

LAW WARP

Libel online is governed by arcane legislation that even pre-dates the invention of the light bulb. It's time for reform, says **Alastair Brett**

'Spotting change in the law is like watching a glacier move!' Never was a saying more apt than in our electronic age and in connection with Internet law generally. The Internet has radically changed the law of defamation as newspapers can now be sued in almost any jurisdiction around the globe. Libel tourism has as a result become a canker in our midst and London 'the libel capital of the western world'.

The tragedy is that the government has picked up almost every other vote-catching topic and legislated on it, but when it comes to electronic publications and the Internet it has failed pitifully to do anything about our arcane and Dickensian law in the twenty-first century.

Electronic publications are still governed by the weird and wonderful case of the *Duke of Brunswick v. Harmer* (1849). This means that there is no limitation period for any article held on an electronic database, which can be accessed by a member of the public years after it was first published in hard copy.

The facts of the Duke of Brunswick case are worth recounting for their sheer eccentricity. The exiled Duke of Brunswick and Luneberg heard in

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1848 that he had been defamed in the London newspaper the *Weekly Dispatch* in 1830. Not happy with what had been said about him some 17 years previously, he wanted to sue, but the six-year limitation period had long since expired and he was left without a cause of action. So the duke then sent out a manservant to find a copy of the newspaper. The servant duly found one at the British Museum and a copy was picked up from the *Dispatch's* publisher, Mr Harmer.

Armed with a copy of the original article, the duke then sued Harmer for libel, on the grounds that Harmer had republished the defamatory material to the duke's servant. At first instance, the duke was awarded damages of £500 – now nearer to £50,000 – and he obtained a judgment, which meant that Harmer's act of providing a single copy of the original offending article constituted a separate and *new* publication giving rise to a new cause of action which was not time barred, unlike the original publication in 1830.

This 1849 case still governs electronic publications in 2009 even though it was decided some 30 years before electric light bulbs were even invented. In short, each hit on an electronic website constitutes a new publication and the limitation period starts to run all over again (this is sometimes referred to as the 'continuing' or 'multiple publication rule').

With hard copy limitation periods down to one year since the 1996 Defamation Act, UK newspapers and television stations are aghast that the government has done nothing to correct this extraordinary anomaly in relation to electronic publications and bring in a single publication rule as in America. Indeed, money brokers, policemen and other key groups are increasingly complaining, years after the hard copy of an article first appeared, because the article can still be accessed by a Google search as it is easily retrieved from an electronic archive. If the gap between the original hard copy publication (over which there was no complaint) and the more recent electronic search is sufficiently wide, the journalist may well have left the newspaper, notes will have been lost and memories will have faded.

In 2002, the Law Commission recommended that the rule laid down in *Duke of Brunswick* needed review. By 2004, the Ministry of Justice was saying that it was looking into electronic publication and the multiple publication rule. In 2005, the Court of Appeal in *Dow Jones and Co Inc v. Yousef Abdul Latif Jameel* made disapproving noises about *Brunswick* and indicated that going out to buy an old copy of the newspaper would almost certainly now amount to an abuse of process. But while our own judges may

have had doubts about the efficacy of this nineteenth-century precedent, the government was fighting Times Newspapers' attempt to introduce a single publication rule and overturn the rule in *Brunswick* in the European Court of Human Rights (ECtHR).

In March, the Strasbourg Court ruled in *The Times* case and, to the newspaper's horror and amazement, found that on the facts of the *Loutchansky* case (the newspaper had been sued outside the one year limitation period on the archival electronic version of the original article), there was no interference with the media's right to freedom of expression if there was no effective limitation period for electronic publications. The Court simply failed to come to grips with the 'multiple or continuing publication rule' and the anomaly of never ending liability for electronic publications. It did however find that 'libel proceedings brought against a newspaper after a significant lapse of time may well, in the absence of exceptional circumstances, give rise to a disproportionate interference with press freedom under Article 10'. The ECtHR also recognised the public interest in press freedom and the press's primary function as a 'public watchdog' and the value of maintaining archives and making them available to the public. To those who have watched the ECtHR over the last 30 years this judgment was a pale shadow of the great judgments as in *Thalidomide*, *Spycatcher* and *Lingens*.

While *The Times* may have lost this particular battle, the government's spectacular failure to review electronic publications as recommended by the Law Commission in 2002, or heed the warnings of the Court of Appeal in *Jameel*, has left *The Times* with no option but to write to Jack Straw, the justice secretary, and call for the introduction of a single publication rule as in many US states. This means that the act of loading the article up onto the newspaper's website is the act of publication and the limitation period starts to run from that point, *not* when a member of the public accesses the article, which may be many years since publication.

At almost the same time that the editor of *The Times* was writing to Jack Straw, the justice secretary was writing to the newspaper's legal manager following the *Press Gazette's* conference in February, pointing out that he was now considering the ECtHR judgment in the *Loutchansky* case and would be 'assessing in the light of that how quickly a consultation paper on the "multiple publication rule" and the liability of Internet service providers can be published by the government'. It is to be hoped that this can be rolled out quickly given the extraordinary lack of movement by the government over the last four or five years.



