North Dakota Law Review

Volume 32 | Number 2 Article 3

1956

Conflicts of Laws - Multi - State Libel - Choice of Laws under Single Publication Rule

David A. Vaaler

NOTES

CONFICTS OF LAWS — MULTI — STATE LIBEL — CHOICE OF LAWS UNDER SINGLE PUBLICATION RULE — The common law rule applicable to actions involving the publication of a libel is that each distribution and sale of a defamatory statement is a separate and distinct republication and constitutes a ground upon which a cause of action might be maintained.[1] Under this traditional concept a defamed party is allowed as many actions as there are publications,[2] and, in addition, may sue in every jurisdiction in which the defamatory matter is circulated.[3] This is known as the multiple publication rule, and giving it a strict interpretation a libelee could maintain an action for each publication, however made.[4]

The multiplicity of suits possible under such an interpretation is one of the major objections to the rule.[5] This becomes clear when the ability of a vindictive plaintiff to harass the defendant with repeated suits is considered.[6] An additional objection is the difficulty of establishing with certainty a date of publication from which the statute of limitations will run.[7] These objections are valid in England where the rule originated, as well as in the United States where the rule was universally adopted by reference to the common law. A further objection to the application of this rule occurs in the United States where a plaintiff also has available a multiplicity of jurisdictions in which to bring suit, each with separate views as to the substantive rights of the parties.

Modern mass publication and distribution facilities accentuate the difficulties enumerated in the multiple publication rule and have made this concept obsolete.[8] This was succinctly stated by Judge Somerville in *Age-Herald Publishing Company v. Huddleston*:[9] "These old common-law principles undoubtedly had their origin in a relation to the single acts of individuals, in a primitive society, and cannot, either as a matter of principle or common sense, be applied without qualification to the publication of modern newspapers." This reasoning is equally applicable to periodicals, books, radio and television broadcasts.[10] However, in spite of the difficulties involved, the multiple publication rule is still observed in many states.[11]

---

1. Holden v. American News Co., 52 F. Supp. 24 (E.D. Wash. 1943), *appeal dismissed*, 144 F.2d 249 (9th Cir. 1944); Ott v. Murphy, 160 Iowa 730, 141 N.W. 463 (1913); Woods v. Bangborn, 75 N.Y. 495 (1878); Duke of Brunswick v. Harmer, 18 Q.B. 185, 117 Eng. Rep. 75 (1849); Newell, The Law of Slander and Libel §192 (4th ed. 1924), Restatement, Torts §578, comment *b* (1938).

2. Restatement, Torts, §577 (1938) defines publication as follows: "Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed." See also Restatement, Torts §578, comment *b* (1938).

3. See Prosser, *Interstate Publications*, 51 Mich. L. Rev. 959 (1953).

4. See Leflar, *The Single Publication Rule*, 25 Rocky Mt. L. Rev. 263, 268 (1952).

5. See notes, 10 La. L. Rev. 339,340 (1950), 62 Harv. L. Rev. 1041, 1042 (1949), 16 U. of Chi. Rev. 164, 167 (1948), 48 Col. L. Rev. 932, 935 (1948).

6. See note, 35 Va. L. Rev. 627 (1949).

7. Winrod v. Time, Inc., 334 Ill.App. 59, 66, 78 N.E.2d 708, 711 (1948) (dictum). See note, 48 Col. L. Rev. 932, 935 (1948).

8. See note, 35 Va. L. Rev. 627, 629 (1949).

9. 207 Ala. 40, 92 So. 193 (1921).

10. See Donnelly, *The Law of Defamation: Proposals for Reform*, 33 Minn. L. Rev. 609, 627 (1949).

11. See, *e.g.*, Hartman v. American News Co., 69 F.Supp. 736 (W. D. Wis. 1947); Renfro Drug Co. v. Lawson, 138 Tex. 434, 160 S.W. 246 (1942).

