THE LAW OF DEFAMATION SINGLE PUBLICATION RULE IN THE DIGITAL ERA: THE PROTECTION OF PRESS FREEDOM IN ZIMBABWE

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Abstract

The growth of the internet and its social media auxiliary, that entails networking websites and applications enabling users to create and share content online, has created global complexities in the judiciary's adjudication of defamatory online publications. Away from print journalism that generated hard copies in the analogue era confined to a particular jurisdiction, internet publications defy boundaries. More often, re-publications that occur instantaneously at the click of a button create jurisdictional choice of law complications. Scholars have pithily argued that this has not only disrupted the traditional media model but has devastated it. Zimbabwe's traditional defamation laws are yet to adjust and conform to the dictates of the digital era. As such, this paper argues for an authoritative statutory provision or common law position in Zimbabwe that establishes a single publication rule in defamation to safeguard and promote press freedom. This is necessary to avoid the chilling effect of a multiplicity of claims from the same cause of action that can administratively disrupt the dissemination of information or even shut publications. This approach is taken because there is not sufficient statutory clarity on the applicability of either the single or multiple publication rule. This paper establishes that as a developing country, a multiple publication rule will not promote Zimbabwe's democracy through press freedom. As such, this paper traverses the Zimbabwean legal framework on the law of defamation, discusses various international precedents and the applicability of the single publication rule against the multiple publication rule, and makes a case for the former.

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1. Background

The digital era provides immeasurable challenges to the current law of defamation's traditional scope that largely represents its offline scope. Numerous challenges have impacted the editorial administration of newsrooms as they battle to deal with incessant defamation litigation founded on multiple claims, generated by the internet's instant global reach. Many published stories mutate into different forms, assuming new editorial thrusts, meaning, scope, shape and form, due to accompanying online reproductions occurring on many different platforms. Like arrows pointing at the heart of freedom, crippling litigation is often mounted against publications, coming from several aggrieved parties, and or an individual with multiple claims over the same story.

In a defamation action *Tafadzwa Mushunje v Zimbabwe Newspapers* (1980) Ltd,[1] the High Court heard that "a similar claim" over the same cause of action had been instituted by the plaintiff against another publication, the Daily News. It was not argued why the plaintiff would institute multiple claims over the same cause of action without seeking leave of the court and consolidating the matters. Two decades earlier, in *Mashamhanda v Mpofu* & Or,s[2] a similar multiple publication claim was instituted. The court's authoritative pronouncement was that multiple claims can only be instituted with the leave of the court. This provided the scope for the legal legitimacy of multiple claims but only limited to the court's approval. Furthermore, the court held that there was need for a joinder in matters involving multiple defendants.

In the Mashamhanda case, *supra*, the plaintiff had sued the Zimbabwe Banking Corporation for causing the publication of defamatory content that had appeared in a local daily publication.[3] Despite on-going proceedings in his original case, the plaintiff instituted further separate actions without any attempt to consolidate the claims. Similarly, as in the Tafadzwa Mushunje case, *supra*, there was no attempt at consolidating the claims by the plaintiff. Regardless, there is still a leeway to institute

[1] *Tafadzwa Mushunje* v *Zimbabwe Newspapers* (1980) Ltd HH 47-17.
[2] *Mashamhanda* v *Mpofu* & *Ors* 1999 (1) ZLR 1 (H).
[3] *Banking Corporation Ltd* v *Mashamhanda* 1995 (2) ZLR 417 (S).

multiple claims only in circumstances where leave of the court has been sought and granted. This gives indirect justification for the multiple publication rule. The allure of this approach manifests in several efforts at harvesting damages from multiple actions arising from the same cause of action.

With the advent of the Internet, there is a grave danger against press freedom in maintaining the obsolete multiple publication principle that was first introduced in an English court in 1849.[4] The rule is the oldest approach to a defamation claim and was first adopted in the 19th century when the printing press was in its infancy, with very limited copies published and distributed to tiny communities with a negligible number of recipients.[5] Hence, the irrelevance of the multiple publication rule lies in the inherent dangers delivered by the advent of the digital era, which provides technologically inclined individuals with a previously unimaginable republication latitude of original content. Interactions with original content takes many different forms on social media, and would include but not be limited to retweeting, file sharing, hyperlinks and linking. However, there are distinct differences that have to be defined, for the purposes of this contribution, between the social network sites (SNS), and social media. Ellison and Boyd provide that,

> "A social network site is a networked communication platform in which participants 1) have uniquely identifiable profiles that consist of user-supplied content, content provided by other users, and/or system level data; 2) can publicly articulate connections that can be viewed and traversed by others; and 3) can consume, produce, and/or interact with streams of user-generated content provided by their connections on the site." [6]

As opposed to the SNS, the social media is defined as,

> "web-based services that allow individuals, communities, and organizations to collaborate, connect, interact, and build community by enabling them to create, co-create, modifies, share, and engage with user-generated content that is easily accessible."[7]

The participatory technical features that allow for interactions with content after republication would entail demonstration of affections through clicking and using

[4] S Kumar 'Website Libel and the Single Publication Rule' (2003) Vol 70 *University of Chicago Law Review* 639.
[5] Ibid.
[6] NB Nellison and B Danah 'Sociality through Social Network Sites' In WH Dutton (ed) *The Oxford Handbook of Internet Studies* (2013) 151–172.
[7] L Mccay and A Quan-Haase 'What is Social Media and What Questions Can Social Media Research Help Us Answer?' In L Sloan (ed) *The SAGE Handbook of Social Media Research Methods* (2017) 17.

emojis to either show approval, disapproval, outright hatred and fears and anxieties.[8] Growing literature around demonstration of such feelings through linking or clicking the emojis on social media state that they can be defamatory and attract liability.[9] The substantial challenges to the defamation law framework are now provoked by the sudden and often disruptive shift from analogue to the cyberspace where the original news material is subjected to unbelievable reproductions, adaptations and or mutilations that instantaneously spread across different global jurisdictions. Many jurisdictions have been slow to adapt to the law to suit the exigencies of the digital era by either setting precedence or adapting their legislations. For example, in Australia, the first judgment on social media defamation judgment was delivered only in 2013,[10] despite the billion-dollar social media brands, namely Facebook having been launched in 2004, Twitter in 2006, and Instagram in 2010. Some of the states within the United States amended their statutes to reflect the single publication rule as way back as 1948.[11] Subsequently, some states in the United States, have now consistently considered that the policies behind the single publication rule in their determination of similar cases. They note that these cases "are even more cogent when considered in connection with the exponential growth of the instantaneous, worldwide ability to communicate through the Internet."[12] It was not until 2013, that the United Kingdom amended its defamation legislation, to address the retrogressive effect of the multiple publication rule.[13]

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[8] *Burrows* v *Houda* 2020 NSWDC 485 paras 20-21. An emoji is described as "a small digital image or icon used to express an idea, emotion, etc., in electronic communications."

