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## **Horse and Buggy on the Electronic Highway: Transnational Internet Defamation in the High Court of Australia**

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*In Dow Jones & Co Inc v Gutnick, the High Court of Australia recently rejected an appeal to reformulate the common law multiple publication rule and the traditional view of the place of publication in the context of transnational Internet defamation. Instead the Court, applying orthodox conflict of laws doctrine and traditional torts theory, held that defamation occurs in every jurisdiction and on each occasion that the alleged defamatory material is "downloaded". This paper critiques the High Court's decision and concludes that a collective failure of will and imagination on the part of courts, legislatures, law reform bodies and international organisations to deal with the difficult issues of transnational Internet defamation is restricting the potential of the Internet as a truly revolutionary medium for publication and communication.*

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The English Law Commission recently released its preliminary investigation into the impact of defamation law on Internet communications.<sup>1</sup> At almost the same time, the High Court of Australia dismissed an appeal by international publishers Dow Jones against a decision of Hedigan J<sup>2</sup> that allowed a Melbourne businessman to pursue defamation proceedings in Victoria over an Internet publication via a server based in the United States.<sup>3</sup> With the exponential growth of Internet publications it is inevitable that a New Zealand court will soon have to decide similar issues.

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<sup>1</sup> Law Commission, *Defamation and the Internet: A Preliminary Investigation*, Scoping Study No2, December 2002 <[www.lawcom.gov.uk/files/defamation2.pdf](http://www.lawcom.gov.uk/files/defamation2.pdf)> (at 25 March 2003).

<sup>2</sup> *Gutnick v Dow Jones & Co Inc* [2001] VSC 305. For comment thereon, see D Rolph "The Message, Not the Medium: Defamation, Publication and the Internet in *Dow Jones & Co Inc v Gutnick*" (2002) 24 Sydney LR 262.

<sup>3</sup> *Dow Jones & Co Inc v Gutnick* (2002) 194 ALR 433, [2002] HCA 56.

## 1 *DOW JONES & CO INC V GUTNICK: THE FACTS*

Dow Jones, the appellant, is a large corporation listed on the New York Stock Exchange with its headquarters in New York. It is the publisher of the *Wall Street Journal*, a daily financial newspaper, and *Barron's*, a weekly magazine, also concerned with financial matters. It also operates a subscription news site on the World Wide Web where paid-up subscribers can access *Barron's*.<sup>4</sup> The web server is based in New Jersey. Mr Gutnick, who lives in Victoria and operates his business there, although he also has other business interests in the United States and elsewhere, objected to an article in the October 2000 edition of *Barron's* which he alleged wrongly defamed him by asserting that he was a tax evader and money launderer. He brought an action in the Supreme Court of Victoria seeking damages, but only in respect of the damage to his reputation in Victoria. His decision to limit his claim in this way significantly narrowed the issues that the Court had to address, as well as limiting the usefulness of its decision as a source of guidance for future courts.

Of the 550,000 subscribers to the website, 1,700 of those were in Australia. Dow Jones sought to have the claim set aside or permanently stayed on the basis that the article was not published in Victoria, and that the plaintiff had no cause of action in Internet defamation in Victoria. Dow Jones argued that the article was published in New Jersey where it was uploaded onto the servers which it maintained there, that no act was therefore committed in Victoria to justify service of proceedings out of the jurisdiction without leave of the Court, and that Victoria was *forum non conveniens*. Hedigan J rejected all of these arguments and dismissed the application. In his Honour's opinion

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<sup>4</sup> See <<http://www.barrons.com>> (at 25 March 2003).

the Victorian Court had jurisdiction to hear the case.<sup>5</sup> Dow Jones applied for leave to the Court of Appeal of Victoria. That Court also rejected its arguments. In its opinion, the fact that the authorities established that defamatory material is published at the time and in the place where it is made manifest, in a form capable of being comprehended by a third party, was sufficient to dispose of the case.<sup>6</sup>

What constituted publication and locating where publication occurred were the principal issues debated in the High Court of Australia. These two issues were, in turn, crucial to determining the three closely inter-related conflicts questions before the High Court:<sup>7</sup>

- (a) whether the Supreme Court of Victoria had jurisdiction, given that the appellant was a US corporation;
- (b) which law governed the substantive issues in the case; and
- (c) if the Supreme Court of Victoria was vested with jurisdiction, whether it ought to decline to exercise it on the ground of forum non conveniens.

