

Publishing for Eternity: Legal and Practical Consequences of the Multiple Publication Rule in Defamation Law

Larina Mullins, Senior Litigation Counsel at News Corp Australia discusses the development of the multiple publication rule and its impact on the news media.

Today's newspaper is tomorrow's fish and chip wrapping, as the saying goes. News by its very nature must be new. Breaking. Fleeting. And then it's gone.

That is no longer so in the internet age. When publications are permanently stored and immediately retrieved by ever-improving search algorithms, nothing is ever truly gone. Nothing is ever truly deleted.

However, the law has never been great at adapting to new technology. Defamation law is no exception.

This paper considers the development of the multiple publication rule, its effect on the limitation period for online publications, and its practical impact on the news media.

A. Development of the multiple publication rule

In defamation law, the act of publication does not depend upon how the publisher issued the material. It's a question of how the material was read by its audience.

There is a longstanding principle that each publication gives rise to a new cause of action. Where there are multiple publications, there can be multiple causes of action.

The multiple publication rule 'bites' when applying a limitation period.

A cause of action for defamation is not sustainable if brought after the end of a limitation period of one year running from the date of the publication of the matter complained of.¹ If material is read today, any defamation claim must commence within one year from today. However, according to the multiple publication rule, if the same material is read again in, say, the year 2030, a claim can be brought within one year in 2031.

The earliest instance of the multiple publication rule was *R v Carlisle*.² Richard Carlisle faced two criminal prosecutions for blasphemous libel for selling two copies of the same publication. One action was brought by the Attorney-General and the other by the Society for the Suppression of Vice. The Court allowed both prosecutions to proceed, saying "every copy of the same libel sold by the defendant was a separate publication, for each of which he was liable to be prosecuted criminally".³

The multiple publication rule then arose in a civil claim for defamation in *Duke of Brunswick v Harmer*.⁴ The Duke accused Mr. Harmer of "falsely, wickedly and maliciously"⁵ publishing in a newspaper called the *Weekly Dispatch* an accusation that the Duke committed "acts of outrage and oppression such that the Duke should be deposed by his subjects".⁶ The Duke had sent his manservant to

obtain back-copies of the newspaper from the British Museum and from the publisher's own office. The relevant edition was issued in 1830. The manservant obtained the copies in 1848, some 18 years later. The publisher pleaded the limitation period (then six years). The Court held that there was a new act of publication when the copies were provided. The action was not statute-barred.

Duke of Brunswick v Harmer has been cited as the authority for the multiple publication rule in Australia repeatedly from 1906⁷ to 2017.⁸

B. Application to online publications

The first application of the multiple publication law to online publications was in the American courts in 2002. In *Firth v State of New York*⁹ the claimant was formerly employed by the Department of Environmental Conservation as Director of the Division of Law Enforcement. His responsibilities included acquiring weapons for the law enforcement staff. The State posted on its website a report entitled "*The Best Bang for Their Buck*," which was critical of the claimant's managerial style and procurement of weapons. The claimant sued for defamation after the one-year limitation period had expired. The State moved to dismiss the claim as time-barred.

1 Section 14B of the *Limitation Act 1969* (NSW) and similar legislation in other States and Territories.

2 (1819) 1 Chit 45.

3 Ibid 453.

4 (1849) 14 QB 185; [1849] Eng R 915; (1849) 117 ER 75.

5 Ibid 75.

6 Ibid 76.

7 *Mission v McOwan* [1906] VLR 280.

8 *Otto v Gold Coast Publications Pty Ltd* [2017] NSWDC 101 per Gibson DCJ, [60].

9 (2002) 98 NY 2d 365; (2002) 775 NE 2d 463.

10 Ibid 369.

The claimant argued that each “hit” or viewing should be considered a new publication because the online publication may be altered at any time by its publisher. In this case, the State altered its website by adding a new, unrelated report about the Department of Motor Vehicles (DMV).¹⁰

The Court of Appeals of the State of New York rejected that argument, and concluded as a matter of law that a modification of the website did not constitute a republication.¹¹ It was not a separate publication on a separate occasion, intended to reach a new audience.

