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## Choice of Law in Multistate Libel Suits

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justifying it on the questionable theory of vested rights. As stated by Professor Stumberg, "Its greatest virtue is its simplicity, the facility of its application."<sup>31</sup>

It is eminently clear that the jealous adherence to this rule will lead to hardship in many cases. As has been pointed out above in the cases referred to, the courts have realized this fact and, upon considerations of sound social policy and basic tort theory, are leaning toward applying the law of the place where the tortfeasor acted. It is submitted that this solution to the problem produces a more just result and better serves the social function of the law.

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### CHOICE OF LAW IN MULTISTATE LIBEL SUITS

It is generally considered axiomatic that the creation and extent of tort liability is governed by the law of the place of wrong.<sup>1</sup> The place of wrong is defined as the place where the impact occurs upon the interest alleged to have been violated.<sup>2</sup> As the interest protected against defamation is that of a person's interest in his unblemished reputation,<sup>3</sup> the place of impact is said to be where the defamatory statement has been communicated to third persons.<sup>4</sup> Obviously, such a rule results in difficulties where an allegedly defamatory statement has been published in a newspaper or magazine which has been circulated throughout the nation or even into foreign countries. With communication to third parties in every state and an impact resulting from each communication,<sup>5</sup> we are confronted with a dilemma as to which law to apply. Furthermore, in mass publication of defamatory matter, we are faced with the closely related task of deter-

31. Stumberg, *op. cit.* supra note 2, at 182.

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1. 62 C.J. 1109, § 27-28; 15 C.J.S. 896, § 12; Goodrich, *Conflict of Laws* (3 ed. 1949) 260; Stumberg, *Conflict of Laws* (1937) 163.

2. Restatement, *Conflict of Laws* (1934) § 377; "The place of wrong is in the state where the last event necessary to make an actor liable for a tort takes place." See, e.g., *Alabama G.S.R. Co. v. Carroll*, 97 Ala. 126, 11 So. 803 (1892) (train negligently repaired in State X moves into State Y where P is injured. Law of Y governs.); *Le Forest v. Tolman*, 117 Mass. 109 (1875) (Dog strayed from State X and bit P in State Y. Law of Y governs.).

3. Restatement, *Torts* (1938) § 559: "A communication is defamatory if it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him."

4. Restatement, *Conflict of Laws* (1934) § 377, comment (a), note (3): "Where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated."

5. *Ibid.*

mining whether each publication to a third person creates a separate tort or whether there is but one cause of action, each new publication being but an aggravation of the original libel.

Under the traditional approach, every time a defamatory article is brought to the attention of a third person, a new publication, giving rise to a new and separate cause of action, is regarded as occurring.<sup>6</sup> This doctrine still has its advocates,<sup>7</sup> notably the Restatement of Torts.<sup>8</sup> However, most states,<sup>9</sup> including Louisiana,<sup>10</sup> have found this approach ill-suited to the needs of a society demanding mass publication. If every copy of a separately delivered newspaper is a distinct offense, then a newspaper with a circulation of 100,000 may be guilty of that many offenses.<sup>11</sup> Such a conclusion would be unworkable. Consequently, the single publication concept evolved as a practical necessity of protecting the defendant from innumerable harassing actions and as a means of facilitating the judicial process. As a consistent extension of this policy, the courts have permitted the plaintiff to make a general allegation that the defamatory matter has been printed and extensively circulated, rather than require him to plead and prove each separate sale.<sup>12</sup> By strictly adhering to the view of the Restatement of Torts,<sup>13</sup> we would not only create doubt as to the effect of *res judicata*,<sup>14</sup> but the statute of limitations would run indefinitely and its very purpose would be de-

6. *Duke of Brunswick v. Harmer*, 18 Q.B. 185, 17 Eng. Reprint 75 (1849); *Cook v. Conners*, 215 N.Y. 175, 109 N.E. 78 (1915).

7. Newell, *The Law of Slander and Libel* (4 ed. 1924) 236, § 192; *Ogders, Libel and Slander* (4 ed. 1924) 132; *Holden v. American News Co.*, 52 F. Supp. 24 (E. D. Wash. 1943), appeal dismissed, 144 F.(2d) 249 (C.C.A. 9th, 1944).