[9] P Singh 'Can an Emoji Be Considered as Defamation? A Legal Analysis of *Burrows* v *Houda* [2020] NSWDC 485" *PER / PELJ* 2021(24) 17. The author submits that "any words or conduct can be considered as defamatory in South Africa, provided that the publication of this statement or conduct lowers the plaintiff's reputation. Our courts have already recognised that a digitally altered photo could be considered to be defamatory. Thus, it is submitted that, provided the plaintiff can establish that the publication of the emoji caused his reputation to be lowered, there would be no obstacle to our court's extending our current legal principles to an act of defamation perpetrated via the medium of an emoji."

[10] *Mickle* v *Farley* [2013] NSWDC 295 para 21. The court held that **"**when defamatory publications are made on social media it is common knowledge that they spread. They are spread easily by the simple manipulation of mobile phones and computers. Their evil lies in the grapevine effect that stems from the use of this type of communication. I have taken that into account in the assessment of damages."

[11] Uniform Single Publication Act 1952 section 1 (West 2) It states 'No person shall have more than one cause of action for damages for libel ... founded upon any single publication or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture.' States that have legislatively adopted the USPA are Arizona, California, Idaho, Illinois, New Mexico, North Dakota, and Pennsylvania. Texas adopted the USPA judicially in *Holloway v Butler*, 662 SW2d 688, 690 (Tex App 1983.).

[12] *Firth* v *State of New York* 98 N.Y.2d 365.

[13] Section 8 of the United Kingdom Defamation Act of 2013 states that "This section introduces a single publication rule to prevent an action being brought in relation to publication of the same material by the

Zimbabwe's defamation laws were borrowed and implemented without the slightest recognition of the internet, and yet the nature of defamation is indisputably changing with the mutations of the technology around the social media. To understand the exigencies of the social media problems, the legal context of the defamation problems are hinged around publication, as an important element of the delict. It is important to define how publication corresponds to the digital platforms, and the resultant potential liability of the media, which has also migrated from the original print traditional platforms to cyberspace, with its previously unforeseen and unregulated republications and reproductions of original media content activities. These forms of publication will be addressed later in this contribution. At this stage, it's important to demonstrate why a case for a single publication rule is being made.

As previously stated, the applicability and relevance of the single publication rule in the digital age is crucial to safeguard press freedom, especially in a developing country like Zimbabwe where democratic values must be insulated. In other jurisdictions, the judiciary has pointed out that their departure from the multiple publication rule was engendered by the fears for "endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants." [14] The same argument advanced by the court, if it is applied with equal measure under the circumstances in which journalists operate in Zimbabwe, could have the proverbial chilling effect on the media and free expression triggered by endless fears of crippling litigation. Self-censorship becomes the norm, often to the detriment of the usual flexibility expected of a free roaming journalist in a democratic environment, insulated by provisions of section 61 of the Constitution, which has a democratic broadened Bill of Rights.[15] In Zimbabwe,

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same publisher after a one year limitation period from the date of the first publication of that material to the public or a section of the public. This replaces the longstanding principle that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period (the "multiple publication rule")."
Available at https://www.legislation.gov.uk/ukpga/2013/26/section/8/notes. (Accessed on 16 July 2021).

[14] Ibid.

[15] Section 61 of the Constitution of Zimbabwe, 2013 states that '1. Every person has the right to freedom of expression, which includes--

a. freedom to seek, receive and communicate ideas and other information.
b. freedom of artistic expression and scientific research and creativity; and
c. academic freedom.

2. Every person is entitled to freedom of the media, which freedom includes protection of the confidentiality of journalists' sources of information.'

the multiple publication rule is implied through the statutes, and is provided for only with the leave of the court, albeit under statutorily unspecified circumstances,[16] and is further buttressed by common law.[17]

At present, there is scope to retrogressively argue that each publication should be treated as separate publication if carried by a different newspaper or if the same story is multiplied under different Internet publications. Republication by the same newspaper is aggravation, and the plaintiff can still claim for punitive damages arising from each republished defamatory content to bump up the damages. As can be gleaned from the Mushunje case, *supra,* there is still a temptation to sue several newspapers separately arising from the same set of facts, without seeking leave of the court and or consolidating the matters.

Practically, should the plaintiff sue two or more newspapers for defamation arising from the same cause of action, the ultimate net effect will be the consolidation of cases.[18] This is normally done for the notion of facility and ease of expedience. The procedure would be convenient if it appears fitting and fair to all the parties involved, particularly, if the facts and circumstances of the case have arisen from the same cause of action. It is therefore argued that a single defamation claim out of the same cause of action should be brought simultaneously against every potential defendant, unless there are other additional different set of facts that have not been previously captured, adding a new defamatory meaning in a different publication. Legally, the plaintiff has scope to choose whichever defendant to pursue.[19]

The potential argument that each defamatory publication, over the same cause of action should be treated as a separate publication for defamation litigation purposes without the proposed need for consolidation, while it is financial boon for plaintiff's with an unassailable case, in the internet era, needlessly creates latitude for the multiplicity of claims that pose the ultimate danger to press freedom. This is so because treating

[16] Damages (Apportionment and Assessment) Act [Chapter 8:06].

[17] *Mashamhanda* v *Mpofu and others* 1999 (1) ZLR 1 (H).