The Court contrasted this against the separate publications of hard-cover and paperback editions of the same book,¹² and morning and afternoon editions of a newspaper.¹³

The Court then stated:

We observe that many Web sites are in a constant state of change, with information posted sequentially on a frequent basis. For example, this Court has a Web site which includes its decisions, to which it continually adds its slip opinions as they are handed down. Similarly, Web sites are used by news organizations to provide readily accessible records of newsworthy events as they occur and are reported. Those unrelated additions are indistinguishable from the asserted DMV report modification of the State’s Web site here. **A rule applying the republication exception under the circumstances here would either discourage the placement of information on the Internet or slow the exchange of such information, reducing the**

Internet’s unique advantages. In order not to retrigger the statute of limitations, a publisher would be forced either to avoid posting on a Web site or use a separate site for each new piece of information [emphasis added].¹⁴

Later that same year when the High Court of Australia was faced with the same issue in *Dow Jones & Co Inc v Gutnick*,¹⁵ it declined to consider *Firth v State of New York*, mentioning it only once in passing.¹⁶

The High Court conducted its own analysis of online publication, based upon the parameters of the Internet as it was in 2002. It referred to the estimated number of Internet users of 655 million (it is currently 3.7 billion¹⁷) and quaint terms such as “cyberspace”.¹⁸ This led to analogies being made between the Internet, and radio and television broadcasts (describing the Internet as “no more or less ubiquitous than some television services”),¹⁹ the use of “telefacsimile”,²⁰ and the purchase of a newspaper in order to read it.²¹

In *Dow Jones v Gutnick*, the High Court noted that online publishers do not “put matter on the Internet in order for it to reach a small target. It is its ubiquity which is one of the main attractions to users of it”.²² The High Court emphasised that online publishers “do so knowing that the information they make available is available to all and sundry without any geographic restriction”.²³ It also took a cynical view of the relevant jurisdiction depending upon the location of the publisher’s servers, fearing that “opportunistic” publishers would exploit such a rule to their benefit.²⁴

This brings into sharp relief the different approaches: the American courts address communication as a right, whereas Australian courts treat communication as a wrong.

In that context it becomes less surprising that Joseph Gutnick brought defamation proceedings in an Australian court against Dow Jones, a Delaware corporation, over an article written in New York, uploaded to a server in New Jersey, and appearing on the Wall Street Journal’s website.

Dow Jones applied to set aside service of the originating process or to permanently stay the proceedings, on the basis that Victoria was an inappropriate forum. The Supreme Court refused the application, the Court of Appeal refused leave, and the High Court refused the appeal.

The key issue before the High Court was whether the material complained of was published in Victoria - the **location** where publication occurred - and the Court found that it was published there.

The High Court’s comments regarding the multiple publication rule - the **timing** when publication occurred - were merely *obiter*. Nevertheless, *Dow Jones v Gutnick* is credited as setting “an international precedent confirming that the multiple publication rule applies equally to online publication and broadcast or print”; such that online material is deemed to be published each and every time it is downloaded.²⁵

C. Distinction between print and online

Despite the ideal expressed in *Dow Jones v Gutnick* that rules should be technology-neutral,²⁶ the effect has

11 Ibid 371.

12 *Rinaldi v Viking Penguin* [1981] 52 NY2d 422, 433.

13 *Cook v Conners* (1915) 215 NY 175, 179.

14 *Firth v State of New York* above n 9, 371-372.

15 (2002) 210 CLR 575.

16 Ibid [30] per Gleeson CJ and McHugh, Gummow and Hayne JJ.

17 internetworldstats.com (3,739,698,500 Internet users as at 31 March 2017).

18 *Dow Jones v Gutnick* above n 15, [80] per Kirby J.

19 Ibid [39] per Gleeson CJ and McHugh, Gummow and Hayne JJ.

20 Ibid [125] per Kirby J.

21 Ibid [181] per Callinan J.

22 Ibid [181] per Callinan J.

23 Ibid [39] per Gleeson CJ and McHugh, Gummow and Hayne JJ.

24 Ibid [20] per Gleeson CJ and McHugh, Gummow and Hayne JJ.

25 Veronica Scott and Gemma-Jane Cooper, *Liability for internet archives: the risks* (2010) 13(1) INTLB 12.

been to create vastly different rules for print publications as distinct from online publications.