8. Section 578, Comment (b): "Each time a libelous article is brought to the attention of a third person, a new publication has occurred, and each publication is a separate tort. Thus, each time a libelous 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."

9. E.g., *Means v. MacFadden Publications Inc.*, 25 F. Supp. 993 (S.D. N.Y. 1939); *Cannon v. Time Inc.*, 39 F. Supp. 660 (S.D. N.Y. 1939); *Backus v. Look Inc.*, 39 F. Supp. 662 (S.D. N.Y. 1941) *Hartmann v. Time Inc.*, 64 F. Supp. 671 (E.D. Pa. 1946); *Age-Herald Publishing Co. v. Huddleston*, 207 Ala. 40, 92 So. 193 (1921); *Winrod v. Time Inc.*, 334 Ill. App. 59, 78 N.E.(2d) 708 (1948); *Bigelow v. Sprague*, 144 Mass. 425, 11 N.E. 674 (1886); *Forman v. Mississippi Publishers Corp.*, 195 Miss. 190, 14 So.(2d) 344 (1943); *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S.W. 496 (1908).

10. *Brian v. Harper*, 144 La. 585, 80 So. 885 (1919).

11. *Age-Herald Publishing Co. v. Huddleston*, 207 Ala. 40, 92 So. 193 (1921).

12. See, e.g., *Brian v. Harper*, 144 La. 585, 80 So. 885 (1919).

13. See Restatement, Torts (1938) § 578, Comment (b), quoted in note 8, *supra*.

14. *Clark, J.*, dissenting in *Sidis v. F-K Publishing Corp.*, 113 F.(2d) 806, 811 (C.C.A. 2d, 1940), cert. denied, 311 U.S. 711, 61 S.Ct. 392, 85 L.Ed. 462 (1940).

feated.<sup>15</sup> It must be conceded, however, that the application of the single publication rule in conjunction with the statute of limitations and doctrine of *res judicata* may result in certain inequities. The defamed person could be barred from maintaining suit by the statute of limitations and on principles of *res judicata* at a time when he is still sustaining injury to his reputation.<sup>16</sup> From a practical standpoint, the hardship is conjectural, for newspapers and magazines are of ephemeral interest, and circulation of out-of-date issues is not likely to occur. When it occurs, the tendency is to deny that the sales are part of the same mass distribution process and hence are not included in the single publication rule.<sup>17</sup> Even granting these shortcomings, consideration of the primary objectives of the single publication rule should lead the courts to the conclusion that the additional publications are only a repetition of the original libel and should be admissible only to prove the extent of the defamatory charge and the quantum of damages.<sup>18</sup>

For a truly expeditious trial, it is necessary that this single publication doctrine be supplemented by a single choice of law rule. Unfortunately, there has been little judicial discussion concerning a choice of law rule in multistate libel cases. The decisions that have squarely met the problem are of little aid in the development of a workable solution. For instance, in *O'Reilly v. Curtis Publishing Company*,<sup>19</sup> plaintiff sued in Massachusetts for an alleged libel in that state and then, in a new action, for harm alleged to have been sustained through the circulation of the same statement in thirty-eight additional states. He claimed in the second action punitive damages, which are not obtainable under Massachusetts law. The defendant's plea for abatement of the second suit was rejected upon the ground that that suit was not upon the same cause of action as the first. "The publication in each of the thirty-eight states," the court said, "gives rise to separate causes of action."<sup>20</sup> As to obtaining punitive damages, the court stated, "The defendant's liability for the libel published in such state is governed by the laws of that particular state."<sup>21</sup> Decisions such as this lead to that interminable litigation that the

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15. *Winrod v. Time Inc.*, 334 Ill. App. 59, 78 N.E. (2d) 708 (1948).

16. Note (1949) 9 LOUISIANA LAW REVIEW 558.

17. *Winrod v. McFadden Publications Inc.*, 62 F. Supp. 249 (N.D. Ill. 1945).

18. An excellent survey of this topic can be found in Note (1949) 62 Harv. L. Rev. 1041.

19. 31 F. Supp. 364 (D. Mass. 1940).

20. *Id.* at 365.

