc v Gutnick* (*Dow Jones*).[39] That case involved the upload in the United States of an article that was critical of the respondent, an Australian businessman. Gutnick downloaded the article in Australia and brought action against Dow Jones in this country. Issues arose concerning whether an Australian court should hear the

[29] Law Commission, *Defamation and the Internet: A Preliminary Investigation* (2002) 3.23–3.24.

[30] Ministry of Justice, *Draft Defamation Bill: Consultation* (2011) 30.

[31] David Erdos, "Data Protection and the Right to Reputation: Filling the Gaps after the Defamation Act" (2013) 73 *Cambridge Law Journal* 536, 555.

[32] For discussion of the process of this law reform in the United Kingdom, see Stephen Bates, "Libel Capital No More – Reforming British Defamation Law" (2012) 34 *Hastings Commercial and Entertainment Law Journal* 233.

[33] Phillipson, n 15, 158 dismissed the former multiple publication rule as "archaic".

[34] Alastair Mullis and Andrew Scott, "Tilting at Windmills: The *Defamation Act 2013*" (2014) 77 *Modern Law Review* 87.

[35] *McLean v David Syme & Co Ltd* (1970) SR (NSW) 513, 520, 528; *Jones v TCN Channel Nine Pty Ltd* (1992) 26 NSWLR 732. In contrast, see *Meckiff v Simpson* [1968] VR 62, 65.

[36] *Webb v Bloch* (1928) 41 CLR 331, 363–365 (Isaacs J).

[37] Australian Law Reform Commission (ALRC), *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) 60–61 [113]; ALRC, *Choice of Law*, Report No 58 (1992) 57 [6.53–6.54].

[38] David Rolph, *Defamation Law* (Thomson Reuters Australia Limited, 2016) 152: "[T]he multiple publication rule is well established historically, even if not entirely defensible on rational grounds … merely because it has been sanctioned by its application for over 150 years does not mean that (it) is an indispensable part of defamation law"; see also Belinda Robilliard, "Jurisdiction and Choice of Law Rules for Defamation Actions in Australia Following the *Gutnick* Case and the Uniform Defamation Legislation" (2007) 14 *Australian International Law Journal* 185.

[39] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575; [2002] HCA 56.

matter, and which laws were applicable to resolve the case. In the course of considering these matters, members of the High Court also reflected on the multiple publication rule, although it was not necessary to be determined for the resolution of the case. The comments were obiter dicta only, but have assumed particular importance, given the relative dearth of cases on the question. Dow Jones had suggested that Australia adopt the single publication rule.

In declining to do so, the joint reasons noted the nature of a defamation action. The reasons stated that in defamation, damage was the gist of the action, the damage being harm to reputation. That harm is (only) done when the defamatory material is read, heard or seen. Until that point, no harm was done. The joint reasons said that this should be borne in mind. Publication was not a unilateral act on the part of the publisher. Rather it was a bilateral act – where the publisher makes the information available, and the third party has access to it.[40] The joint reasons concluded that the bilateral nature of publication underpinned the long-established rule that every communication of defamatory matter provided a new cause of action, citing *Harmer*. It also noted that State defamation legislation in some ways reflected the multiple publication rule. The joint reasons stated it would be a "large step" to now depart from it.

The joint reasons briefly traced the circumstances leading to adoption of the single publication rule in most of the United States. It noted that it had originally started as a means to confine the number of actions in relation to a particular matter, before expanding to also influence the place in which the tort was said to have occurred, and the relevant law to be applied to resolve the matter. The joint reasons criticised the American law for having confused and conflated different concepts in this manner.[41] The joint reasons then proceeded to consider such concepts, reinforcing that for the purposes of Australian choice of law rules, the question was where in substance the cause of action arose. They found that because damage was the gist of a defamation action, in substance the cause of action arose in the place where damage occurred or could occur. This could conceivably be every jurisdiction around the world where the plaintiff had a reputation.[42] This influenced the High Court in deciding not to adopt the single publication rule.

While Kirby J agreed with the joint reasons that the High Court should not abolish the multiple publication rule,[43] he appeared to be far more ambivalent about the outcome. He frankly stated that the conclusion that the Court, including his judgment, had reached was counter-intuitive and not wholly satisfactory.[44] Kirby J said that in most cases the damage to the plaintiff's reputation would be in their country of residence. Thus, it did not impose an intolerable burden on defendants to be cognisant of the defamation law of that country in determining whether or not to publish contentious matter.[45] He acknowledged difficulties where plaintiffs had a reputation in more than one jurisdiction, but such difficulties would arise regardless of which rule was chosen.[46]

Callinan J noted a sharp difference between, on the one hand, the law of the United Kingdom and Australia and, on the other, the law of the United States. He noted that law of the former two countries weighted protection of reputation more heavily than the United States, which weighted free speech more heavily. He said some had suggested the US law had weighted defamation law "far too heavily" in favour of the defendant.[47] Australia's adoption of the English multiple publication rule should be seen in that light. It is not known what the views of Callinan J would now be, given that the United Kingdom has legislated to overturn the multiple publication rule. Should the Australian law continue to adhere to the

[40] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 600 (Gleeson CJ McHugh Gummow and Hayne JJ, with whom Gaudron J agreed); [2002] HCA 56.