Print publications gain the benefit of the one year limitation period. However, for online publications, as long as material remains available to be accessed, the limitation period is effectively open-ended.²⁷

The distinction was made clear in May 2017, in the NSW District Court decision in *Otto v Gold Coast Publications Pty. Limited & anor.*²⁸

David Otto brought a defamation claim over articles in The Gold Coast Bulletin newspaper and online at goldcoastbulletin.com.au on 14 November 2015.²⁹

Mr. Otto's claim relates to the following imputations:

1. the plaintiff made an indecent proposal to Shayla Chandler;
2. the plaintiff tried to have sexual relations with Shayla Chandler against her will;
3. the plaintiff asked Shayla Chandler to be one of a menage a trois;
4. the plaintiff is a con-man; and
5. the plaintiff conned Shayla Chandler by making her believe he was offering her a proper job when his real motive was to seduce her.

On 11 November 2016 - three days before the limitation period would expire - Mr. Otto commenced proceedings. However, his lawyers named the wrong companies as defendants.³⁰

On 17 November 2016 - after the limitation period had expired - Mr. Otto's lawyers served the Statement

of Claim and were promptly notified of their error.

On 9 December 2016, Mr. Otto's lawyers filed an Amended Statement of Claim. This added Gold Coast Publications Pty. Limited as a defendant pursuant to rule 19.1 of the *Uniform Civil Procedure Rules 2005 (NSW) (UCPR)*. The date of commencement in relation to an added party is the date on which the amended document is filed, under UCPR 19.2(4). Accordingly, the date of commencement in relation to Gold Coast Publications was 9 December 2016.

Mr. Otto had in effect commenced proceedings 25 days late. The limitation period has been strictly applied in defamation proceedings, and a delay of just a few days or hours can be fatal.³¹

Mr. Otto applied for an extension of the limitation period under section 56A of the *Limitation Act 1969 (NSW)* which amongst other things provides that a court must extend the limitation period if satisfied that it was not reasonable in the circumstances for the plaintiff to have commenced an action in relation to the matter complained of within 1 year from the date of the publication.

The question for determination was the meaning of the phrase "*not reasonable in the circumstances*", and taking into consideration Mr. Otto's conduct during the whole of the limitation period³² as follows:

1. Mr. Otto admitted that he was aware of the limitation period from 2015.³³ He also acknowledged that he had recently commenced defamation proceedings over

similar allegations in a broadcast of *A Current Affair*, and identical allegations in *The Daily Mail Online*,³⁴

2. Mr. Otto admitted that he was aware of the article in The Gold Coast Bulletin newspaper just days after publication because the woman named in the article, Shayla Chandler, sent a copy to Mr. Otto.³⁵ Further, one month after publication, that article was tendered in evidence during an interlocutory hearing concerning *A Current Affair*;³⁶ and
3. Mr. Otto acknowledged that he had the benefit of counsel and solicitors acting for him from June 2016 - being five months before the limitation period expired.³⁷
4. Mr. Otto failed to establish that it was not reasonable to commence proceedings prior to the expiry of the limitation period.³⁸ His application to extend the limitation period was refused.

This meant that the following claims were statute-barred:

- 1) the whole of the printed newspaper article; and
- 2) the online article from 14 November to 9 December 2015 (being more than one year before the date of commencement).

However, the claim as to the online article from 9 December 2015 onwards could continue.

In the judgment, Gibson DCJ noted the artificiality of this result:

... striking out the print publications does not end these proceedings, in that online version of the matters complained of are,

²⁶ *Dow Jones v Gutnick* above n 15, [125].

²⁷ Jennifer Ireland, *Defamation 2.0: Facebook and Twitter* (2012) 56 *Media & Arts Law Review* 53, 66.

²⁸ *Otto* above n 8. The writer is the solicitor for the defendants in these proceedings.

²⁹ Mr. Otto also sued Queensland Newspapers Pty. Ltd. over an article online at couriermail.com.au but nothing turns on this for the purposes of this paper, so it has been omitted.

³⁰ Nationwide News Pty. Limited and News Corp Australia.