21. *Ibid.*

single publication theory is designed to eliminate. *Hartmann v. Time, Incorporated*,<sup>22</sup> resulted in an equally undesirable decision. Suit was brought in Pennsylvania for an alleged libel circulated throughout the United States and all other civilized nations. The court found that Pennsylvania had adopted the single publication rule, and that the magazine containing the alleged libel was circulated from Pennsylvania. It held that the Pennsylvania statute of limitations determined whether or not the action was barred with respect to all states and countries also following the single publication rule. However, in as far as the suit was concerned with harm suffered in states or countries not following the single publication rule, the case was remanded to the trial court with directions to ascertain for each such state and country whether or not its statute of limitations had run. The end result of the decision is that the courts are placed in the position of having to wade through the laws of forty-eight states and an indefinite number of countries. A forum with an internal single publication rule practically defeats its own policy by adoption of a multiple publication rule for conflict of laws purposes.<sup>23</sup>

In several cases, the courts either have ignored the conflict of laws problem<sup>24</sup> or have recognized the problem without deciding it.<sup>25</sup> This fact is an indication that the courts prefer to by-pass the question rather than plunge into the difficulties created by the present state of the law.<sup>26</sup>

Assuming that it is desirable in choice of law cases that there be a rule resulting in the application of just one law, the question arises as to where a multistate defamation should be localized. An analysis of the cases on multistate libel reveals that the difficulties have resulted mainly from an attempt by the courts to apply to the tort a localization developed in other connections. Obviously, it is important to know where and to how many people the libel is communicated.<sup>27</sup> Yet, why should we look to

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22. 166 F.(2d) 127 (C.C.A. 3rd, 1948), cert. denied 334 U.S. 838 (1948).

23. See Note (1948) 61 Harv. L. Rev. 146.

24. *Curley v. Curtis Publishing Co.*, 48 F. Supp. 29 (D. Mass. 1942); *Layne v. Kirby*, 208 Cal. 694, 284 Pac. 441 (1930).

25. *Grant v. Reader's Digest Ass'n, Inc.*, 151 F.(2d) 733 (C.C.A. 2d, 1945), cert. denied 326 U.S. 797, 66 S.Ct. 822, 90 L.Ed. 1041 (1946); *Spanel v. Pegler*, 160 F.(2d) 619 (C.C.A. 7th, 1947).

26. The recent case of *Mattox v. News Syndicate Co., Inc.*, 176 F.(2d) 897 (C.C.A. 2d, 1949) is an excellent example of the difficulty of applying the law of the place of wrong in multistate libels. The United States Circuit Court of Appeals said the place of wrong was at the plaintiff's domicile for that was the only place he suffered damages, even though there was wide circulation of the publication in other states.

27. *Sutherland, Damages* (3 ed. 1904) 3490, § 1207.

the same factors as far as conflict of laws is concerned? Seemingly, it is because the courts are assuming the very thing they are called upon to decide, that a right of action accrued there.<sup>28</sup> Instead of employing this circuitous method to ascertain a choice of law, it would seem more proper to formulate a principle based on the very fact that a court, in a case having foreign contacts, looks to foreign law at all rather than simply applying its own law in all cases properly before it. Why do courts ever apply the law of another state or country? They seek to apply that law which will best protect both the justified expectations of the parties appearing before it and the governmental interests of the states or countries affected.<sup>29</sup>

Since libel consists of an invasion of a person's interest in his reputation and good name,<sup>30</sup> it would seem appropriate to apply the law of the state where the plaintiff's most significant social interests are centered. This suggests a domicile approach.<sup>31</sup> The rationale of this proposal breaks down, however, when the area of publication is limited to states other than the plaintiff's domicile. Another possible solution was presented in *Banks v. King Features, Incorporated*.<sup>32</sup> In an attempt to apply the "last event" doctrine of the Restatement of Torts,<sup>33</sup> the court held that liability for the invasion of the right of privacy was to be determined under the law where the seal of privacy was first broken. Though this doctrine of the "first impact" might be suitable for an invasion of privacy, it becomes unworkable in multistate libel suits. The tort of defamation and the tort of invasion of privacy are concerned with the protection of different interests. The interest protected against defamation is that of a person's interest in his unblemished reputation.<sup>34</sup> The interest protected against invasions of privacy is a person's interest in peace and solitude.<sup>35</sup> Thus, by the very nature of the right of privacy, the wrong can occur only at one place, where the person's solitude is infringed upon, which is wherever the person happens to be at that time. On the other hand, since the place of wrong in defamation is

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28. This idea of a vested right has been severely attacked in Yntema, *The Hornbook Method and Conflict of Laws* (1928) 37 Yale L.J. 468; Rheinstein, *The Place of Wrong: A Study in the Method of Case Law* (1944) 19 *Tulane L. Rev.* 4.