[18] Order 13 Rule 92 of the High Court Rules. Provides that: 'Where separate actions have been instituted and it appears to the court convenient to do so, it may upon the application of any party thereto and after notice to all interested parties, make an order consolidating such actions, whereupon –

(a) the said actions shall proceed as one action;

(b) the court may make any order which it considers proper with regard to the further procedure, and may give one judgment disposing of all matters in dispute in the said actions:

Available https://zimbabwelawreports.com/high-court-rules.html. (Accessed 21 January 2022).

[19] In *Zvobgo* v *Modus Publications (Pvt) Ltd* 1995 (2) ZLR 96 (H) the plaintiff opted to sue the newspaper, Financial Gazette, not the originator of the defamatory remarks at the Press Conference.

each publication as a separate publication that can attract separate damages even after the conclusion or settlement of the original matter, will provide scope for endless claims and create uncertainty.

Furthermore, it is submitted that there should be a minimum number of defendants that can be pursued in the digital era. A single publication could be cited and a minimum number of defendants joined to ensure administrative efficiency, expeditious adjudication and the resolution of the dispute. The circumstances under which defendants may be joined vary, depending on the interest and preferences of the plaintiff, include, but are not limited to the financial capacity to meet the financial obligations set out in the claim. At present, there is latitude to sue different publications over the same defamatory statements without the joining or consolidation of the claim. As in the case of *Zimpapers*, the publisher has a plethora of different regional online media outlets that absorb the same articles published by the flagship national daily for consumption amongst its respective provincial readership. Yet, the considerations that are at play, should the plaintiff sue the various regional outlets that carry the same online content, with different variations in tone to suit the nuances and respective communal tastes without distorting the original content, are unclear. The prospects for initiating litigation separately and claiming different damages, is high given that there are more provinces in the country with High Court stations that have original jurisdiction to adjudicate on any matter arising within their jurisdiction.

Another important consideration is that media professionals are not in control of their original stories posted on their websites, if as in most cases, they are not locked with technological protection devices for user-copy and paste or editing reproduction access. The real threat of the Internet is republication of original content on the social networking sites. Pandey posits that,

> "SNWs travels way faster than on print media, more like a Wildfire. With the proliferation of social networking websites and their widespread use, especially amongst the youth, one observes certain legal loopholes in their operation and use. On one hand, while such SNWs provide an easy to use, convenient and cost effective way of networking (whether at a personal level or for commercial reasons), however the other hand presents the drawback of such SNWs. One such glaring drawback is the opportunity they provide for 'cyber-defamation' **or '**virtual defamation' to mushroom**."**[20]

[20] V Pandey 'The "Single Publication" Rule Of Defamation On Social Networking Websites'(2014) *Singh & Associates.* Available at https://www.mondaq.com/india/libel-defamation/346258/the-single-publication-rule-of-defamation-on-social-networking-websites. (Accessed on 15 July 2021).

The proliferation of lawsuits could threaten the survival of publications, especially given the global economic meltdown in which the industry precariously finds itself operating.[21] Zimbabwe is not confined to a different location. Its fledgling media industry is surviving by a thread, yet it is crucial in the dissemination of information, which is the lifeblood for democracy, as the fourth pillar of governance.[22]

The predicament of press freedom, is compounded by the fact that Zimbabwe's media law, like that of its colonial master, weighs favourably towards protection of reputation and leaves journalists vulnerable to lawsuits.[23] The executive has admitted that the current law offers inadequate protection to the media from defamation suits, therefore "constrains the media from fulfilling their role of exposing dishonesty, corruption and nepotism, and promoting integrity and honesty in public administration."[24] However guaranteeing reputational personality rights and press freedom or freedom of expression is a tough balancing act. Feltoe explains:

> "The law of defamation seeks to achieve a satisfactory balance two competing interests. On the one hand, it recognises the right of the individual to be afforded protection against harm to his reputation. On the other hand, it also recognises that the public have a right to free speech and to proper access to information. Put in the context of newspaper reporting it is vitally important that there should be a free press that keeps the public informed, especially about public affairs. This free press should not be stifled by highly

[21] J Cronje 'Noseweek magazine may be forced to close after losing defamation case' *Fin24*, 17 May 2021. Available at Jan Cronje https://www.news24.com/fin24/companies/ict/noseweeks-print-magazine-may-be-forced-to-close-after-losing-defamation-case-20210517. (Accessed 21 January 2022). It reported that 'Irreverent investigative magazine Noseweek, which for the past 28 years has lampooned SA's rich and famous, may be forced to close following a court ruling that it must pay R330 000 plus costs to a senior attorney at the law firm Edward Nathan Sonnenbergs. In an email to subscribers, the magazine's editor Martin Welz said Noseweek as a print publication was "unlikely to survive", but may continue online. See also *Katz* v *Welz and Another* Unreported Judgment number (22440/2014) [2017] ZAWCHC 135 (7 November 2017). The court held that 'A graphic and/or digital representation of Mr Katz published on the front cover of Noseweek with the caption "The man who stole justice" (the cover page). This same image also appeared on page 3 of the magazine. The digital image, as well as the accompanying caption, were published once again in the August 2014 edition of Noseweek.'

[22] See also *Chavunduka & Anor* v *Minister of Home Affairs & Anor* 2000(1) ZLR 552(S). Writing for the unanimous court GUBBAY CJ at 558C-G said:

> "This court has held that s 20(1) of the Constitution is to be given a benevolent and purposive interpretation. It has repeatedly declared the importance of freedom of expression to the Zimbabwean democracy – one of the most recent judgments being that of *United Parties* v *Minister of Justice & Ors* 1997(2) ZLR 254(S) at 268C-F, 1998(2) BCLR 224(ZS) at 235I-J. Furthermore, what has been emphasised is that freedom of expression has four broad special objectives to serve: (i) it helps an individual to obtain self-fulfilment; (ii) it assists in the discovery of truth, and in promoting political and social participation (iii) it strengthens the capacity of an individual to participate in decision–making; and, (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.'

[23] 'Government official sues publisher' Media Institute of Southern Africa (MISA) 16 November 1999. Available at https://ifex.org/government-official-sues-publisher/. (Accessed 15 July 2021).

[24] MSA 'Government official sues publisher' Media Institute of Southern Africa (MISA) 16 November 1999. Available at https://ifex.org/government-official-sues-publisher/. (Accessed 15 July 2021).