The thrust of Dow Jones' arguments was that the common law of defamation in Australia, as it related to Internet defamation, should be reformulated. In particular, the High Court was urged to reconsider the common law rule that every publication of defamatory material constitutes a new and separate tort.

## 2 THE TORT OF DEFAMATION

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<sup>5</sup> [2001] VSC 305 at [130]: "The most significant of the features favouring a Victorian jurisdiction is that the proceeding has been commenced by a Victorian resident conducting his business and social affairs in this State in respect of a defamatory publication published in this State, suing only upon publication in this State and disclaiming any form of damages in any other place."

<sup>6</sup> *Dow Jones & Co Inc v Gutnick* [2001] VSCA 249 at [8].

<sup>7</sup> See [2002] HCA 56 at [69] per Kirby J.

## 2.1 Place of Publication

Dow Jones sought to persuade the Court that, for the purposes of locating the tort of Internet defamation, publication of the defamatory material occurred in the United States where the last significant element of publication occurred. In the majority judgment of the High Court, Gleeson CJ, McHugh, Gummow and Hayne JJ<sup>8</sup> saw the issue as determining where the tort of defamation was committed, in circumstances where the place in which the publisher acted, and the place in which the publication was presented in comprehensible form, were in two different jurisdictions. Their Honours analysed publication in this situation as a bilateral act in which the publisher made the publication available, and a third party had it available for his or her comprehension.<sup>9</sup> Much of the focus of Dow Jones's arguments before Hedigan J had concentrated on the technology involved in Internet publication and the active role played by the reader in extracting the article from the Dow Jones Web server. In the High Court these arguments were accorded lesser weight and greater prominence was given to the policy arguments based on the desirability of there being a single law governing the conduct of those who made material available on the World Wide Web. Unfortunately, these received only cursory attention in the majority judgment, although Kirby J gave these policy arguments careful consideration in a separate judgment.

Defamation is often called a plaintiff's tort. All that the plaintiff need do is prove that defamatory words that identify her in some way have been published to a third party.<sup>10</sup> It is not necessary for the plaintiff to prove that

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<sup>8</sup> All of the other three judges came to the same conclusion as the majority. Gaudron and Callinan JJ delivered brief separate judgments that added nothing to the majority judgment. Kirby J, however, delivered an insightful separate judgment that analysed the issues in depth.

<sup>9</sup> [2002] HCA 56 at [26].

<sup>10</sup> In the words of Isaacs J in *Webb v Bloch* (1928) 41 CLR 331, 363: "To publish a libel is to convey by some means to the mind of another the defamatory sense embodied in the vehicle."

she has suffered damage, as damage is presumed.<sup>11</sup>As the essence of the tort is damage to reputation, ie, the estimation in which others hold the plaintiff,<sup>12</sup> publication requires that the defamatory matter be in a form that is comprehended by the third party.<sup>13</sup> If, for example, the words are contained in a letter written in a foreign language that the recipient does not understand, there is no publication.<sup>14</sup>

This was the difficulty that Dow Jones faced in its argument that the Internet tort was complete at the point that the information was written, committed to digital form and uploaded or otherwise processed to its server in New Jersey. At that point the information was not in a form that was comprehensible by anyone. It only became comprehensible once it had been downloaded from the server to the subscriber's computer in Victoria. Dow Jones was attempting to persuade the Court to move away from the well-known and well-established elements of the tort. The strategic reasons for this are obvious. If the tort were held to be located in New Jersey, Dow Jones would be able to take advantage of a governing law that favoured freedom of expression to a greater degree than the law of Victoria. The Court refused to do so, on the basis that the tort of defamation is concerned to protect reputation. Hence, what is important is not where the defamatory material is composed or sent from, but where the publication is read or received.