[41] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 604; [2002] HCA 56.

[42] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 606–607 (Gleeson CJ McHugh Gummow and Hayne JJ, with whom Gaudron J agreed); [2002] HCA 56.

[43] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 635; [2002] HCA 56.

[44] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 642–643; [2002] HCA 56.

[45] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 639; [2002] HCA 56.

[46] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 639; [2002] HCA 56.

[47] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 650; [2002] HCA 56.

UK position, as Callinan J appeared to support in *Dow Jones*, contrasting our law with that of the United States (prior to a time when the United Kingdom legislated to in effect adopt the American position)? Callinan J said that publishers must simply accept that if they publish defamatory material, a cause of action might be available to them in every jurisdiction in which the material was available, where the plaintiff could show they suffered damage.[48]

The uniform defamation laws, enacted in Australia in the early 21st century, considered the situation where there was multiple publication of matter in more than one jurisdiction. The relevant legislative response is in the form of a choice of law rule,[49] rather than something equivalent to s 8 of the *Defamation Act 2013* (UK). Some experts in defamation law have interpreted the relevant provision in the uniform defamation law as introducing something like a single publication rule.[50]

My reading of the provision is that all it deals with is the relevant law to be applied (the substantive law applicable) and, perhaps, the relevant forum (in this jurisdiction). In other words, it does not state as such that only one action can be brought in relation to the same defamatory matter that might be downloaded in different states at different times. It is literally a choice of law rule, stating that the law of the State with the closest connection to the relevant harm is to be applied to resolve it. In my view, nothing in the legislation would preclude a plaintiff suing in a New South Wales (NSW) court based on online defamation downloaded there, and then later suing in another NSW court based on online defamation downloaded in Victoria. *The legislation does not on its face preclude multiple actions based on the same matter; all that it mandates is the relevant law to be applied.*[51] So although some experts believe the legislation does mandate the single publication rule with respect to actions based on publication in multiple jurisdictions within Australia, another view is that the legislation does not in fact to do so, and that it continues to exist with respect to defamation actions involving publication in more than one Australian jurisdiction. And, in any event, the multiple publication rule lives on in Australia with respect to actionable defamation occurring both within this country and overseas.

Further, the uniform defamation law says only that the "substantive" law of that jurisdiction is to be applied. Substantive law includes limitation periods[52] and all matters relating to damages.[53] Thus, the

[48] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 651; [2002] HCA 56. The multiple publication rule was described as a "cornerstone" of Australian defamation law by Peek J in *Google Inc v Duffy* (2017) 129 SASR 304, [193]; [2017] SASCFC 130. The High Court's decision in Dow Jones, including its affirmation of the multiple publication rule, has been criticised: Nathan Garrett, "Dow Jones & Co v Gutnick: Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?" (2004) 13 *Pacific Rim Law and Policy Journal* 61, 88: "[T]he ruling in Gutnick is overbroad and presents a danger to international free speech. Gutnick is based on precedent from a time when international concerns were far less relevant, and as a result, it has the potential to impose Australia's free speech standards on the rest of the world."

[49] *Defamation Act 2005* (NSW) s 11(2) states: "[I]f there is a multiple publication of matter in more than one jurisdictional area, the substantive law applicable in the Australian jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection must be applied in this jurisdiction to determine each cause of action for defamation based on the publication"; see equivalently *Defamation Act 2005* (Vic) s 11; *Defamation Act 2005* (Qld) s 11; *Defamation Act 2005* (SA) s 11; *Defamation Act 2005* (WA) s 11; *Defamation Act 2005* (Tas) s 11; *Civil Law (Wrongs) Act 2002* (ACT) s 123; *Defamation Act 2006* (NT) s 10.

[50] Rolph, n 38, 153: "[U]nder the national, uniform defamation laws, a form of the 'single publication rule' was introduced in relation to the publication of defamatory matter occurring in more than one jurisdictional area within Australia. This is clearly designed to overcome the 'multiple publication rule' in the context of multi-state defamation cases occurring in Australia." In contrast Patrick George, *Defamation Law in Australia* (LexisNexis, 2nd ed, 2012) 140 simply notes that s 11 is a choice of law rule. He does not indicate that it removes the multiple publication rule with respect to defamation in multiple Australian jurisdictions.

[51] I accessed an explanatory memorandum of legislation introducing the uniform defamation legislation to determine whether my interpretation of the provision was correct or not. Explanatory Memorandum, *Defamation Bill 2005* (WA), for example, in discussing the relevant reform (cl 11) discusses the provision as a choice of law rule (4–6). It does not indicate an intention to abolish the multiple publication rule for defamation occurring in more than one Australian jurisdiction.