> restrictive defamation laws. But at the same time the law cannot ignore the fact that newspapers and other broadcasting media are extremely powerful agencies which are able to reach enormous numbers of members of the public and that, if they publish defamatory material, the end result can be devastating harm to reputation. It should also be borne in mind that harm to reputation is extremely insidious and once reputation has been damaged it is very difficult to repair the damage."[25]

In the context of the inherent dangers of the Internet and the relevance of the single publication rule, it shall be proposed in this paper that there is need for the development of the common law position that tilts in favour of press freedom. As the current situation obtains, there is also the dearth of online precedents intertwining the necessity of the protection of media freedom, balancing it with the technological necessity for Internet freedom, and personality rights. In this regard, it is therefore important to dissect the law of defamation and its elements, before addressing the background and legal implications of the single and multiple publication rule to press freedom in detail.

2. Defamation

Defamation is part of the law of delict. It is the publication of an oral or slanderous statement, to one or more persons other than the defendant that lowers his or her self-esteem, exposing the individual to public ridicule or shame.[26] Defamation is also widely regarded as the "intentional infringement of another's right to his good name, or, more comprehensively, the wrongful, intentional publication of words or behaviour concerning another which has the tendency to undermine his status, good name or reputation."[27] However a distinction has to be made between South Africa and the Zimbabwean jurisdiction in the application of the 'intention to injure' element. In the former, there is no need to establish the intention, as once a publication is deemed defamatory, intention is presumed. Feltoe notes that in the *Garwe v ZimInd* case, the court dealt with the absence of intention to defence even though this was not necessary in a Zimbabwe setting.[28]

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[25] G Feltoe *A Guide to the Zimbabwean Law of Delict* (2018).
[26] *Masuku* v *Goko & Anor*2006 (2) ZLR 341 (H) at 347 C-D. See also *Butau* v *Madzianike & 2 Ors* HH 378-12 at 8.
27 J Neethling, JM Potgieter and PJ Visser Deliktereg 5 ed (2006) 325.
[28] Feltoe (n 25 above). However, in the case of *Garwe* v *Zimind Publishers (Pvt) Ltd* 2007 (2) ZLR 207 (H) the High Court dealt with the defence of the absence of intention to defame that was raised in that case as if this defence is applicable in Zimbabwe. It stated that *animus injuriandi* is a subjective intention on the part of an individual, as opposed to the mass media, to defame or injure the reputation of the plaintiff. The court found on the facts, that D had intention to defame. This case, however, did not change the position in relation to the mass media where apparently the court still accepted that the legal position that applied in South Africa at that time still applied in Zimbabwe; and the position in South

Defamation can also occur through physical actions, which can demonstrably suggest defamatory imputations. The closest definition to the slander, is considered by Burchell and McKnorrie, who define it as a "civil wrong attracting damages to compensate for losses suffered when one person conveys an idea, by whatever means, of and concerning another person which is derogatory or demeaning of the latter and which does not attract one of the various defences which might exclude liability."[29] A person's reputation, is that status that he enjoys in society.[30] The key defamation elements captured in the foregoing, are, *inter alia*, wrongfulness and publication that injures the good name of another. The courts will consider the context, extent, nature and form of the wrongfulness to determine liability, having applied the objective test of a hypothetical reasonable person, who is presumed to be an ordinary person of average intelligence.[31] As such, the reasonable person standard is flexible and value-based.[32] The assumption arising therefrom is that members of the community generally assumes there would be compliance[33] with an undeviating value system and behavioural standard of conduct and that a member's conduct must conform to the "ideals and standards of a particular community".[34] Therefore, the reasonable person alluded to has to be that ordinary person in society who upholds that shared value system. Courts have held that the conventional test for determining whether a statement is defamatory or not, is if it would probably lower the plaintiff in the "estimation of right-thinking members of society generally."[35] The reference to "right-thinking persons" is therefore "no more than a convenient description of a reasonable person of normal understanding and development, and that the reference to the views of society 'generally' includes views held by a substantial section of the community."[36]

Africa at that time was that liability of the mass media was strict and there was no requirement that the media had to have had the intention to defame.

[29] J Burchell & K McKnorrie 'Impairment of Reputation, Dignity and Privacy' Available at https://strathprints.strath.ac.uk/3377/3/Norrie_Burchell_OUP_2005_Impairment_of_reputation_dignity.pdf. (Accessed 14 July 2021).

[30] Neethling, Potgieter & Visser (n27 above) 129.

[31] *Heroldt* v *Wills* 2013 2 SA 530 (GSJ).

[32] JC Van der Walt and JR Midgley *Principles of Delict* (2016) 237, 243.

[33] R Ahmed 'The Standard of the Reasonable Person in Determining Negligence - Comparative Conclusions.' (2021) Vol 24 *Potchefstroom Electronic Law Journal (PELJ)* 1-55. https://dx.doi.org/10.17159/1727-3781/2021/v24i0a8631.

[34] Van der Walt and Midgley (n32 above).

[35] See *Sim* v S*tretch* [1936] 2 All ER 1237 (HL) at 1240 per Lord Atkin.

[36] *Le Roux and Others* v *Dey* 2011 (3) SA 274 (CC).

The published statement must be about or concerning the plaintiff. If the plaintiff establishes that the statement was defamatory, other elements considered above those of intention and wrongfulness will be presumed. Several defences are available to the defendants to rebut the allegations raised in the pleadings, and each defence carries its own unique set of considerations to be applied in the adjudication of the dispute. However, in most circumstances, the defendant in each claim must raise a defence which proves that the element of unlawfulness was never present to sustain his defence. This paper is however not inclined to go into details of each defence, save to point out they include, but are not limited to justification,[37] privilege,[38] fair comment,[39] and as recently developed in South African jurisprudence, reasonableness.[40]

3. Publication

Publication is an essential prong of the defamation. In the digital era, the traditional concepts of defamation liability have to be analysed in much more complex situations that entail streaming content, webcasting, and endless rebroadcasts and reproductions in which the audience has gone beyond our traditional communications onto the global unified stage. Nevertheless, however, proving that Internet communication is a publication is not a difficult task. Scholars note that any web page that is accessible by a computer user and which is capable of being read and understood, constitutes a publication.[41] In the Australian defamation case *Rindos v Harwick*[42] an author of a defamatory computer message was found liable for damages. Liability would not apply if the published material is in a non-readable form.[43]