Mr Gutnick was suing solely for damage to his reputation in Victoria as a consequence of the publication that had occurred in that State. He argued that the defamation was committed in Victoria. It was there that the damage to his

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<sup>11</sup> *Ratcliffe v Evans* [1892] 2 QB 524, 529 per Bowen LJ.

<sup>12</sup> *Parmiter v Coupland* (1840) 151 ER 340, 342 per Parke B.

<sup>13</sup> *Pullman v Hill & Co* [1891] 1 QB 524, 527.

<sup>14</sup> *Fleetwood v Curley* (1619) 80 ER 413, 414.

reputation occurred, for it was there that the publication of which he complained was comprehensible by readers. Yet the article had been read in many other places, and it is trite law that every separate publication constitutes a separate cause of action. The issues raised by Dow Jones might have received greater consideration by the majority had Mr Gutnick not been careful to give the Court an assurance that he would not sue elsewhere.

## 2.2 Every Publication Constitutes a New and Separate Tort

The majority of the High Court considered that it was the bilateral nature of the publication that lay behind the common law multiple publication rule that each communication of defamatory matter founds a separate cause of action.<sup>15</sup> Application of the rule means that in the case of a newspaper there is a publication and a new cause of action on each occasion that an article is read.<sup>16</sup> Although this rule has an ancient pedigree,<sup>17</sup> it has been applied to Internet publications.<sup>18</sup> It was described in 1953 by Prosser,<sup>19</sup> who was concerned about its application in respect of interstate communications, and

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<sup>15</sup> [2002] HCA 56 at [27].

<sup>16</sup> *McLean v David Syme & Co* (1970) 72 SR (NSW) 513, 520 and 528; *Louchansky v Times Newspapers Ltd (No 2)* [2002] 1 All ER 652.

<sup>17</sup> This rule can be traced back to *Duke of Brunswick v Harmer* (1849) 14 QB 185. Here the original article defaming the Duke was published in 1830 at a time when the limitation period for libel was 6 years. Seventeen years later one copy of the article was purchased, by an agent of the Duke's, from the paper's office and another was obtained from the British Museum. When an action was brought by the Duke in respect of the later copies, the defendant sought to argue that the action was statute barred. He was not successful. The Court of Queen's Bench held that each copy of the newspaper constituted a separate publication in respect of which the Duke could sue. The case was approved in *Berezovsky v Michaels* [2002] All ER 986, 993 per Lord Steyn (with whom Lord Hobhouse and Lord Nolan agreed), 1005 per Lord Hoffman, and 1007 per Lord Hope.

<sup>18</sup> See *Godfrey v Demon Internet* [2001] QB 201 and *Louchansky v Times Newspapers Ltd (No 2)* [2002] 1 All ER 652.

<sup>19</sup> WL Prosser "Interstate Publication" (1953) 51 Mich LR 959.

before the Internet was conceived,<sup>20</sup> as one that might be “appropriate to small communities and limited circulations” but which was “potentially disastrous today”.<sup>21</sup> To moderate the effect of this multiple publication rule the US courts first developed a doctrine whereby the entire edition of a newspaper<sup>22</sup> and later a book<sup>23</sup> were to be regarded as a single publication for which only one cause of action could lie within the state. In doing so the rule was justified on the basis that it gave effect to the purposes of limitation statutes. The rule was later described as follows:<sup>24</sup>

“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
- (c) 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.”

Dow Jones urged adoption of the US single publication rule for dissemination of articles on the Internet. Essentially, Dow Jones sought to persuade the Court that, at least in respect of publications on the Internet, it should consciously reformulate the common law and treat defamation as a global tort, rather than multiple wrongs committed with each and every single publication and every Internet hit.<sup>25</sup>

Dow Jones’ arguments did not receive a sympathetic hearing from the majority of the Court. Although the majority accepted that there were

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<sup>20</sup> The prototype of the Internet was not designed and developed until 1969 under contract to an agency of the US Department of Defense, the Advanced Research Projects Agency.