29. See Rheinstein, *supra* note 28, at 20.

30. See Restatement, Torts (1938) § 559, quoted in note 3, *supra*.

31. This theory has been proposed in a Comment (1947) 60 *Harv. L. Rev.* 941. See also Note (1949) 43 *Ill. L. Rev.* 556.

32. 30 F. Supp. 352 (S.D. N.Y. 1939).

33. See note 2, *supra*.

34. See Restatement, Torts (1938) § 559, quoted in note 3, *supra*.

35. See Prosser, *A Handbook on the Law of Torts* (1941) 1050.

wherever the defamatory statement is communicated,<sup>36</sup> there may be simultaneous impacts occurring in many jurisdictions, making ascertainment of the "first impact" impossible.

Because we are dealing with a conflict of laws problem, it appears appropriate to localize the wrong<sup>37</sup> so as to result in the application of only one law. This means localization at the place which is the most "essential" in the situation, the place where the situation has its "center of gravity."

Suggestions in that respect may be derived from the field of unfair competition, and copyright and trademark infringements,<sup>38</sup> where the courts are perplexed with a similar problem of localizing a tort producing impacts in numerous places. Faced with this difficulty, several courts have felt compelled to look to the place of the most basic element of the wrong and not to the place of each individual illegal act. Especially noteworthy among these decisions is the case of *Addressograph-Multigraph Corporation v. American Expansion Bolt Manufacturing Company*.<sup>39</sup> In Illinois, where the suit was brought, defendant manufactured certain devices to be used in machines manufactured by the plaintiff, without plaintiff's consent. The plaintiff claimed that this action of the defendant constituted unfair competition as such or at least in those places where the defendant's product would be palmed off as a product of the plaintiff. When it appeared that the plaintiff's claim could not be fully maintained under Illinois law, he pleaded that the tort be regarded as having been committed at all those places where the defendant's products were sold to the public. The Circuit Court of Appeals for the Sixth Circuit rejected this contention and held that the tort was committed at the place where the defendant's product was manufactured. The court said:

"The main charge of unfair competition was a misappropriation by the defendant of plaintiff's business system. The essential element of this alleged wrong was the manufacture and sale by the defendant of plates for the purpose of use in certain machines manufactured by the plaintiff. Defendant's

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36. See Restatement, Conflict of Laws (1934) § 377, comment (a), note (3), quoted in note 4, *supra*.

37. 2 Rabel, *The Conflict of Laws: A Comparative Study* (1947) 322, has previously suggested that a characteristic locality be found to determine a choice of law rule.

38. For a complete discussion of all the cases in this field as regards conflict of laws, see Note (1947) 60 *Harv. L. Rev.* 1315.

39. 124 F.(2d) 706 (C.C.A. 7th, 1941), cert. denied 316 U.S. 682, 62 S.Ct. 1270, 86 L.Ed. 1778 (1942).

place of business was in Illinois where it received and filled orders for such plates. The wrong, if such it be, was the sale in Illinois for the use indicated."<sup>40</sup>

In *Triangle Publications v. New England Newspaper Publications*,<sup>41</sup> plaintiff sued to enjoin copyright infringement and unfair competition caused by defendant's nationwide publication of horse racing information derived from plaintiff's periodicals. In deciding on a choice of law, the Federal District Court for Massachusetts said:

"In considering the question of unfair competition, I must apply the law which the Massachusetts courts would apply. . . . In view of the fact that defendants prepared all of their material in Massachusetts and the further fact that the greater part of the competition occurred in Massachusetts, I should suppose that the Massachusetts state courts would apply only the Massachusetts law of unfair competition. Even if some part of the defendant's papers were sold in other states (which is not clear in the evidence) the Massachusetts courts, in determining the issues of damages, would probably not apply to such sales the rules of unfair competition prevailing in these states."<sup>42</sup>

Several observations are to be drawn from these and other cases.<sup>43</sup> First, as a result of the characterization of the basic element of the wrong, there is a marked tendency to look to the place of acting and to turn away from the place of effect. Second, a more appropriate localization can be achieved by centering the place of acting at the defendant's main place of business,<sup>44</sup> which is the focal point from which a nationwide tort usually emanates.