Following the advent of the internet, publication has been extended to give effect to its original traditional meaning. Publication therefore extends, and would be established

[37] *Du Plessis & Ors* v *De Klerk & Anor* 1996 (3) SA 850 (CC).
[38] See *Garwe* v *Zimind Publishers* (Pvt) Ltd 2007 (2) ZLR 207 (H) at 231; *Mugwadi* v *Dube & Ors* 2014 (1) ZLR 753 (H).
[39] *Moyse & Ors* v *Mujuru* 1998 (2) ZLR 353 (S).
[40] *National Media Ltd & Ors* v *Bogoshi* 1998 (4) SA 1196 (SCA).
[41] A Russell and M Smillie, 'Freedom of Expression –v- The Multiple Publication Rule', 2005 (1) *The Journal of Information, Law and Technology (JILT)* 3.
[42] Western Australia Supreme Court No 1994 of 993.
[43] *R* v *Arnold* [1997] 2 All ER 548 the UK Court of Appeal decided that pornographic images downloaded to a bulletin board could be a photograph for the purposes of the Protection of Children Act 1978 and that the data was distributed or shown, even though it was merely made available for downloading.

if "it can occur in various forms such as speech, print and online forums like websites, newsgroups and bulletin boards."[44] Publication can also be presumed in circumstances where there is a real likelihood "that the defamatory statement would be read or heard, unless the contrary is proved."[45] A repeat or confirmation of a defamatory online statement can raise liability through republication, which is viewed in the traditional context of the repetition rule. Retweeting an original defamatory tweet, would constitute and attract liability for republication, as it is a repeat or confirmation of the original publication. This would apply to a forum such as Facebook and Twitter. Twitter users widely disseminate a piece of information through the practice of retweeting. Allen notes that 'the more users use the retweet button, the more people take to Twitter, and the more the social medium is used. Again tweets can be dug up through a search on a search engine like Google and once the tweet is found, it can again be retweeted ad nauseam.'[46]

Publication has mutated in many different forms arising from the internet technological advancements. The technological social media elements have unique transmission features that can easily raise liability for defamation, while equally attracting liability for copyright infringements under intellectual property law.[47] In the internet context, the reasonable persons used for objective test to determine the meaning deduced arising from a published defamatory statement, are ordinarily the class or members attached to the social media platforms from which the contentious publication was relayed. In *Manuel v Economic Freedom Fighters,*[48] the defamatory publication was hosted on Twitter and the hypothetical ordinary reader was taken to be a reasonable representative of users of Twitter who follow the EFF and Mr Malema, and share his interest in politics and current affairs.[49] The court importantly held that:

> "because of social media platforms like Twitter, Facebook and others, ordinary members of society now have publishing capacities capable of reaching beyond that which the print and broadcast media can. Twitter users follow news in general on the service worldwide. They get their news either through scrolling their Twitter feeds or browsing the tweets of those they follow. When there is breaking news, they become even more

[44] I Desan 'An Analytical Look Into the Concept of Online Defamation in South Africa' (2018) Vol 32 *Speculum Juris*.
[45] Ibid.
[46] AA Allen 'Twibel retweeted: Twitter libel and the single publication rule' (2014) Vol XV *Journal of High Technology Law* 79.
[47] OH Dean & A Dyre *Introduction to Intellectual Property Law* (2014) 417. See also *Moneyweb (Pty) Limited* v *Media 24 Limited and Another* 2016 (4) SA 591 (GJ) 121.
[48] *Manuel* v *Economic Freedom Fighters and Others* 2019 (5) SA 210 (GJ).
[49] Ibid.

> participatory, commenting, posting their opinions and retweeting. Statements are debated and challenged, and people can make up their minds on the issue."[50]

Unlike the traditional print media, the court further held that the:

> "difference between an ordinary person communicating matters of public interest or concern to the general public on social media, and a journalist publishing the same statement in a newspaper, is that in the case of the former, the communication is capable of reaching millions more instantaneously than, for example, printed copies of newspapers." [51]

That's the scope of internet reach, which can be safely used as aggravation if the extent of publication is huge in the quantification for damages.[52] The same approach was used in *Garwe v ZimInd publishers*.[53] The extent and reach of social media publications are huge, unrestrained, and highly insidious to the reputation of the litigant. A publication is bourgeoned in different multiple publications carrying the same devastating defamatory content. The social media platforms, such as Facebook, Twitter, and Instagram, have become a convenient outlet for self-expression without restraint, yet they haven't been adequately regulated and subjected to legal rules conveniently transposed from the traditional principles of defamation. Thus, republication or tagging have become important features that can raise liability. If an individual does not agree with the content arising from the tag, there is compelling need to detach oneself to avoid liability arising from association and hosting such content.[54]

It is with this background and the legal ramifications of the digital era, that publication, should be debated justifying the relevance of either the single or multiple publication rule in the Zimbabwean jurisdiction context to determine liability. It is argued that the advent of the internet, undoubtedly provides adjudication difficulties in determining liability.

3.1 Multiple Publication Rule

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[50] Ibid.
[51] Ibid.
[52] *Mickle* v *Farley* [2013] NSWDC 295 at 21. The court held that**, "**There is one matter that I omitted in relation to the compensatory damages and that is to stress that when defamatory publications are made on social media it is common knowledge that they spread. They are spread easily by the simple manipulation of mobile phones and computers. Their evil lies in the grapevine effect that stems from the use of this type of communication. I have taken that into account in the assessment of damages that I previously made."
[53] *Garwe* v *Zimind Publishers (Pvt) Ltd* 2007 (2) ZLR 207 (H).
[54] A Roos & M Slabbert 'Defamation on facebook: *Isparta* v *Richter* 2013 6 SA 529 (GP)' (2014) Vol 17 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*.