[52] *Choice of Law (Limitation Periods) Act 1993* (NSW) s 5; *Choice of Law (Limitation Periods) Act 1993* (Vic) s 5; *Choice of Law (Limitation Periods) Act 1996* (Qld) s 5; *Limitation of Actions Act 1936* (SA) s 38A; *Choice of Law (Limitation Periods) Act 1994* (WA) s 5; *Limitation Act 1974* (Tas) s 32C; *Limitation Act 1985* (ACT) s 56; *Choice of Law (Limitation Periods) Act 1994* (NT) s 5, overturning the former common law position: *McKain v RW Miller & Co (South Australia) Pty Ltd* (1991) 174 CLR 1 that such matters are non-substantive (in other words, procedural).

[53] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 543–544 (Gleeson CJ Gaudron McHugh Gummow and Hayne JJ); [2000] HCA 36, overturning the former common law position: *Stevens v Head* (1993) 176 CLR 433 that such matters are procedural.

uniform defamation laws solve the issue of plaintiffs resorting to different jurisdictions to circumvent limitation periods, to the extent that the defamation action relates to publication in Australia (only).[54] The uniform defamation laws do not apply with respect to actions in Australia and overseas.

The statutory review of the *Defamation Act 2005* (NSW), completed in June 2018, found that in the digital age, the notion of a limitation period running as from the date material was downloaded was "problematic".[55] It suggested further consultation with stakeholders as to the possible introduction of a single publication rule.[56] The Review's reticence in this regard has been criticised by a judge of the District Court of New South Wales, who concluded that the problems with the multiple publication rule had long been known.[57] We await the outcome of the freshly announced review of national defamation laws.

MULTIPLE PUBLICATION RULE IN THE UNITED STATES

At first, the United States embraced the multiple publication rule of *Harmer*.[58] This is reflected in s 578 of the *Restatement of Torts* (1938) which provided that:

> Each time a libellous article is brought to the attention of a third person, a new publication has occurred, an each publication is a separate tort. Thus, each time a libellous book or paper or magazine is sold, a new publication has taken place which, if the libel is false and unprivileged, will support a separate action for damages against the seller. So too, each time a libellous article is reprinted or redistributed, a new publication is made and a fresh tort is committed.

In hindsight, such a rule might be thought to have been inappropriate in the United States, given that country's strong commitment to freedom of speech values, enshrined in the *First Amendment*. It might be thought that the multiple publication rule unduly chills freedom of speech, by potentially exposing defendants, including the media, to large-scale liability. Elsewhere, American defamation law has been moulded by free speech concerns.[59] The UK defamation law is generally more concerned with preservation of reputation and has traditionally been seen as much more plaintiff-friendly in this area of law.[60]

However, dissatisfaction with this original position soon emerged in the United States. In the following year, a case with a somewhat similar fact pattern to *Harmer* emerged. The case was *Wolfson v Syracuse Newspaper* (*Wolfson*).[61] The plaintiff alleged they had been libelled by an article in the defendant newspaper in 1935. The relevant New York limitation period was one year within which action must be brought. The plaintiff commenced action in 1937, outside of the limitation period. He argued that the material remained readily available, and that a third person had accessed the relevant article in a library in 1937. In effect, the plaintiff relied on the multiple publication rule to argue that his action was not

[54] Compare Rolph, n 38: "[T]he problem of the multiple publication rule in relation to limitation periods persists in Australia." With respect, given statutory reforms to the question of whether limitation periods are to be regarded as substantive or procedural, I must disagree.

[55] *Statutory Review Defamation Act 2005*, NSW Department of Justice (2018) 2.31.

[56] 2.32. The Review does not expressly take the position that s 11 of the uniform defamation law has removed the multiple publication rule.

[57] JC Gibson, "Adapting Defamation Law Reform to Online Publication" (2018) 22 *Media and Arts Law Review* 119, 132.

[58] *Staub v Van Benthuysen*, 36 La Ann 467, 469 (1884): "[E]very sale or delivery of a written or printed copy of a libel is a fresh publication, and every person who sells a written or printed copy of it may be sued therefore"; Robert Leflar, "The Single Publication Rule" (1953) 25 *Rocky Mountain Law Review* 263; Sapna Kumar, "Website Libel and the Single Publication Rule" (2003) 70 *University of Chicago Law Review* 639.

[59] *New York Times Co v Sullivan*, 376 US 254 (1964) (limiting actions for defamation by public figures to cases of malice).

[60] Specifically, in the United Kingdom law liability for defamation is strict in nature, not requiring proof of fault. Once the fact of defamation and publication has been shown, the burden of proof shifts to the defendant to show that a defence applies. United Kingdom courts have generally adopted more liberal jurisdiction laws, assuming jurisdiction to hear defamation claims in cases where the connection between the jurisdiction and the case are tenuous. They have been slow to deny jurisdiction on forum non conveniens grounds in this context.