<sup>21</sup> WL Prosser “Interstate Publication” (1953) 51 Mich LR 959, 961.

<sup>22</sup> *Julian v Kansas City Star Co*, 107 SW 496 (1908) (SC, Missouri).

<sup>23</sup> *Gregoire v G P Putnam’s Sons*, 81 NE (2d) 45 (1948) (NYCA).

<sup>24</sup> *Restatement (Second) of Torts* § 577A(4) (1977).

<sup>25</sup> This argument had not been successful in *Berezovsky v Michaels* [2000] 2 All ER 986.

problems inherent in the multiple publication rule, it considered that the law had grappled with these same problems ever since newspapers and magazines had been distributed to large numbers of people over wide geographic areas. And, in a somewhat disingenuous statement, the majority doubted that the reach of the World Wide Web was uniquely broad given the “very wide dissemination of radio and television”.<sup>26</sup> In its opinion those who used the Internet as a medium to disseminate information did so knowing the potential reach of the information posted there, and hence should bear the risk of geographically unbounded liability.

Kirby J, however, was much more sympathetic to the argument that the Internet posed unique difficulties, and might justify judicial innovation, although in the end he had to acknowledge the limited ability of the Court to change the law:<sup>26</sup>

“The genius of the common law derives from its capacity to adapt the principles of past decisions, by analogical reasoning, to the resolution of entirely new and unforeseen problems. When the new problem is as novel, complex and global as that presented by the Internet in this appeal, a greater sense of legal imagination may be required than is ordinarily called for. Yet the question remains whether it can be provided, conformably with established law and with the limited functions of a court under the Australian constitution to develop and re-express the law.”

Kirby J recognised that the Internet was not simply an extension of past communication technology, but was instead revolutionary technology not previously contemplated. Unlike his fellow judges, he accepted that the Internet was not simply another medium of human communication, but

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<sup>26</sup> [2002] HCA 56 at [39]. See also L Collins (ed), *Dicey and Morris Conflict of Laws*, 13th ed, Sweet & Maxwell, London, 2000, vol 2, p 1568: “[D]efamation over the internet is not, perhaps, conceptually different from defamation by other media: rather it merely increases the number of countries where the offending material can be accessed.”

<sup>26</sup> *Ibid* at [92].

rather represented a quantum leap in the distribution of information.<sup>27</sup> Whilst it was a medium that overwhelmingly benefited humanity this did not mean that the “human right” to the protection of the law for reputation and honour should not also be defended. And, although the adoption of a single publication rule might favour the jurisdiction of the courts and the law of the United States on occasion, he observed that this would not always be the case.<sup>28</sup>

### 3 JURISDICTION

The Supreme Court (General Civil Procedure) Rules 1996 (Vic) allow for service of the originating process out of the jurisdiction without leave of the Court where the “proceeding is founded on a tort committed within Victoria” (r 7.01(1)(i)), or where “the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring” (r 7.01(1)(j)). Dow Jones argued that the Supreme Court of Victoria was not vested with jurisdiction under para (i) because the alleged tort had in fact been committed in New Jersey rather than “within Victoria”. The more formidable obstacle of para (j) was met with the rather strained argument that it should be construed narrowly as applying only where the cause of action was characterised as being based on an alleged foreign tort, so that it did not overlap with para (i).

The Court rightly rejected these arguments, holding that the Victorian Court had “long-arm” jurisdiction under para (j). Kirby J considered this issue

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<sup>27</sup> Ibid at [164].