The multiple publication rule posits that each and every publication of a defamatory matter gives rise to a separate cause of action. The complex nature of the digital era makes this cumbersome. This is precisely so, because:

> "In the realm of digital media, the multiple publication rule assumes that each and every download of online material constitutes a separate publication, which effectively resets the limitation period for defamation actions. This means that an article posted and maintained online may remain actionable for libel for an indefinite duration."[55]

While this rule is manageable in the analogue sphere, where publications are relatively few and identifiable, the multiplicity of internet media publications, some of which operate anonymously, renders the applicability of this rule difficult. This is especially so, because a fresh cause of action arises in every webpage hosting and publishing the defamatory content. The limitation period to institute proceedings become difficult to ascertain. In the analogue world, each copy of a magazine or newspaper is a separate, actionable case for defamation. Each hit on a webpage is a new publication, creating a new cause of action, arising from the same facts that have already been adjudicated upon. This puts publishers in a predicament and can be harmful to the administration and management of newspapers because they are hamstrung by a multiplicity of burdensome and crippling litigation.

3.1.1 Criticisms of the Rule

This rule is out of fashion and should give way to the single publication rule in the digital era. Publications are easily uploaded online, in various jurisdictions, defying common jurisdictional borders. Newspapers or online publishers will live in perpetual fear of litigation. The end result is dry copy which does not set the agenda for public interest debate. Forum shopping is common, and every favourable jurisdiction for litigation is approached and could easily be flooded with litigation. Already there are presumed claimant friendly defamation action environments targeted for mounting litigation.[56] Scholars have opined that: "the possibility of each 'click' amounting to a

[55] R Leder *et al* 'Australia: I thought you said you were single?: analysing the new model defamation provisions publication rule' (2020) Corrs Chambers Westgarth Available at https://www.mondaq.com/australia/libel-defamation/987672/i-thought-you-said-you-were-single-analysing-the-new-model-defamation-provisions-publication-rule. (Accessed 15 July 2021).

[56] *Depp* v *News Group Newspapers Ltd* [2020] EWHC 2911 (QB) was a defamation trial in England that was initiated by American actor Johnny Depp, who sued United Kingdom News Group Newspapers (NGN), *The Sun* for libel. The article alleged that Depp had abused his ex-wife, actress Amber Heard, during their relationship. *The Sun* published an article in their online and print

new publication ... facilities this unsavoury practice."[57] The rule's substantial restriction in press freedom makes it an unfavourable rule in a developing country like Zimbabwe with limited publications. Big corporates, the state and financially and politically powerful individuals can easily emasculate publications, mulcting them in irrecoverable costs that can collapse the publishing industry or result in the control and manipulation of the editorial policy to suit policies or agendas of new properties to suffocate free expression.

With the technological breakthroughs such as the modern printing press, a single libelous statement can now reach millions of readers and lead to a staggering number of lawsuits. Kumar posits that the "courts became concerned that the statute of limitations would no longer be effective if it were renewed every time a new party saw the libelous statement. A rule was needed that would give libel victims adequate means to seek redress without forcing publishers to face countless lawsuits for an indefinite span of time. Consequently, courts began to adopt the single publication rule."[58]

3.2 Single Publication Rule

The single publication rule treats the multiple publication of defamatory material over a single cause of action as one. For example, if several media publications attend a press conference and publish defamatory contents emanating therefrom, the plaintiff cannot sue the several publications separately if the facts arising are the same. Under this rule, "any form of mass communication or aggregate publication is a single communication and can give rise to only one action for libel," and this rule applies "where communication is simultaneously available to multiple persons."[59]

In this jurisdiction, it is the norm to join other defendants for liability damages to be assumed jointly and severally.[60] Under the Damages (Apportionment and Assessment of Damages) Act

versions in which they alleged that Depp was a "wife beater" and criticized his casting in the *Fantastic Beasts* film franchise.

[57] U Connolly 'Multiple publication and online defamation - recent reforms in Ireland and the UK' (2012) Vol 6 *Masaryk University Journal of Law and Technology* 35-47.

[58] Kumar (n5 above) 639.

[59] *In re Davis*, 347 B.R. 607, 611 (W.D. Ky. 2006) citing *Mitan* v. *Davis*, 243 F.Supp.2d 719, 722 (W.D. Ky. 2003).

[60] See *Nyatanga* v *Editor, The Herald & Anor* 2001 (1) ZLR 63 (H).

[61] a litigant should only pursue one action in damages against one or more wrongdoers.[62] The plaintiff is not entitled to further action and damages. Defamation, which is delictual in nature, is covered by the definition of "fault" in section 2 of the Damages (Apportionment and Assessment) Act. In terms of section 6 of the Act, a claimant cannot bring another action for damages in respect of the same cause of action against any wrongdoer who was not joined in the first action, save with the leave of the Court. The purpose of the single publication rule, is to avoid duplication of litigation and to enforce "the once and for all" rule in respect of damag es. This persuasive approach, was upheld in *Mashamhanda*, *supra*, where the court held that, **"**The general principle is that a plaintiff should not be allowed to recover damages in excess of his actual loss orbe twice compensated for the same wrong. Put another way, the plaintiff is entitled to receive a sum representingthe damages that he has suffered from a single wrong inflicted by all. Defamation damages are not a road to riches."[63]

The court's position is fortified in various precedents that have preceded it, where damages have been granted in one action against several defendants.[64] Fault, is a key consideration in delictual liabilities, and defamation in particular, precisely because it was defined to mean:

> **"**negligence, breach of statutory duty or other act, omission or circumstance which giv es rise todelictual liability, or would, but for the provisions of this section, give rise to th e defence of contributory negligence".

This position is settled. Defamation gives rise to delictual liability, as such, it is fault. Further authority is derived from an authoritative text. Feltoe opines that:

> "As a matter of general principle, a person may only bring one action against the same defendant upon *a single cause of action*. Once he or she has brought that action his or

[61] Damages (Apportionment and Assessment) Act [Chapter 8:06].

[62] Section 6 of the Damages (Apportionment and Assessment) Act [Chapter 8:06 states that: (1) If a person who suffers damage which was caused by the fault of two or more wrongdoers, whether or not they were acting in concert, brings an action for damages against one or more, but not all, of the wrongdoers concerned—

(a) the claimant shall not be entitled thereafter to bring another action for damages in respect of the same cause of action against any other such wrongdoer who was not joined in the first action, without leave of the court granted upon good cause being shown;

(b) any wrongdoer who has been joined in the action may, before the close of pleadings, give notice to any other wrongdoer, who has not been joined, of his entitlement to intervene in the action and, if he does not give such notice, shall not be entitled thereafter to sue him for any contribution in respect of the damages concerned, without leave of the court granted upon good cause being shown.