[61] *Wolfson v Syracuse Newspaper*, 254 App Div 211; 4 NYS 2d 640 (4th Dept, 1983), affd 279 NY 716; 18 NE 2d 676.

statute-barred due to the passage of time. The Court found for the plaintiff. It effectively adopted a single publication rule, contrary to the *First Restatement*:

> If the bar of the statute of limitations can be lifted by means such as plaintiff now seeks to employ, we may no longer term it a "statute of repose" which makes effective a purpose which the legislature has conceived to be imperative – to outlaw stale claims … the rule for which the plaintiff contends would not only permit libel actions against news publishers without limitation as to time but its scope would extend beyond the field of journalism. For example, if plaintiff's position is correct in law it must follow that, although a book may have had but one publication 20 years ago, if the publisher continues to make unsold copies of the single publication available to the public today, by sale or otherwise, such conduct amounts to a republication of any libel which the book contains and thereby becomes actionable. Believing that such a rule would nullify the clear purpose of the statute of limitations, we affirm the order dismissing the complaint.[62]

The New York Court of Appeals affirmed the approach taken in *Wolfson* in *Gregoire v G P Putnam's Sons*,[63] a similar scenario to the former case, but involving books. The book containing the allegedly defamatory material was originally published in 1941 but had been reprinted on several occasions since. The plaintiff brought suit in 1946; the one-year limitation period for defamation actions remained in place. The Court of Appeals applied the single publication rule, rejecting the multiple publication rule in *Harmer* on the basis that it

> [H]ad its origin in an era which long antedated the modern process of mass publication and nationwide distribution of printed information. That rule also gave scant heed to the public policy which underlies statutes of limitation, long regarded as "statutes of repose" designed to outlaw stale claims.

Leading torts scholar William Prosser was highly critical of the multiple publication rule:

> The rule may or may not have been appropriate in 1849 to small communities and limited circulations. It scarcely needs pointing out that it is potentially disastrous today (where there is mass circulation of material) … yet the rule has received the unqualified acceptance of the Restatement of Torts, apparently blissfully unaware of the problems … (he cited a case where it was found a plaintiff in a defamation action had an action against the defendant in each of the thirty-nine states in which the allegedly defamation material had circulated) … the consequences of these multiple causes of action are scarcely attractive. The opportunity is afforded for a litigious or vindictive plaintiff, or one who is merely seeking a bargaining position for purposes of extortion, to subject the defendant to repeated suits in every state in which (they) can get jurisdiction … since the causes of action are distinct, a judgment in one is not res judicata in any other … the menace which all this carries to the publisher is too obvious to require comment.[64]

Subsequently the single publication rule would be adopted in the *Uniform Single Publication Act 1952* (US)[65] and Restatement (Second) of Torts (1977).[66] The Restatements assume particular significance in American law, given there is no "national" common law as pertains in Australia.[67] Note that neither the uniform single publication legislation nor the restatements impose any choice of law rule.[68]

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[62] *Wolfson v Syracuse Newspaper*, 254 App Div 211, 213, 642; 4 NYS 2d 640 (4th Dept, 1983); see likewise *Hartmann v Time Inc*, 64 F Supp 671, 678 (ED Pa, 1946).

[63] *Gregoire v G P Putnam's Sons*, 298 NY 119; 81 NE 2d 45 (1948).

[64] William Prosser, "Interstate Publication" (1953) 51 *Michigan Law Review* 959, 961–969; see also Joseph Knakal, "Problems under the Uniform Single Publication Act" (1958) 15 *Washington and Lee Law Review* 321, 326: "[I]f 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."

[65] Uniform Single Publication Act (US) s 1 states that no person shall have more than one cause of action for damages for defamation founded upon any single publication, exhibition or utterance.

[66] Restatement (Second) of Torts (1977) s 577A(3) states that "[A]ny 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." Most states have adopted the *Restatement (Second) of Torts* (1977): Kumar, n 58, 642; Comment "Multi-State Libel and Conflict of Laws" (1953) 47 *Northwestern University Law Review* 255, 257.

[67] *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520, 563 (Brennan CJ Dawson Toohey Gaudron McHugh Gummow and Kirby JJ); compare *Erie Railroad Co v Tompkins*, 304 US 64, 78–79 (1938).

[68] Debra Cohen, "The Single Publication Rule: One Action, Not One Law" (1996) 62 *Brooklyn Law Review* 921, 940.

The State courts have applied the single publication rule to distribution of material on the internet.[69] The most well-known precedent is *Firth v New York*.[70] There the plaintiff brought legal action for allegedly defamatory material posted on the internet. The relevant limitation period was 12 months, but the plaintiff brought legal action more than 12 months from when the material was first uploaded. The Court, applying the single publication rule, found the claim was statute-barred. The Court found that application of the multiple publication rule in the context of the internet would exacerbate problems with multiplicity of suits and harassment of defendants. This could damage free speech values.[71] The Court in this case found that publication had occurred when the material was posted on the internet.[72]

Multiple Publication Rule in Canada

The rule was (implicitly) recognised in the Canadian Supreme Court decision in *Thomson v Lambert* (*Thomson*).[73] That case involved various proceedings against the managing director of a company publishing a newspaper, as well as the newspaper's distributor. The plaintiff also took action against various outlets which sold the newspaper which contained an article defamatory of him. While the Supreme Court permitted it, the joint reasons sounded a note of caution. It asserted that plaintiffs in a defamation action should not be permitted to go on suing ad infinitum in different jurisdictions, when they might have brought one action.[74] The Court referred to some English authorities to the effect that in some cases, courts should be prepared to stay later actions as an abuse of process.