<sup>28</sup> Cf Callinan J’s rather hysterical conclusion (ibid at [200]) that the adoption of the single publication rule would impose “an American legal hegemony in relation to Internet publications”, which echoes similar views expressed by Hedigan J and by D Rolph, “The Message, Not the Medium: Defamation, Publication and the Internet in *Dow Jones & Co Inc v Gutnick*” (2002) 24 Sydney LR 262, 273-274. As D Harvey (“Casenote – *Dow Jones v Gutnik* [sic]” (2003) 2 Tech Law Forum 5) rightly points out, such a turn of judicial phrase is unfortunate and inappropriate in the context of a conflict of laws analysis.

in detail, holding that the only characterisation question was whether the claim was “in respect of damage suffered wholly or partly in Victoria”. Once this was established, the only further question was whether that damage had been caused by a tort. On this interpretation, the place of the occurrence of the tort was irrelevant.<sup>29</sup> Given that it had held that there was jurisdiction under para (j), the High Court found it unnecessary to consider whether para (i) also provided a basis for jurisdiction.<sup>30</sup>

The wording of the Victorian Rules therefore effectively allowed the High Court to sidestep the issue of locating the tort for the purpose of vesting jurisdiction. If the same fact situation as in *Gutnick* were to come before a New Zealand court, however, this question could not be so easily avoided. The equivalent New Zealand provision, r 219(a) of the High Court Rules, allows for service out of the jurisdiction without leave of the Court in transnational tort litigation where “any act or omission in respect of which damages are claimed was done or occurred in New Zealand”. In accordance with the “substance of the tort” test laid down by the Privy Council in *Distillers Co (Biochemicals) Ltd v Thompson*,<sup>31</sup> the requirement is that the act or omission “on the part of the defendant which gives the plaintiff his cause of complaint must have occurred within the jurisdiction”. With regard to defamation, the better view is that the wording of r 219(a) would require the publication of the offending statement to have taken place in New Zealand.<sup>32</sup>

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<sup>29</sup> Ibid at [100].

<sup>30</sup> Ibid at [47] and [100].

<sup>31</sup> [1971] AC 458, 467 (PC).

<sup>32</sup> There is contrary authority to the effect that the suffering of damage in New Zealand can, in itself and without more, found jurisdiction under r 219(a): see *Adastra Aviation Ltd v Airparts (NZ) Ltd* [1964] NZLR 393, 395; *Longbeach Holdings Ltd v Bhanabai & Co Ltd* [1994] 2 NZLR 28, 34 (CA); *Biddulph v Wyeth Australia Pty Ltd* [1994] 3 NZLR 49. However, these cases should be treated with caution. First, their reasoning that the suffering of damage in itself is sufficient because “it is that suffering of damage which is the foundation of tortious liability”, would not seem to apply to defamation, where *publication* has always been seen as the gravamen of the tort. Secondly, the reasoning in

Where, as in *Gutnick*, the place of publication is disputed, further issues arise. How does one decide which act constitutes publication and, more importantly, which law – the *lex fori* or the *lex causae* – applies to determine this jurisdictional question? In *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc*,<sup>33</sup> the English Court of Appeal reviewed the case law in this area and reached two conclusions:

“First, in deciding whether an alleged tort has been committed in this country or in some other country, our courts will look back over the series of events constituting it and ask themselves ‘Where in substance did this cause of action arise?’ Secondly, in answering this question, the courts will apply exclusively [the *lex fori*].”

On this approach, and on the assumption that a New Zealand court would agree with the High Court’s refusal to reformulate the common law definition of publication and the multiple publication rule, the court would probably reach the same conclusion as the High Court did in *Gutnick*. Jurisdiction would vest under r 219(a) because publication of the alleged defamatory material had occurred in New Zealand.<sup>34</sup>

#### 4 CHOICE OF LAW

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the above cases is difficult to reconcile with the plain meaning of r 209(a) (see *Baxter v RMC Group plc* [2003] 1 NZLR 304, 314, 316) and seems fundamentally illogical.

<sup>33</sup> [1990] 1 QB 391, 443. See generally R Fentiman, “Tort – Jurisdiction or Choice of Law?” (1989) 44 CLJ 191; J Lee, “International Tort Litigation: Revisiting Order 11 Rule 1(f)” [2000] Singapore J of Legal Studies 136.