THE SINGLE PUBLICATION RULE AND ITS INTERPRETATIONS

To meet these objections the single publication rule has been adopted by statute[12] or developed by judicial decision[13] in several states. Under this rule a libelous statement printed in any publication is considered one inclusive tort with each separate republication constituting an aggravation of the original wrong.[14]

It is clear that under the common law theory the defamed has a cause of action in as many jurisdictions as the libelous statement was published.[15] Thus the determination of a suit in one jurisdiction did not bar a subsequent suit in a different jurisdiction.[16]

Unfortunately, the same result occurs through an interpretation given the single publication rule in some states. *In O'Reilly v. Curtis Pub. Co.*[17] the court held that the single publication rule applied to the internal law of the state and operated only to group into one action all the defamatory matter circulated within the state. This interpretation has the desirable consequence of barring succesive suits within a single jurisdiction, but still allows a separate action in every state in which the libel was published.[18] This construction of the rule does little to overcome the objections to the common law view.

Judge Learned Hand, indicating a different impression of the effects of the single publication rule on a widely circulated libel, stated, by way of dictum, in *Mattox v. News Syndicate Co.*:[19] "We assume that in any event a plaintiff must recover in one action all his damages for all the publications, wherever made; . . ." This view would group the publication of a libelous statement over a number of jurisdictions into one composite tort to be adjudicated in one action in a single jurisdiction.[20] This interpretation would eliminate most of the difficulties inherent in the multiple publication rule. For the same reason it is preferable to the narrow construction of the single publication rule adopted by the court in the *O'Reilly* case.

CHOICE OF LAW PROBLEM

Certainly if the laws of a single jurisdiction are to be applied to adjudicate a multi-state libel action each case requires the determination of which jurisdiction's laws are to be applied. For example if a libellant domiciled in state A publishes a libel in state B and C, the court, applying the single publication

---

12. *E.g.*, Ariz. Code Ann. §§27-2001—27-2005 (Supp. 1954); Cal. Ann. Civ. Code §§3425.1—3425.5 (West's 1955); N.D. Rev. Code §14-0210 (Supp. 1953).

13. See, Hartman v. Time, Inc., 64 F.Supp. 671 (E. D. Pa. 1946), *vacated in part*, 166 F.2d 127 (3rd Cir. 1947), *cert. denied*, 334 U. S. 838 (1948); Means v. Mac Fadden Publication, Inc., 25 F.Supp. 993 (S.D.N.Y. 1939); 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. Sprauge, 140 Mass. 425, 5 N.E. 144 (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 (1907).

14. Hartman v. Time, Inc., 64 F.Supp. 671 (E.D. Pa. 1946), *vacated in part*, 166 F.2d 127 (3rd Cir. 1947), *cert.* denied, 334 U. S. 838 (1948); Age-Herald Publishing Co. v. Huddleston, 207 Ala. 40, 92 So. 193 (1921); Wolfson v. Syracuse Newspapers, Inc., 254 App. Div. 211, 4 N.Y.S.2d 640 (4th Dept. 1938), *aff'd* 279 N.Y. 716, 18 N.E.2d 676 (1939).

15. See note 3, *supra*.

16. See note, 23 So. Calif. L. Rev. 51, 52 (1949).

17. 31 F.Supp. 364 (D. Mass. 1940).

18. See notes, 10 La. L. Rev. 339, 341 (1950), 26 Rocky Mt. L. Rev. 335, 336 (1954).

19. 176 F.2d 897 (2d Cir. 1949).

20. See 24 So. Calif. L. Rev. 103, 104 (1950).

rule as interpreted by Judge Hand in the *Mattox* case, would be forced to make a choice of law.

In *Hartman v. Time, Inc.*,[21] the court, when faced with a libel published in a nationally circulated magazine, by implication gave the single publication rule its most desirable interpretation to date by viewing the defamation published in all single publication states as giving rise to only one cause of action.[22] This costruction appeared to necessitate a determination of what state law should control the disposition of the action. The court, however, felt differently and indicated instead that in a multi-state libel the law of each state in which the libel was published would be referred to and applied by the forum.[23] It is submitted that a more desirable solution could have been effectuated by applying the law of a single jurisdiction rather than that of many states.