The issue arose in *Carter v British Columbia Federation of Foster Parents' Association*.[75] The issue concerned a limitation period. The plaintiff sought to sue the defendant for defamation more than two years after the allegedly offensive post to the defendant's internet chat forum. Thus, the question of whether Canadian law accepted the single or multiple publication rule directly arose for consideration. If the multiple publication rule was applied, the plaintiff's claim would not be statute-barred; if the single publication rule was applied, it would be.

The British Columbia Court of Appeal did not appear to regard the matter as settled in Canadian law. As a result, it considered the law in the United Kingdom and Australia, observing that both (at the time) applied the multiple publication rule. It then noted that American law applied the single publication rule. The Court concluded that although it was difficult to find a clear statement in the Canadian cases one way or the other, the Court of Appeal concluded that "the clear tendency of the authorities in my view is in favour of the English and Australian position and not in favour of the American position".[76] The Court's comments about the English position were true at the time; however, as has been discussed

[69] Note "The Single Publication Rule and Online Copyright: Tensions Between Broadcast, Licensing and Defamation Law' (2010) 123 *Harvard Law Review* 1315, 1319–1320.

[70] *Firth v New York*, 98 NY 2d 365; 775 NE 2d 463 (2002).

[71] See also *Shively v Bozanich*, 31 Cal 4th 1230, 1244 (2003) where the Court noted that the old multiple publication rule "challenged the ability and willingness of publishers to report freely on the news and on matters of public interest … the advent of books and newspapers that were circulated among a mass readership threatened unending and potentially ruinous liability, as well as overwhelming (and endless) litigation". Itai Maytal, "Libel Lessons from across the Pond: What British Courts Can Learn from the United States' Chilling Experience with the Multiple Publication Rule in Traditional Media and the Internet" (2010) 3 *Journal of International Media and Entertainment Law* 121, 130: "United States courts adopted the single publication rule because, had they continued to apply the multiple publication rule, the courts knew they would eventually cripple the modern mass publishing industry."

[72] Kumar is critical of this, favouring a time of publication when the material was realistically viewable by the intended audience, though she concedes this is typically at the time of posting: Kumar, n 58, 655–656. For a more recent example of the application of the multiple publication rule in the United States, see *Pendergrass v Choicepoint Inc* (US District Court, ED Pennsylvania, Civil Action No 08-188, 9 December 2008).

[73] *Thomson v Lambert* [1938] 1 SCR 253.

[74] *Thomson v Lambert* [1938] 1 SCR 253, 273 (Cannon Crocket and Davis JJ), 258 (Duff CJ making a similar point).

[75] *Carter v British Columbia Federation of Foster Parents' Association* [2005] BCCA 398.

[76] *Carter v British Columbia Federation of Foster Parents' Association* [2005] BCCA 398, [18] (Hall J, with whom Prowse and Saunders JJ agreed).

above, the UK parliament legislated to implement the single publication rule in that jurisdiction. As a result, to the extent that the British Columbia Court of Appeal based its decision on the then state of UK law, obviously this part of the reasoning has been overtaken and marginalised by "events", similar to the reasoning of Callinan J in *Dow Jones*. The Court also endorsed the position in *Thomson* that, at least sometimes, a court might stay multiple proceedings involving essentially the same example of defamation.[77]

Finally, in *Breeden v Black*,[78] a unanimous Supreme Court found that it was "well established" that every repetition or republication of a defamatory statement constitutes a new "publication". Thus, Canada continues to apply the multiple publication rule.

In summary, the common law world was initially taken by the *Harmer* decision and applied the multiple publication rule. However, in hindsight it was incompatible with the United States' strong protection of free speech values and was overturned there. Dissatisfaction also developed in the United Kingdom, the UK courts eventually deciding the case was wrongly decided, but then at the same time refusing to overrule the only legal rule for which the case might be useful. It fell to the UK Parliament to act, and act it did in 2013. The Australian and Canadian courts continue to follow the *Harmer* rule, even though the case has been strongly criticised for its actual result in subsequent UK decisions, and was eventually overturned by statute in its country of origin. Australian governments are currently considering defamation law reform, including a possible change to this rule.

I will now consider arguments in favour of switching to the single publication rule.

Arguments in Favour of the Single Publication Rule

A. Ease of Litigation

One advantage of a single publication rule is that there is one cause of action. The plaintiff only files one claim, incurs one set of legal fees, and makes their case once. The defendant also knows quickly the scope of the claim against them and can choose to settle the matter or defend it. They will only be required to do so once. One set of legal principles will be applied to resolve the case, by one court. This facilitates a low-cost and quick manner of resolving the matter, as opposed to a potentially drawn out process over many years, across multiple jurisdictions, potentially involving different legal principles in each jurisdiction, different legal personnel etc.

The alternative can be very complicated.[79] This occurs because of the interaction between defamation and two aspects of the rules of private international law, namely the principle of *forum non conveniens*, and the rules to determine which law applies to resolve a tort action with connections to more than one jurisdiction.