³¹ *Van Garderen v Channel Seven Melbourne Pty Ltd* [2016] VCC 953, cited in *Otto* at [37].

³² *Otto* above n 8, [23].

³³ *Ibid* [26].

³⁴ *Ibid* [25].

³⁵ *Ibid* [4].

³⁶ *Ibid* [34].

³⁷ *Ibid* [8].

³⁸ *Ibid* [40].

by reason of the asserted absence of the “single publication rule”, still actionable for the 12-month period prior to the statement of claim. In that respect, this application has been, to a degree, somewhat artificial in nature. ...

The artificiality, in terms of result, of this application underlines an ongoing problem in defamation law in relation to electronic publications. ...

Her Honour then commented on the multiple publication rule as follows:

The Australian interpretation of online publications as subject to the multiple publication rule produces results which appear to **conflict with the strict test for extension of the limitation period** for other defamatory publications to which the multiple publication rule applies as well as to **other tort limitation reforms**, the stated **objects of the uniform legislation** as well as damages principles (see D K Rolph, “A critique of the national uniform defamation laws” (2008) 16 TLJ 207 at 4, n.155 and 14), and **possibly s 23 Defamation Act 2005 (NSW)** (Ghosh v Nine Digital Pty Ltd [2017] NSWCA 90).

Whether the current interpretation of online publication is correct, whether (as has occurred in Google Inc v Trkulja [2016] VSCA 333) previous judgments have misunderstood the nature of the Internet and/or whether a single publication rule can be inferred from the limitation provisions in the current limitation legislation are questions which do not concern me in this application, although the ongoing failure

of the uniform legislation to address electronic publication, despite Kirby J’s warning of this necessity in *Dow Jones & Co Inc v Gutnick*, must be a matter of concern (Stephanie Rigg, “The Duke and his manservant in a world of online defamation” (2016) 21 MALR 424)” [emphasis added].³⁹

This paper will now examine each of the points emphasised above.

Test for Extension of the Limitation Period

As stated above, for defamation claims there is a one-year limitation period, which can be extended only if it was not reasonable for the plaintiff to commence an action within time.⁴⁰

When considering the Queensland legislation imposing the same requirements, the Court of Appeal commented:

The legislature has evidently identified a public interest in the prompt commencement of proceedings for defamation. That is evidenced also by the relative shortness of the limitation period and the relatively unusual strictness of the test [for extension of the limitation period].⁴¹

The strictness of those requirements becomes more apparent when compared to personal injury claims. The limitation period for some claims does not begin until the cause of action is discoverable by the plaintiff.⁴² From that point in time, the limitation period is three years.⁴³ There is also a supporting provision that the plaintiff must commence proceedings within 12 years of the incident.⁴⁴ However, that period can be extended if a court decides it is just and reasonable to do so.⁴⁵

There is a clear contradiction between the severity of the limitation period for defamation claims, and the multiple publication rule that neatly side-steps it.

Tort Limitation Reforms

Prior to 2005, the limitation period for defamation was the same as for any tort: six years. The introduction of the national, uniform defamation laws dramatically shortened that period to one year. To do otherwise would have been incongruous with earlier tort law reforms, which had reduced the limitation period for personal injury claims in most jurisdictions.⁴⁶

Objects of the Uniform Legislation

The objects of the national, uniform defamation laws include:

1. to ensure that the law of defamation does not place unreasonable limits on freedom of expression;
2. to promote speedy and non-litigious methods of resolving disputes; and
3. to provide effective and fair remedies for persons whose reputations are harmed by the publication of defamatory matter.⁴⁷

There are obvious arguments that never-ending liability for online publications could place an unreasonable limit on freedom of expression – addressed in more detail below – and draws out disputes over longer periods and with more litigation.

It is a more nuanced point that the one-year limitation period facilitates the availability of effective remedies.⁴⁸ The sooner a plaintiff obtains a verdict in their favour and a damages award, the greater the vindication

39 *Ibid* [59]-[62].

40 section 56A of the *Limitation Act 1969* (NSW).

41 *Pingel v Toowoomba Newspapers Pty Ltd* [2010] QCA 175, [42] per Fraser JA.