CONTACT POINTS FOR CHOICE OF LAW SELECTION

If a plaintiff is limited to a single action in a multi-state libel a conflict of laws problem is squarely posed. For example, in a libel action the place of wrong is where the defamatory matter is communicated to a third person.[24] When a libel has simultaneously occured in a number of jurisdictions, the law of each is applicable to the tort. In an effort to aid the courts in selecting the law to be applied, a number of possible contact points have been advanced by judges and legal writers.[25]

a. The plaintiff's domicil has been suggested as a governing factor in making the choice of law on the theory that this would be the location of the plaintiff's principal reputation and therefore the jurisdiction in which he would suffer the greatest harm.[26] However, if the plaintiff's reputation exists in a state other than that of his domicil, the rationale for this rule disappears.[27]

b. To overcome the objections to the application of the law of the plaintiff's domicil, it has been submitted that the law of the state of the plaintiff's principal activity to which the defamation relates should govern.[28] This theory would be difficult to employ, however, since a libelee might carry on his business equally in more than one state. Furthermore, no comprehensive definition has been made of the term "activity". Hence, courts are free to place different connotations on the term.[29]

c. The common law impact theory of torts is reflected in the recommendation that the law of the state where plaintiff suffered the greatest harm

---

21. 64 F.Supp. 671 (E.D. Pa. 1946); *vacated in part*, 166 F.2d 127 (3rd Cir. 1947), *cert. denied*, 334 U. S. 838 (1948).

22. *Ibid.* See 61 Harv. L. Rev. 1460 (1948). See also notes, 23 So. Calif. L. Rev. 51, n. 30 (1949); 48 Col. L. Rev. 932 (1948). The Circuit Court held that, in states following the *multiple publication rule*, each publication constituted a separate cause of action.

23. Note, 23 So. Calif. L. Rev. 51 (1949).

24. Restatement, Conflicts of Laws §377 (5) (1938).

25. See Leflar, *Choice of Law: Torts: Current Trends*, 6 Vand. L. Rev. 447, 454 (1953). See also notes, 35 Va. L. Rev. 627, 632 (1949), 43 Ill. L. Rev. 556, 560 (1948), 60 Harv. L. Rev. 941, 943 (1947).

26. Notes, 35 Va. L. Rev. 627, 636 (1949), 60 Harv. L. Rev. 941, 947 (1947).

27. *Ibid.*

28. Leflar, *Choice of Law: Torts: Current Trends*, 6 Vand. L. Rev. 447, 455 (1953).

29. In determining the site of the plaintiff's principal activity the court must first determine what factor will be used in definition of the term. For example, in the case of a railroad, the term activity could be interpreted as miles of trackage, passengers carried, freight or revenue received from a single jurisdiction.

be chosen.[30] An objection to this contact point is the difficulty of determining, particularly in the case of a widely known plaintiff, where the greatest injury occured.[31]

d. The state of the defendant's domicil or incorporation has been advanced as the most convenient contact point to utilize.[32] The adoption of this situs, however, would place the plaintiff at a disadvantage by allowing a publisher to choose a state with lenient libel laws for his domicil regardless of the location of the main offices or publishing plants.[33]

e. Another contact point advocated is that of the state of the principal circulation of the defamatory matter.[34] The impossibility of determining such a location presents a disqualifying objection to this choice.[35]

f. A further contact point suggested to aid the court in its choice of an applicable law is the jurisdiction in which the libel is first seen.[36] The almost simultaneous publication of a libel on a radio and television broadcast seriously limits the usefulness of this choice.

g. The law of the forum has been advanced as a possible choice of an applicable law.[37] This is based on the familiarity which the court should have with its own laws.[38] However, by choosing to apply its own law, the court would, in effect, allow the plaintiff to select from among the states in which he sustained inury, the one in which he might receive the most favorable verdict.[39]

The interpretation of the single publication rule and the ascertainment of substantive law applicable to a multi-state libel were before the court in the recent case of *Palmisano v. News Syndicate Co.*[40] This action involved an alleged libel printed by the defendant company, publisher of the New York Daily News. A libel suit was commenced in New York by a resident of New Jersey. Plaintiff died before the trial and his administratrix was substituted as party plaintiff. The defendant, a New York domicilliary, moved to dismiss the action on the ground that it was governed by New Jersey law and under that law a cause of action abates on the death of the injured party.[41] Under the law of New York the cause of action survives.[42] The court, in denying the defendant's motion, held that the decision involved a problem too important to be decided on procedural grounds.[43]