If we accept that every "publication" of the allegedly defamatory material creates a new cause of action, courts in some parts of the world will readily hear such a claim, even if the connection between that jurisdiction and the claim is tenuous. For example, UK courts heard the defamation action brought by *Berezovsky* against *Forbes* magazine, although the magazine had very low circulation in the United Kingdom. In *Bin Mahfouz v Ehrenfeld* an action in the United Kingdom was permitted based on 23 internet sales and online availability of the defendant's book in that jurisdiction.[80] Similarly in *King v Lewis*,[81] the UK courts heard a claim of defamation by boxing promoter Larry King against a resident of

[77] *Carter v British Columbia Federation of Foster Parents' Association* [2005] BCCA 398, [19].

[78] *Breeden v Black* [2012] 1 SCR 666, 679 (Le Bel J, for the Court).

[79] Sarah Staveley-O'Carroll, "Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment" (2009) 4 *New York University Journal of Law and Liberty* 252, 265: "[I]n an era of online publishing and distribution the multiple publication rule creates a particularly severe threat, since it puts all writers, publishers and even lay people with an online presence at the mercy of British and Australian courts". The statement was made at a time when the United Kingdom favoured the multiple publication rule. As noted above, it was abolished by the *Defamation Act 2013* (UK).

[80] *Bin Mahfouz v Ehrenfeld* [2005] EWHC 1156 (QB).

[81] *King v Lewis* [2004] EWCA (Civ) 1329.

New York, based on allegedly anti-semitic statements on a California website. The UK courts asserted jurisdiction over this matter on the basis that Mr King had a global reputation, and the material could be downloaded in the United Kingdom. Of course, courts can decline to hear cases brought before them on the basis of *forum non conveniens*. However, it has been observed that UK courts, for instance, have seldom used this doctrine to decline to hear a defamation claim.[82] And Australia has adopted a notoriously strict approach to *forum non conveniens* claims, making it most unlikely a court will stay an action brought in Australia on that basis.[83] The United States has become so concerned about this that Congress passed the *SPEECH Act*, preventing American courts from recognising or enforcing foreign judgments on the basis they are incompatible with the *First Amendment*.[84]

This can be exacerbated by choice of law tort rules that in some jurisdictions favour application of the law the "place of the wrong" to resolve cases.[85] If, for example, in the case of defamation, the place of the wrong is deemed to be wherever in the world the material can be downloaded, as has been interpreted to be the case,[86] we potentially see application of a range of laws of defamation in various courts around the world arising from the very same facts. There are real differences in the law of defamation around the world, complicating matters for a plaintiff seeking to make out their case, and a defendant trying to defend one. It is believed that a single publication rule will take much of the complication, cost, and uncertainty out of legal proceedings for defamation that might cross State borders. The aim of legal rules should be to encourage simplicity, timely resolution of results and low-cost dispute resolution, not to drag disputes out for years and create uncertainty for all parties concerned.

B. Ongoing Harm of Defamation Can Be Counteracted with a Takedown Order

Some critics of the law reform that has occurred in the UK lament that in the process of benefitting defendants by avoiding the possibility of ad infinitum law claims against them, they proceed to systematically damage those whose reputations have been harmed, because the defamation can continue. For example, Mullis and Scott argue:

> Criticism of the pre-existing rule (multiple publication) was always wilfully one-eyed. It decried the perpetual risk of suit being brought, but singularly failed to acknowledge the concomitant potential for ongoing harm to be caused precisely by that continuing publication … the new rule can be criticised correspondingly as wrong in concept because it elides the harms caused by online publication. Reputational harm is caused not by the act of publication (in its everyday rather than legal sense), but rather when the reading occurs. Irrespective of when first publication occurs, each reading has the potential to harm

[82] *Mardas v New York Times* [2008] EWHC 3135, [12]: "I]t will only be in rare cases that it is appropriate to strike out an action as an abuse on the ground that the claimant's reputation has suffered only minimal damage and/or that there has been no real and substantial tort within the jurisdiction"; Staveley-O'Carroll, n 79, 264–265.

[83] A stay will only be granted in Australia for this reason where the chosen Australian forum was "clearly inappropriate" (*Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538), in contrast with the United Kingdom, where the relevant test is whether there is a more appropriate forum than that chosen by the plaintiff: *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)* [1987] 1 AC 460.

[84] Lil Levi, "The Problem of Trans-National Libel" (2012) 60 *American Journal of Comparative Law* 507, 523–532.

[85] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [2000] HCA 36; *Regie Nationale des Usine Renault SA v Zhang* (2002) 210 CLR 491; [2002] HCA 10; *Tolofson v Jensen* [1994] 3 SCR 1022; *Private International Law (Miscellaneous Provisions) Act 1995* (UK) (s 11, though defamation claims are expressly excluded s 13), mirrored in the Rome II Regulation, *EU Regulation 864/2007* (2007). Thus the common law rules will apply in the United Kingdom, or the so-called 'double actionability' rules of *Boys v Chaplin* [1971] AC 356, themselves mired in controversy and uncertainty, leading to their abandonment with respect to almost all tort actions in the *Private International Law (Miscellaneous Provisions) Act 1995* (UK). This was not a vote of confidence in the workability of the "double actionability" rules, but they would apply in respect of an action for defamation. For the record, I have generally applauded a move to the law of the place of the wrong as the correct rule, but in the area of defamation, its interaction with the multiple publication rule can cause difficulties. See also Trevor Hartley, "Libel Tourism and Conflict of Laws" (2010) 59 *International and Comparative Law Quarterly* 25.