[63] *Mashamhanda* v *Mpofu & Ors* 1999 (1) ZLR 1 (H).

[64] *Robinson* v *Kingswell* 1913 AD 513; 527; *Hartley* v *Palmer* 1907 SC 229 at 236; *Zimbabwe Newspa pers (1980) Ltd &Anor* v *Bloch* 1997 (1) ZLR 473 (S).

> her remedies at law are exhausted and he or she is precluded by the principle of *res judicata* from bringing a further action." [65]

As the World Wide Web grows, courts are increasingly leaning towards the single publication rule to website libel, where a consensus has been reached that it is a single publication rule because the Web is a form of mass publication.[66] Kumar argues that 'in implementing this rule, the courts have skewed the single publication rule to favour publishers, by broadly defining when publication on the Web occurs, and narrowing the circumstances when republication can be found.'[67] This approach is persuasive and important for press freedom and therefore should be followed in this jurisdiction.

3.1.2 Benefits of the Rule

The single publication approach provides a speedy resolution of litigation and brings finality to litigation. A single definitive judgment is pronounced and puts to bed all the issues arising within the four corners of the litigation. Multiple litigations arising from the same cause of action creates uncertainty and overturns clearly established facts, creating ambiguity in law. The principle of *res judicata*, is part of our law, and is borrowed from various ancient legal systems.[68] The doctrine of *res judicata* is based on the maxims *Nemo debet lis vaxari pro eaderm causa* (no man should be vexed twice for the same cause); *Interest republicae ut sit finis litium* (it is in the interest of the state that there should be an end to a litigation); and *Re judicata pro veritate occipitur* (a judicial decision must be accepted as correct).[69] *Res judicata* is a public policy consideration, and a matter can only be reopened under the considerations of fraud and or mistake, or when the lack of jurisdiction is cited.[70] As such, the single publication rule is an important principle to safeguard the interests of justice, and promote administrative efficiency, providing legal certainty and finality to a dispute.

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[65] Feltoe (n25 above).
[66] Kumar (n5 above).
[67] Ibid.
[68] *Maparura* v *Maparura* 1988 (1) ZLR 234 (HC) at 236C-D.
[69] S Yadav 'An analytical overview of doctrine of finality and judicial response in India' *EPRA International Journal of Multidisciplinary Research (IJMR)* - Peer Reviewed Journal Volume: 7 Journal DOI: 10.36713/epra2013 || SJIF Impact Factor: 7.032 ||ISI Value: 1.188.
[70] Ibid.

In the digital environment where the same publication can be hosted by various media platforms of the same publishing house, as earlier argued, and in this context, it is financially crippling and administratively cumbersome to pursue every potential defendant online over the same facts.

4. Comparative Analysis

The growing global jurisprudence is to suspend the multiple publication rule, prompted by the exigencies accompanying the inescapable technological advancements. The United States[71] and the United Kingdom[72] are considered because of their complex and enduring defamation laws, that have been a subject of jurisprudential debate around their being either claimant friendly or defendant friendly legal frameworks. Zimbabwe has significantly borrowed its common law from its colonial master, the United Kingdom,[73] while the former has also borrowed its provisions outlawing the multiple publication rule from the United States.

The United States was the first to outlaw the multiple publication rule in 1948, after the executive interventions following concerns and considerations of it "being unsuited to

[71] *New York Times Co. v Sullivan*, 376 U.S. 254. The precedent radically changed the nature of libel law in the United States by establishing that public officials could win a suit for libel only when they could prove the media outlet in question knew either that the information was wholly First Amendment's guarantees of freedom of speech and freedom of the press provide defendants in the United States a measure of protection from defamation lawsuits. See also, Steven Pressman 'An Unfettered Press Libel Law in the United States' Available at https://usa.usembassy.de/etexts/media/unfetter/press08.htm. (Accessed 22 January 2022). He writes that the 'the famous decision in *New York Times Co. v Sullivan* once and for all created a national rule that squared more fully with the free press guarantees of the First Amendment. In its ruling, the Court decided that public officials no longer could sue successfully for libel unless reporters or editors were guilty of "actual malice" when publishing false statements about them.'

[72] M Socha 'Double Standard: A Comparison of British and American Defamation Law' (2004) *Penn State International Law Review*: Vol. 23: No. 2, Article 9. 471. Writes that, 'British laws are much more plaintiff friendly and less protective of speech when compared to American laws. The differences between British and American defamation law may seem trivial, but they are increasingly important in our changing, more globally integrated world. The most important reason to be aware of the differences in the defamation laws of Britain and the United States is that plaintiff friendly British laws may have a chilling effect on speech here in America.' Ideas are easily exchanged between citizens of the United States and England and thus, the threat of facing a lawsuit in England could lead to potential defendants eliminating content from books, magazines, news articles, and material available online.'

[73] J Pfumorodze & E Chitsove 'The Law in Zimbabwe' (2021) *Global law and Justice*: 'The common law of Zimbabwe is primarily the Roman–Dutch Law as per the provisions of section 192 of the Constitution of Zimbabwe. This provision reads that the law to be administered by the courts of Zimbabwe is the law that was in force on the effective date, as subsequently modified. The law that was in force includes Roman–Dutch Law as applied at the Cape of Good Hope on June 10, 1891. However, the common law at the Cape in 1891 had been heavily influenced by English Law, hence the common law of Zimbabwe must be said to be Anglo–Roman–Dutch Law.'

the modern era and in particular the possibility of a number of reprints."[74] The statutory rule is set out under the Uniform Single Publication Act 1952, which provides that:

> "A single communication heard at the same time by two or more third persons is a single publication. Any 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. As to any single publication, only one action for damages can be maintained; all damages suffered in all jurisdictions can be recovered in the one action; and a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions."[75]