42 section 50D of the *Limitation Act 1969* (NSW).

43 section 50C of the *Limitation Act 1969* (NSW).

44 *Ibid*. The 12 year “long-stop” limitation period is named after the position in cricket where a fielder stands directly behind the wicketkeeper, so the fielder can catch the ball if the wicketkeeper fails to do so.

45 section 62A of the *Limitation Act 1969* (NSW). The matters to be considered are prescribed in section 62B.

46 D K Rolph, *A critique of the national uniform defamation laws* (2008) 16 TLJ 207, 212. A six year limitation period applied in all States and the Australian Capital Territory. A three-year limitation period applied in the Northern Territory.

47 section 3 of the *Defamation Act 2005* (NSW) and similar legislation in other States and Territories.

48 Rolph above at n 46, 212.

of the plaintiff's reputation. The multiple publication rule militates against such outcomes.

Section 23 of the Defamation Act

Section 23 of the Defamation Act 2005 (NSW) provides as follows:

23 Leave required for further proceedings in relation to publication of same defamatory matter

If a person has brought defamation proceedings for damages (whether in this jurisdiction or elsewhere) against any person in relation to the publication of any matter, the person cannot bring further defamation proceedings for damages against the same defendant in relation to the same or any other publication of the same or like matter, except with the leave of the court in which the further proceedings are to be brought.

Such leave was sought regarding online publications in *Ghosh v Nine Digital Pty Ltd*.⁴⁹

Dr. Ratna Ghosh sought to join Nine Digital Pty Ltd and Nine Network Australia Pty Ltd as defendants in defamation proceedings. Dr. Ghosh had previously sued the Channel Nine companies – together with some of her neighbours – over *A Current Affair's* program accusing her of renting out a Gold Coast “party house”. Dr. Ghosh repeatedly failed to draft a satisfactory pleading against the Channel Nine companies and her claim against those defendants was dismissed. Her claim against the neighbours remained on foot.

After judgment was handed down, Channel Nine continued to publish the program online (constituting a new publication under the multiple publication rule). Dr. Ghosh sought to bring the Channel Nine companies back into the proceedings.

At first instance, Rothman J would not permit Dr. Ghosh to join the Channel Nine companies, partly pursuant to section 23 of the *Defamation Act*.

Dr. Ghosh sought leave to appeal from that judgment. In May 2017, Basten JA and Simpson JA constituting the NSW Court of Appeal refused leave to appeal.

Basten JA carried out a preliminary analysis of the arguments about section 23. His Honour accepted that section 23 may prevent a plaintiff from commencing further proceedings for the same matter remaining online, saying “*on the ordinary reading of this language, it was engaged in the present circumstances*”.⁵⁰ His Honour saw no implied limitations on section 23 in the express language used, the statutory context in which the provision appeared, or in any extrinsic materials relevant to the drafting of the provision.⁵¹

Basten JA looked to the previous legislation – the *Defamation Act 1974* (NSW) – and quoted the New South Wales Law Reform Commission Report on Defamation⁵² with respect to the predecessor to section 23 stating:

We think that a person defamed should not have an uncontrolled liberty to sue a defendant whom he has already sued in respect of the same report, article, speech or other matter.⁵³

D. Practical impact on news media

Evidentiary Disadvantage

The belated commencement of defamation proceedings puts publishers at an evidentiary disadvantage.

This has particular impact upon news media organisations where:

1. journalists do not retain documents from every story for an indefinite period;

2. publishing software is not designed to retain all data;
3. editors and journalists move to other organisations;
4. sources change jobs, email addresses and mobile numbers;
5. sources can become less motivated or hostile over time;
6. avenues of inquiry that once led to further evidence are now closed; and
7. memories fade over time.

Takedowns

The advice often given to online publishers who receive a defamation complaint is to remove the material immediately, even if the removal might only be temporary.⁵⁴

This is met with resistance from editors and journalists who view their publication as a *newspaper of record*, and view their purpose as providing important information to the public. (This is also the reason why publishers keep their archives online, when the simplest solution to this legal problem would be to take it all down.)

The topics that seem most worthy of the risk are politics and crime, which anecdotally are the types of news articles that generate the most defamation claims.