[86] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 606–607 (Gleeson CJ McHugh Gummow and Hayne JJ); [2002] HCA 56; Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia: Eighth Edition* (LexisNexis, 2010) 429.

> to reputation of the person defamed. The problems caused by the perpetual availability of damaging publications online are an increasingly pressing concern.[87]

It is certainly true that the ongoing availability of defamatory material online or in physical version can continue to cause reputational damage. However, that does not necessarily lead to the conclusion arrived at by Mullis and Scott, that this is a reason why the multiple publication rule should apply. A court considering the action (in the case of a single publication rule) could order that the defamatory material be taken down or removed from the internet. This would prevent the kind of ongoing harm that is a legitimate concern for some. Obviously, an organisation or individual who refused to comply with such a court order could be subject to contempt proceedings. Section 13 of the *Defamation Act 2013* (UK) gives the court explicit power to make such an order, which tends to undercut concerns about ongoing harm. If existing Australian legislation is lacking in this regard, it can be amended with a similar provision to s 13 of the UK law, at the time that the single publication rule is established.

C. The High Court's Reasoning in *Dow Jones* in Rejecting the Single Publication Rule Was Suspect

It is submitted that the High Court's obiter dicta reasoning in the *Dow Jones* decision favouring the multiple publication rule is weak. The High Court first explained that in respect of defamation, damage was the gist of the action. It was the publication of the defamation, not its composition, that created the actionable wrong. So much may be conceded, according to the current law.

However, the joint reasons then state the "bilateral nature of publication underpins the long-established common law rule that every communication of defamatory matter founds a separate cause of action".[88] It cited *Harmer* as authority.

At least two points may be made by way of respectful response. First, the fact that publication is required in order to complete an action for defamation does not inevitably lead, as the quote in the previous paragraph suggests, to use of the multiple publication rule. One could simply say that the cause of action crystallises at the time the material is *first* published. This does not necessarily require adoption of the multiple publication rule, involving potentially multiple publication over many years and jurisdictions. It may simply be that one publication is enough. Evidently, the UK legislators who overturned the common law position and legislated for a single publication rule in the limitations context did not believe that this altered the substantial nature of the action for defamation.

Further, it is questionable at the very least for the High Court to rely on the rule from *Harmer* when the English courts themselves have abandoned it, finding the case had been wrongly decided. It is conceded that this had not occurred at the time *Dow Jones* was decided, but it has now occurred, a few years before the UK parliament legislated the rule deriving from the case out of existence. Thus, at least in 2019, one can hardly point to the UK law as providing support for the multiple publication rule. It has been thoroughly rejected in its jurisdiction of origin. This should give those considering reform in Australia food for thought.

Another reason the joint reasons gave for continuing to accept the multiple publication rule was that it had been applied in earlier versions of State defamation legislation.[89] At the time this was written, this was true. Since that time, a system of uniform defamation law was introduced in Australia. However, what would the High Court make of the fact that the uniform defamation laws are, on my reading, conspicuously silent about whether the multiple publication rule is to apply or not? Does the silence of these laws indicate agreement, or non-agreement, with it? And recall that some have argued that

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[87] Mullis and Scott, n 34, 103.

[88] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 600 (Gleeson CJ McHugh Gummow and Hayne JJ); [2002] HCA 56. Gaudron J agreed with the joint reasons, and Callinan J took a similar view, applying the decision in *Duke of Brunswick v Harmer* (1849) 14 QB 185; 117 ER 75 (651). Callinan J expressed concern with the imposition of "American legal hegemony in relation to internet publications" (653–654). Garnett in response claims that the court's judgment "imposes Australian legal hegemony on the publishers of the rest of the world": Garnett, n 48, 76.

[89] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 600–601; [2002] HCA 56.

these laws abolished the rule, at least for defamation confined to Australian jurisdictions. If express acknowledgment in past legislation was a reason for the High Court to maintain the old common law rule, might an express removal cause it to abandon the rule at common law, for international cases not actually contemplated by the legislation?[90]

The joint reasons identify the possibility that adoption of the multiple publication rule could present difficulties in terms of multiple actions based on the same defamatory matter. Their answer involved application of principles of res judicata, issue estoppel and so-called *Port of Melbourne Authority v Anshun Pty Ltd* estoppel in terms of issues that might have been raised in earlier proceedings.[91] The Court said that if proceedings are brought elsewhere, those courts can apply these principles.[92] The joint reasons then responded to Dow Jones' argument that publishers faced the difficult prospect of multiple proceedings in various jurisdictions with different laws. The joint reasons downplayed such arguments:

> The spectre which Dow Jones sought to conjure up … of a publisher forced to consider every article it publishes on the World Wide Web against the defamation laws of every country from Afghanistan to Zimbabwe is seen to be unreal when it is recalled that in all except the most unusual of cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person may resort.[93]

Respectfully, I am not convinced these concerns can be swept away so easily.[94] We do not know where publication has occurred in the abstract. We do not know which legal systems might be implicated, and what their rules regarding res judicata etc might be. It is dangerous to assume their rules are the same as ours. I have written elsewhere about the dangers of presuming foreign law is the same as ours.[95] Further, if it is in fact the case that each download creates a new cause of action, res judicata and issue estoppel would not apply, and given the choice of law rule that it is the law of the place of the wrong that applies, this law will clearly differ around the world, such that questions of estoppel may not arise, even if all countries concerned do recognise such principles.