As the rule developed over time with the rampant effects of internet showing and throwing themselves theatrically in the court for defamation determination on the intricate technical appliances on the internet and social media, the courts doggedly refused to budge and insisted on applying the single publication rule, in instances where the multiple publication rule was demanded. In the *Firth v. State* case, [76] the Court of Appeals of New York, rejected the plaintiff's argument that the single publication rule should not apply to the internet and declined to find that each hit to a site should be considered a new publication.[77] The danger of the court adoption this approach lay in the multiplicity of claims, associated with each internet hit, and the accompanying financial ramifications. The court's argument was plausible, that if each hit were to be considered a publication, it would have a "a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the internet, which is, of course, its greatest beneficial promise."[78] This approach would apply to the news environment, where allowing greater liability for defamatory content could have a chilling effect, as this would require more in-depth research and analysis would delay the time at which material would be available online. Furthermore, the scholars observed that 'allowing the multiple publication rule would discourage posters from

[74] Section 577A of the 2nd Restatement of Torts (197) as follows: (2) A single communication heard at the same time by two or more third persons is a single publication. '(3) Any 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. '(4) As to any single publication, (a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in the one action; and a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.'
[75] Uniform Single Publication Act 1952; Section 577A of the 2nd Restatement of Torts (197).
[76] *Firth* v *State* 775 N.E.2d 463 (N.Y. 2002).
[77] Ibid at 465.
[78] Ibid at 466.

revising content as more facts developed, as such alteration could give rise to a new publication and therefore a restarted statutory period. The *Firth* case has been cited approvingly by virtually every other court to consider the issue.'[79] The same approach followed in an Arizona case, in which no distinction was made between print and online publications of the same story.[80] To date, the United States pursues the legal position that, as a principle, the plaintiff in a libel suit against a publisher has only one claim for each mass publication, as laid out in the *Keeton v. Hustler Magazine, Inc*., case.[81]

Guided by the provisions of the United States, the United Kingdom, through the statutory intervention under the Defamation Act of 2013, has since amended the common law principle to adopt the single publication rule. This permanently buried the multiple publication rule and resurrected the single publication rule under Section 8 of the defamation Act. The English legislators were mindful of the inherent dangers the internet carried and provided amendments under section 8 of the Act which provided that:

> **"**where a person publishes a statement to the public, the publication will be deemed to include any subsequent publications of substantially the same statement (unless the manner of publication is materially different). This 'single publication' rule aims to protect defendants from claims made long after the initial publication and replaces the previous 'multiple publication' rule which stated that each publication restarted the limitation period."[82]

In 1849 an English court established the multiple publication rule and held that each delivery of a libellous statement to a third party constitutes a new publication of the libel, which in turn gives rise to a new cause of action.[83] The rule had been authoritatively laid down in the *Duke of Brunswick v. Harme*rn case.[84] The original rule in the *Duke of Brunswick's* case, *supra*, was

[79] *Nationwide Bi-Weekly Admin., Inc.* v. *Belo Corp.,* 512 F.3d 137, 144 (5th Cir. 2007) wherein the court held that "Every court to consider the issue after Firth has followed suit in holding that the single publication rule applies to information widely available on the Internet."
[80] *Simon* v *Arizona Board of Regents* Med L Rep 1240 (Ariz Super Ct 1999). The court found that the single publication rule applies to website publications. Moreover, it found that the distribution of the same story in the print edition of the newspaper did not constitute republication. Courts have only begun to look at how to apply the single publication rule to libel on the Web. In 1999, Arizona became the first state to extend the single publication rule to the Web.
[81] *Keeton* v *Hustler Magazine, Inc*., 465 U.S. 770 (U.S. 1984), as to any single publication: (1) only one action for damages can be maintained; (2) all damages suffered in all jurisdictions can be recovered in the one action; and (3) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.
[82] Section 8 of the Defamation Act, 2013.
[83] Kumar (n5 above).
[84] *Duke of Brunswick* v *Harmer*, [1849] 14 Q.B. 185 permitting a cause of action for each copy of a newspaper that was printed with a libelous statement.

based on a now unpersuasive premise that the purchase of a newspaper almost two decades after its original publication was sufficient to found a claim for libel. Under the English libel law, this logic was equally followed in the leading modern case of *Loutchansky* v *Times Newspapers Ltd* where the court held that:

> "It is a well-established principle of the English law of defamation that each individual publication of a libel gives rise to a separate cause of action, subject to its own limitation period." [85]

This approach was legally unsustainable because of the internet's long reach, where defamatory material was accessed via a website could be re-published and the one-year limitation period would re-start. Again multiple publication rule encourages 'Libel tourism' which raises insoluble issues, based on fundamental differences as to the appropriate balance between freedom of speech and the protection of reputation and the applicable principles governing jurisdiction. It has also created jurisdictional tensions between states, as manifested in the tensions in Anglo-American relations. With the application of the multiple publication rule, some jurisdictions will prove more attractive for litigants.[86]

5. Conclusion

Undoubtedly, there is need for law to adjust in line with the digital technological advancements that have created enormous tension within the defamation law framework. These adjustments primarily relate to adjudications processes to define publication, jurisdiction, and liability for republication using technical technological features on the social media platforms. While there is an increasing body of precedents to help define the same, there isn't as yet, a delineated coherent legal framework to deal with digital era related liability. This may result in different approaches in adjudication processes resulting in different incompatible legal outcomes. A case has been made for the authoritative common law pronouncement on the applicability of the single publication rule. The digital era has an obvious temptation to attract multiple claims over the same matter, with different defendants that could have been consolidated in a single claim being pursued separately for damages. This is possible because the internet offers different technological features that can easily manipulate publications creating new meanings out of original publications. Tshere is a chance for slight deviation from an original message that could potentially create a new cause of action. As such, common law has to pave the way for new principles that create a coherent and certain legal framework. Indisputably, the multiple-publication rule promotes libel-tourism, threatens press freedom, and creates endless litigation that could be a huge burden in the administrative of justice with backlogs.

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[85] *Loutchansky* v *Times Newspapers Ltd* ([2002] QB 783).
[86] D Rolph 'Splendid Isolation? Australia as a Destination for 'Libel Tourism' (2013) Vol 19 *Australian International Law Journal* 79-95.