<sup>34</sup> See *Bata v Bata* [1948] WN 366; *Lee v Wilson and Mackinnon* (1934) 51 CLR 276; and cf the analogous cases of *Diamond v Bank of London & Montreal Ltd* [1979] QB 333 and *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey* [1984] 2 Lloyd’s Rep 91. See also *Baxter v RMC Group plc* [2003] 1 NZLR 304, 317-318.

In *John Pfeiffer Pty Ltd v Rogerson*<sup>35</sup> and *Regie National des Usines Renault SA v Zhang*<sup>36</sup> the High Court of Australia departed from the traditional “double actionability” rule in *Phillips v Eyre*<sup>37</sup> in respect of intranational and transnational torts, in favour of an application of the law of the place of the commission of the wrong (*lex loci delicti commissi*) to all such torts. By contrast, New Zealand continues to apply the double actionability rule in *Phillips v Eyre* to transnational tort litigation, with the “flexible exceptions” associated with that rule.<sup>38</sup> On both approaches, locating the place of commission of the wrong is crucial for choice of law purposes.

The High Court in *Gutnick* acknowledged that locating the place of the wrong was not always easy, and that adopting a single locating rule would inevitably pay “insufficient regard to the different kinds of tortious claims that may be made”.<sup>39</sup> The majority analysed the choice of law issue by reference to jurisdiction and *forum non conveniens* decisions and on the basis of the same test, namely: “where in substance did this cause of action arise?”<sup>40</sup> Their Honours held that defamation will generally be governed by the law of the place where the damage to reputation occurs, and that this will ordinarily occur where “the material which is alleged to be defamatory is available in comprehensible form assuming ... that the person defamed has in that place a reputation which is thereby damaged”.<sup>41</sup> Given their refusal to reformulate

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<sup>35</sup> (2000) 203 CLR 503.

<sup>36</sup> (2002) 76 ALJR 551.

<sup>37</sup> [1870] LR 6 QB 1.

<sup>38</sup> See *Boys v Chaplin* [1971] AC 356 (HL) and *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 194 (PC). For the New Zealand courts’ (mis)interpretation and application of *Red Sea*, see *Starlink Navigation Ltd v The Ship “Seven Pioneer”* [2001] 2 Lloyd’s Rep 57; *Baxter v RMC Group plc* [2003] 1 NZLR 304.

<sup>39</sup> [2002] HCA 56 at [43].

<sup>40</sup> *Ibid*, citing *Jackson v Spittall* (1870) LR 5 CP 542; *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

<sup>41</sup> *Ibid* at [44].

the substantive elements of the tort of defamation, the majority inevitably concluded that the place of the wrong was Victoria.

With respect, the majority's discussion of choice of law is not a model of clarity, largely because the Court chose to avoid the issue of the place of the wrong in the context of jurisdiction. A more clearly structured approach to such matters is found in the two-stage analysis advocated by Slade LJ in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc.*<sup>42</sup> In terms of this approach, the court should first ask, by reference to the *lex fori* and the "substance of the tort" test in *Distillers*, whether the tort has been committed within or outside the jurisdiction. If, on the application of this test, it is found that the tort is "in substance" committed within the jurisdiction, any choice of law issue falls away – the tort is characterised as a domestic tort and the *lex fori* automatically determines questions of substantive liability. However, if the tort is found in substance to have been committed outside the jurisdiction, then and only then does the issue of choice of law arise.

Kirby J teased out the issues of jurisdiction, *forum non conveniens* and choice of law more carefully.<sup>43</sup> His Honour was not persuaded that the process of identifying and characterising the place of the wrong need be the same for jurisdiction and choice of law.<sup>44</sup> He was of the view that the test set out in jurisdiction and *forum non conveniens* cases like *Distillers* and *Voth v Manildra Flour Mills Pty Ltd*<sup>45</sup> was not necessarily appropriate for determining

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<sup>42</sup> [1990] 1 QB 391, 446.