The court was asked on the basis of the pleadings to select the law of the plaintiff's domicil to govern the action before it. It is true that a federal court,

30. See Mattox v. News Syndicate Co., 176 F.2d 897 (2d Cir. 1949).
31. See note, 25 N.Y.U.L.Q. Rev. 165 (1950). See also notes, 63 Harv. L. Rev. 1272 (1950), 34 Minn. L. Rev. 332 (1950).
32. Leflar, *Choice of Law: Torts: Current Trends,* 6 Vand. L. Rev. 447, 454 (1953).
33. *Ibid.*
34. Ludwig, *"Peace of Mind" in Forty Eight iPeces Vs. Uniform Right of Privacy,* 32 Minn. L. Rev. 734, 761 (1948).
35. Leflar, *Choice of Law: Torts: Current Trends,* 6 Vand. L. Rev. 447, 455 (1953).
36. Banks v. King Features Syndicate, Inc., 30 F.Supp. 352 (S.D.N.Y. 1939).
37. *Ludwig supra* note 34, at 760.
38. *Ibid.*
39. Leflar, *Choice of Law: Torts: Current Trends,* 6 Vand. L. Rev. 447, 456 (1953).
40. 130 F.Supp. 17 (S.D.N.Y. 1955).
41. Palmisano v. News Syndicate Co., *supra* note 41, at 18, citing Decedent Estate Law, McK. Consol, Laws, c., 13, §119.
42. Palmisano v. News Syndicate Co., *supra* note 41, at 18, citing N. J. Stat. Ann. Title 2A: 15-3.
43. In denying the motion to dismiss, the court cites, 2 Moore, Federal Practice 2245 (2d ed. 1948): "(A) complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*"

which has assumed jurisdiction on the basis of diversity of citizenship is bound by the conflicts of laws rule in effect in the state in which it sits.[44] However, as the decision pointed out, the jurisdictional law applicable to actions of this nature has not been conclusively determined in New York, and such a choice of law cannot be made without a consideration of the merits of the plaintiff's cause of action. The court mentioned that although the plaintiff was domiciled in New Jersey, the majority of the contact points advocated by legal writers existed in New York. Hence, the trial court could conceivably hold, as in *Dale System v. General Teleradio,*[45] that the law of the forum should govern on these grounds.

CONCLUSION

The different substantive concepts employed by various states concerning the adjudication of a multi-state libel; the difference in the interpretation of the single publication rule in separate courts, and the general reluctance of the judiciary to decide the conflict of laws problem inherent in such an action[46] have prevented the interested parties from obtaining in one action a complete determination of their rights. To resolve this present unsettled state the promulgation of a conflict of laws doctrine which will result in uniformity, convenience and justice should be made.

In 1952 the National Conference of the Commissioners on Uniform State Laws proposed a Uniform Single Publications Act. This Act, which has been approved by the American Bar Association and adopted by several states,[47] is designed to include in a plaintiff's recovery damages for the whole wrong wherever committed.[48] It is intended to preclude, under the Full Faith and Credit Clause of the Federal Constitution, any later action anywhere on the same wrong.[49] In addition, the Act provides that the time of the initial publication will be the date from which the statute of limitations will run.

It is submitted that the attainment of a uniform conflicts of laws doctrine requires the establishment of a single standard to be followed by all forty-eight states. While difficulty is anticipated in obtaining unanimous adoption of such a standard, some definite progress has been made.

DAVID A. VAALER

---

44. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. 487 (1941).
45. 105 F.Supp. 745, 747 (S.D.N.Y. 1952).
46. See Prosser, *supra* note 3, at 965, n. 32.
47. See note 12 *supra.*
48. See Leflar, *The Single Publication Rule,* 25 Rocky Mt. L. Rev. 263, 276 (1952).
49. *Ibid.*