It is the opinion of the writer that the law of defendant's principal place of business can be applied successfully to multi-state libels. In every libel the most essential element of the wrong is the publishing of the defamatory article, even though, as regards damages, communication to third persons is an essential element.<sup>45</sup> If this be true, it would seem to follow that the

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40. 124 F.(2d) 706, 709 (C.C.A. 7th, 1941), cert. denied 316 U.S. 682, 62 S.Ct. 1270, 86 L.Ed. 1778 (1942).

41. 46 F. Supp. 198 (D. Mass. 1942).

42. *Id.* at 203.

43. *Socony-Vacuum Co. v. Rosen*, 108 F.(2d) 632 (C.C.A. 6th, 1940); *Mathews Conveyor Co. v. Palmer-Bee Co.*, 135 F.(2d) 73 (C.C.A. 6th, 1943).

44. Comment (1948) 16 U. of Chi. L. Rev. 164, has advocated the adoption of the principal place of business. Hancock, *Torts in the Conflict of Law* (1942) 253 suggests the law of the place of broadcasting to radio listeners.

45. See Sutherland, *loc. cit.* supra note 27.



appropriate governing law is the law of the principal place of defendant's business. Because the printing process of a national periodical often extends over several states<sup>46</sup> the selection of the law of the main publishing office<sup>47</sup> will avoid complications in locating the proper phase of the printing process.

Not only would the rule be simple in its application, but the defendant would also be able to predict with fair accuracy whether his actions will subject him to a suit for damages.<sup>48</sup> Before publishing an article, it is only natural that he look to his own law regarding his liability for defamatory material rather than to the law of some state or country where the article might be accidentally circulated. As far as the plaintiff is concerned, he can justifiably expect only that his recovery of damages will be governed by an appropriate law. Nevertheless, to be certain that no undue burdens are imposed on the plaintiff, an alternative application of the law of the state of circulation is suggested, if action is brought there and damages are limited for the harm suffered in the state of the forum.<sup>49</sup> Therefore, the plaintiff seldom will have to travel to a foreign state in order to bring suit.

Because the precise problem of a choice of law rule in multi-state libels never has been presented in Louisiana, the courts are in a position to turn to any theory. The decision of *State v. Moore*<sup>50</sup> perhaps can be said to be one step in the direction towards the proposed rule of this article.

DONALD L. PELTIER

#### INTENTION OF THE PARTIES—THE REQUIREMENT OF SUBSTANTIAL CONNECTION

"We are of the opinion, therefore, that the right of parties to a contract to have their reciprocal duties and obligations under

46. *Cannon v. Time Inc.*, 39 F. Supp. 660 (S.D. N.Y. 1939) (composition in one state, printing in another state, and distribution was handled from still another state).

47. See 2 Rabel, loc. cit. supra note 37. Professor Rabel also advocates the law of the main publishing house.

48. Goodrich, *Public Policy in the Law of Conflicts* (1930) 36 W.Va. L.Q. 156, 167-168 (emphasizes predictability). See also Rheinstein, loc. cit. supra note 29.

49. *Wright v. RKO Radio Pictures Inc.*, 55 F. Supp. 639 (D. Mass. 1944); *Kelley v. Lowes Inc.*, 76 F. Supp. 473 (D. Mass. 1948).

50. 140 La. 231, 72 So. 965 (1916) (in interpretation of venue statute, the supreme court held that the criminal libel was committed at the place of printing and publication and not in the parishes where circulated). However, *Vicknair v. Daily Publishing Co.*, 144 La. 809, 81 So. 324 (1919) distinguishes the *Moore* case on the ground that it was a suit for criminal libel.