Further, let us assume that the defamation action is being brought by a world-famous actor, after defamatory stories appeared about her online. With respect, how does "identifying the person about whom material is to be published … identify the defamation law" to be applied? Evidently, it does not. The fact we can identify the actor involved says nothing about which law is to be applied. The question of which law applies is, as the High Court earlier itself observed in the case, a product of choice of law rules in tort, rules which differ around the world. That is quite a separate matter to the identity of the person allegedly defamed. If the court were referring to the residence or nationality of the person defamed, still that bears little relation to the defamation law to be applied. According to Australia's choice of law rules, the defamation law to be applied is the place of publication, and according to the High Court, that is wherever the material is to be downloaded. Again, that is quite independent of where

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[90] David Rolph argues the undesirability of different rules being applied to intra-Australian and international cases: Rolph, n 38, 157.

[91] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

[92] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 604.

[93] *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 609.

[94] To like effect, see Garnett, n 48, 76. At 88, Garnett concludes that "the ruling in *Gutnick* is overbroad and presents a danger to international free speech. *Gutnick* is based on precedent from a time when international concerns were far less relevant, and as a result, it has the potential to impose Australia's speech standards on the rest of the world". Robilliard, n 38, 197: "If a defamatory statement can be sued upon in any jurisdiction where it is published, it is logical that plaintiffs will bring an action in the jurisdiction whose law is most favourable to their case. The High Court suggested these jurisdictional rules would not have an undue burden upon defendants because of safeguards within Australian law. However, the decision has a tendency to require publishers to consider a multitude of legal standards when calculating the cost of harm, since different countries strike a different balance between free speech and the protection of reputation. Moreover, the costs of calculating liability for damage suffered by a plaintiff who has a substantial reputation in more than one jurisdiction may have a chilling effect on free speech because one of those jurisdictions has more restrictive defamation laws than the others. Hence publishers in attempting to comply with several countries' laws may be reduced to the lowest common denominator and are likely to spend increasing amounts of money on exercising precaution above the socially efficient level."

[95] Anthony Gray, "Choice of Law: The Presumption in the Proof of Foreign Law" (2008) 31(1) *University of New South Wales Law Journal* 136–157.

the plaintiff happens to live. Having apparently criticised the American courts for conflating choice of law with the substantive action, arguably the High Court in *Dow Jones* proceeded to do exactly the same thing. Thus, the joint reasons are not convincing.

The judgment of Kirby J reflects an acute awareness of these issues. He noted the "undesirable consequences" of telling a person uploading material on the internet that they could be liable under the defamation law of any country in which the person allegedly defamed by it had a reputation.[96] He acknowledged some of the practical limitations on the spectre of multiple suits across jurisdictions, also acknowledging potential cost impediments. Nevertheless, he expressly found the result of the case, in which he joined, less than satisfactory.[97] In the end, Kirby J concluded that reform of this area of the law was beyond judicial remit, dissatisfied as he was with the conclusion.

Conclusion

One way or the other, through legislation or case law, Australian defamation law must abandon the multiple publication rule. The basis of the rule was abandoned in its country of origin, the Court of Appeal eventually finding the *Harmer* case from which the principle was derived was in fact wrongly decided. Paradoxically, they refused to overrule the principle derived from it. Law reform was left to the UK Parliament, which duly acted in 2013. The rule was always difficult and clumsy, but through the internet and technology, the kind of legal mischief and misery it can create for both parties caught up in defamation proceedings involving more than one jurisdiction has multiplied exponentially. It serves to undercut limitation periods, delay the final resolution of legal disputes, preserving them indefinitely, and feeds into existing confusion about which court/s should hear matters and which law/s should be applied. This complex mess is not warranted by the interests the law is seeking to uphold.

While the law should protect an individual's reputation from baseless attack, and the potential for individuals to be harmed by defamation and in particular online defamation fully recognised, it would be much better for there to be one single legal proceeding to resolve the matters in dispute between the parties, together with a court's powers to order the removal of the offensive material to prevent future publication, as opposed to creating a new legal action every single time the material is downloaded. The law should preserve and protect reputations, but not subject defendants to the spectre of endless, uncertain litigation. If the High Court of Australia will not act on the state of the common law in this area, parliaments must.

[96] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 627; [2002] HCA 56.

[97] *Dow Jones and Co Inc v Gutnick* (2002) 210 CLR 575, 643; [2002] HCA 56.