There is also a correlation between the seriousness of the allegation in question, and the editorial compulsion to keep that material online. It is the most damaging allegations, the *big stories*, that publishers will insist remain online for the information of the public. The result is that the content that they keep online also poses the greatest risk to the business. By comparison, trivial allegations that are low risk are readily taken down.

Further, there is a practical issue with takedowns. Some publishing software does not allow the temporary removal of material from a website – it is not as simple as flicking a

49 [2017] NSWCA 90.

50 *Ibid* [16].

51 *Ibid* [20].

52 (1971) LRC No 11, [100].

53 *Ghosh* above n 49, [21].

54 Scott and Cooper above n 25.

switch off and on. To remove a story, the whole file is deleted. To put the story back online, the publisher must re-build the story in its entirety: the headlines, body copy, captions, videos, photographs and formatting. This leads to a commercial decision: is the information in the story worth the time and effort required to re-publish it? Most of the time, the answer is no, so the *temporary* takedown is in fact permanent.

Practical Choices in News Reporting

Some of the practical tips proffered by lawyers to online publishers⁵⁵ are as follows.

1. Avoid linking new articles to historical material:

Comment: This advice makes sense in theory but there is a strong business case against putting it into practice. Search engine optimisation relies upon links to prominent content on prominent websites, which in turn leads to more traffic visiting the publisher's website. For this reason, some publishing software analyses new content and inserts links to historical material automatically.

2. Exercise care when researching a current news article and avoid drawing too much from historical material available on the internet, which may be out of date:

Comment: The increasing constraints on time and resources, combined with the ease of obtaining historical material from the internet, inevitably make it an appealing option.

3. Always respond swiftly and properly if contacted about potentially problematic internet material:

Comment: News media organisations are not always afforded a chance to make a swift and proper response to a

complaint. Sometimes they are first notified of a problem when they are served with a Statement of Claim. The plaintiff has already commenced proceedings and incurred considerable legal costs. This is despite the legislative regime for service of a concerns notice, giving the publisher an opportunity to make an offer to make amends, and potentially avoid litigation.

4. Have an effective policy and procedure for removal of internet material:

Comment: Some publishers are too small to dedicate their limited resources to preparing policies of this nature. Other publishers are too large to have one policy that adequately addresses all of their various business operations, and the wide range of factual scenarios that may arise. As discussed above, the obvious and easy solution is to take down the material from the website, and any policy would make that step a necessity. However, there may be a variety of professional, ethical and commercial reasons why the matter should remain online that are difficult to anticipate.

5. Seek advice from legal experts before publication:

Comment: The cost of seeking legal advice on every article is prohibitive. Instead, a preliminary assessment is made by the editorial staff as to whether there could be a legal problem and if so, whether the story is worth the legal fees. This problem is alleviated to some extent by fixed fee costs agreements with external lawyers, or in-house legal teams providing pre-publication advice. Nevertheless, the practice continues that legal advice is only sought on a selection of "problematic" stories. The unavoidable consequence is that some stories – those that do not

initially appear to be worth the legal fees or worth the risk to the business – are never published.

Chilling Effect

Online publishers argue that the multiple publication rule - and the never-ending liability for online publications - has a chilling effect on free speech.

In 2002, the UK Court of Appeal accepted that the multiple publication rule does restrain freedom of expression to some extent. However, the Court was not convinced that the restriction was disproportionate.⁵⁶

The publisher in that case, Times Newspapers, challenged that decision before the European Court of Human Rights.⁵⁷ The Court held that, on the facts of that case, there was no real prejudice to Times Newspapers. However, the Court acknowledged that:

libel proceedings brought against a newspaper after a significant lapse of time might well ... give rise to a disproportionate interference with press freedom under [Article 10 of the European Convention of Human Rights].⁵⁸

The US courts (unsurprisingly) have been more strident in their protection of free speech, for example:

Communications posted on Web sites may be viewed by thousands, if not millions, over an expansive geographic area for an indefinite period of time.

Thus, a multiple publication rule would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants. Inevitably, 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.⁵⁹

55 Ibid.

56 *Loutchansky* [2002] QB 783, 817.