Credit: Harley Schwadron/CartoonStock

One quick and simple remedy, if the government is not enamoured of a US style 'single publication rule', is to give all electronic archive publications that can easily be accessed and have been online for more than a year an automatic 'archive', qualified privilege defence. Thus an article that had *not* been sued over in the first year after hard copy publication could only be the subject of litigation if the publisher refused or neglected to 'publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction' under section 15 of the current Defamation Act. This would enable those who had been subject to highly critical articles to have them reasonably updated if facts had changed but they were still being tarred with an age-old brush. John Whittingdale's select committee inquiry might consider this and insert a clause into the Civil Law Reform Bill due to be published this year.

And if the government is going to look at these issues, media lawyers will want to remind civil servants that the consultation paper should undoubtedly *also* consider liability for postings on newspapers' comment boxes, where the newspaper simply provides a bulletin board or forum for discussion and comment. Whether websites owners are liable for everything and anything posted on their website is an unresolved question. Is some pre-moderation of postings better than nothing or is it better to have no pre-moderation at all to try to become a non-participating conduit with no knowledge of what is or is not being posted on a website? In short, what does 'taking reasonable care' actually mean under section 1 of the Defamation Act?

The analogy of the naughty schoolboy writing something on the blackboard at school springs to mind. No one in their right mind would hold the school liable for a really naughty message on a fifth-form blackboard. The boy writing the message is open to serious punishment, but the moment a teacher sees it and it is rubbed off the board that should be the end of the matter. Newspapers believe that should be the law for bulletin boards and comment boxes as well, so that when someone complains about something that is manifestly defamatory, if the newspaper takes it down immediately it will not attract liability. The person posting it will still be subject to the full rigours of the law.

Another burning question is, does posting a hyperlink to another website, and what may be a defamatory article on that website, give rise to liability under the case of *Hird v. Wood* (1894)? Another wonderfully antique case. There a man sat all day smoking his pipe, continuously pointing to a defamatory placard on the side of the road. He may not have written what was on the placard, but he certainly attracted the attention of all the passers-by and was held liable for the publication.

This problem is particularly germane to articles in foreign publications where the law might be much more defendant friendly as in the United States with its First Amendment. Foreign publications, after all, will have no interest in our law of contempt and what may be the publication of highly prejudicial material to an up-and-coming criminal trial in this country. But the moment a newspaper in this jurisdiction posts a link to a foreign newspaper, with an article which is highly prejudicial to a forthcoming criminal trial, it could find itself at the wrong end of a nasty contempt action or wasted costs order under the Courts Act 2003 and subsequent regulations.

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At present, no one can satisfactorily say if putting a hyperlink to another newspaper will leave the domestic newspaper susceptible to a libel action or prosecution for contempt.

There is no English case on the point. Collins (*The Law of Defamation and the Internet* 2nd edition) suggests that including a hyperlink on a web page is enough to attract liability for the content of the linked site. However, in Canada, it has been held that the publication of a webpage address in a *hard copy* newsletter is insufficient to found liability for publication of the contents of the webpage (*Carter v. BC Federation of Foster Parents Association* [2005] BCCA 398). More recently (*Crookes v. Wikimedia Foundation Inc* [2008] BCSC 1424) it has been held by the British Columbia Supreme Court that the insertion of a hyperlink to a defamatory webpage is also, without more, insufficient to found liability.

In *Bunt v. Tilley* [2006] EWHC 407 it was said that a defendant is not liable unless 'knowingly involved in the process of publication of the relevant words'. This, however, has been qualified by one judge saying that a defendant does not have to be aware of the defamatory content before they can become liable. What is essential is 'a degree of awareness or at least an assumption of general responsibility'.

Electronic and Internet law is in a wondrous mess, and anything but 'proportionate', 'necessary' or 'certain', to use three yard sticks by which all laws should be judged. With libel tourism increasingly problematic, because of cross-border publications, the government must step in and do something. But when one calls on the government to set up an international conference to discuss a UN or EC Convention on Internet law there is nothing but howls of despair and remarks like 'it cannot be done'. But what is to stop this government giving a lead and calling for an international convention on civil liability for cross-border Internet publications? A conference should be set up to discuss the following subjects:

A common 'take down' policy which would avoid civil liability if removal was within hours of a complaint being made

An agreed 'single publication' rule for all electronic publications on the Internet

A common limitation period for defamatory material on the Internet

Agreed criteria on what would constitute a 'substantial publication', a prerequisite to a cause of action based on Internet hits in a jurisdiction outside the claimant's own jurisdiction

Other criteria before a civil action claiming damages and other relief could be mounted

Should companies and individuals be treated in the same way or should there be special rules for companies and any relief they might seek?

The role of arbitration in international disputes, particularly Internet publications

'Public interest' defences in an international context and could one find a common denominator in all jurisdictions?

Having started with an age-old saying I might finish with another – 'nothing ventured, nothing gained'. The government might remember this in trying to take a lead on law reform in the twenty-first century. □

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