57 *Times Newspapers Ltd v United Kingdom* [2009] ECHR 451.

58 Ibid [48].

59 Firth above n 9, 370.

E. Single publication rule in other jurisdictions

The US, UK and many European jurisdictions have gradually rejected the ‘multiple publication rule’ in favour of a ‘single publication rule’, also known as a ‘first publication rule’. Under that rule, each mass communication (which may be repeatedly published in various formats) counts as a single publication. It is deemed to be published only on the first occasion.

The US courts pivoted to the single publication rule in the 1940s – not because of any grand philosophical debate about the act of publication or comprehension of meaning, but because of the practical consequences.

First, the courts expressed concern about claimants avoiding the limitation period. The Court of Appeals of the State of New York in *Gregoire v Putnam's Sons*⁶⁰ held that a publisher’s sale from stock of a copy of a book containing libellous language did not constitute a new publication because if that were the case:

... the Statute of Limitation would never expire so long as a copy of such book remained in stock and is made by the publisher the subject of a sale or inspection by the public. Such a rule would thwart the purpose of the Legislature to bar completely and forever all actions which, as to the time of their commencement, overpass the limitation there prescribed upon litigation.⁶¹

Secondly, the US courts were concerned about the multiplicity of law suits exposing publishers to potential harassment, and draining judicial resources.⁶²

Thirdly, the US courts held that the single publication rule actually reduces the possibility of hardship to plaintiffs by allowing the collection of all damages in one case commenced in a single jurisdiction.⁶³

From the 1950s onwards the legislature followed the courts’ lead, passing the *Uniform Single Publication Act* and similar legislation.⁶⁴

In the UK, section 8 of the *Defamation Act 2013* prescribed a new rule which amongst other things provides that any cause of action against the person for defamation in respect of the subsequent publication is to be treated as having accrued on the date of the first publication.

F. Opportunity for law reform in Australia

Back in Australia, the introduction of a single publication rule was recently proposed in the context of privacy law. In 2014, the Australian Law Reform Commission tabled its report titled “*Serious Invasions of Privacy in the Digital Era*”. It recommended that the single publication rule be part of any statutory tort of invasion of privacy. When private information is wrongly published once, the subsequent publication of that information by the same person would not give rise to a new cause of action.⁶⁵

The ALRC gave as an example that if a newspaper invaded someone’s privacy in 2014, the person generally should not be able to bring an action for invasion of privacy in 2020, merely because the material remains published in an archive on the newspaper’s website.⁶⁶

The ALRC acknowledged that the absence of the single publication rule in defamation law is problematic. It went so far as to suggest that if the

single publication rule is introduced for the new privacy tort, it should also be inserted in the uniform defamation legislation for consistency’s sake.⁶⁷

It would be a cruel sort of irony if the introduction of a privacy tort – widely seen as a disaster for news publishers – could bring the benefits of a single publication rule in defamation law.

G. Conclusion

The multiple publication rule is a relic from 1800s case law.

It does not adequately address mass communication and has led to perverse outcomes regarding online publication.

When a claim against a newspaper is dismissed but a claim for the same article on a website survives,⁶⁸ there is a clear need for legislative reform.

Our American cousins recognised the potential of mass communication and the practicalities of a single publication rule 80 years ago.

In 2013, the UK followed suit and have provided a template for introducing a single publication rule into our national, uniform defamation laws.

No news media organisation would welcome a statutory tort of invasion of privacy. However, if the trade-off is a single publication rule extinguishing liability for our entire archives of online material, that may be a deal worth taking.

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60 [1948] 298 NY 119.

61 *Ibid* 125-126.

62 *Keeton v Hustler Mag. Inc.* [1984] 465 US 770, 777.

63 *Restatement [Second] of Torts* § 577A, Comment d; Note, *Cyber-Defamation and the Single Publication Rule* [2001] 81 BU L Rev 895, 898.

64 Stephanie Rigg, *The Duke and his manservant in a world of online defamation: Rethinking the multiple publication rule in 21st century Australia* (2016) 21 MALR 424, 432.

65 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (2014), 10.97.

66 *Ibid* at 10.98.

67 *Ibid* at 10.99.

68 *Otto* above n 8.