<sup>43</sup> [2002] HCA 56 at [105]-[110] and [139]-[155].

<sup>44</sup> *Ibid* at [145], citing *David Syme & Co Ltd v Grey* (1992) 38 FCR 303, 314; but see *Armagas Ltd v Mundogas SA* [1985] 1 Lloyd's Rep 1, 24; *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, 446-447; J Lee, "International Tort Litigation: Revisiting Order 11 Rule 1(F)" [2000] Singapore J of Legal Studies 136, 140: "it would make more sense for the *locus delicti* to point to the same place identified by the substance of the tort test."

<sup>45</sup> (1990) 171 CLR 538.

the applicable law. In addition, his Honour noted that *Distillers* and *Voth*, as negligence cases, were not necessarily helpful in determining choice of law in defamation proceedings. However, Kirby J agreed with the majority's conclusion that, in respect of claims based on defamation:<sup>46</sup>

“the publication of the material which damages the reputation of the plaintiff is essential. Merely creating and making the material available is insufficient. The material has to be accessed or communicated in a jurisdiction where the plaintiff has a reputation. That will usually be the place where the plaintiff is resident.”

The High Court therefore held that the applicable defamation law was the law of Victoria, rather than that of New Jersey or New York.

## 5 FORUM NON CONVENIENS

The High Court finally, and unsurprisingly, refused to stay proceedings on the ground that the Supreme Court of Victoria was forum non conveniens. In the majority judgment their Honours, applying the test in *Voth*, concluded that the Supreme Court of Victoria was not a “clearly inappropriate forum”, not merely because the substantive issues were governed by the law of Victoria as the *lex loci delicti*, but more importantly because Mr Gutnick had undertaken to limit his cause of action to Victoria.<sup>47</sup> Kirby J reiterated his preference for the House of Lords' formulation of the forum non conveniens doctrine in *Spiliada Maritime Corp v Cansulex*,<sup>48</sup> which has been accepted in most Commonwealth jurisdictions, including New Zealand, and repeated his

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<sup>46</sup> [2002] HCA 56 at [151].

<sup>47</sup> [2002] HCA 56 at [47]-[48].

<sup>48</sup> [1987] AC 460.

view, expressed in earlier cases, that it was a mistake to reformulate the test. However, his Honour acknowledged that the trial Judge was bound to adopt and apply the test in *Voth*.<sup>49</sup> Once jurisdiction and the place of wrong were established in Victoria and it was more than arguable that the applicable law was the law of Victoria, it could not be shown that the trial Judge's decision that the Supreme Court of Victoria was not "a clearly inappropriate forum" was made in error.

## 6 CONCLUSION

The combination of the application of orthodox conflicts doctrine and traditional torts principles to the novel problems posed by Internet defamation was always going to produce a "result contrary to intuition".<sup>50</sup> The very notion of a "place" where the alleged wrong has been committed becomes fraught with difficulty in relation to Internet communications – "concepts such as 'place of publication' or 'country of origin' lose meaning in a global and digital world, where geography holds less significance."<sup>51</sup> The traditional criterion of the place of publication cannot provide a complete solution "in an age in which virtually world-wide publication can be achieved almost instantaneously".<sup>52</sup> Moreover, the peculiar facts of *Gutnick*, and in

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<sup>49</sup> [2002] HCA 56 at [156]-[163].

<sup>50</sup> Ibid at [164] per Kirby J. But see D Rolph, "The Message, Not the Medium: Defamation, Publication and the Internet in *Dow Jones & Co Inc v Gutnick*" (2002) 24 Sydney LR 262, 279-280, who argues in favour of an orthodox approach. However, his conclusion (at p 280) that the adoption of a single publication rule "effectively seeks to deprive the court of the right to exercise jurisdiction in cases of defamation via the Internet, thereby depriving it of the discretion to decline to exercise jurisdiction" hopelessly conflates jurisdiction and choice of law issues, and appears to be based on the unlikely premise that the combination of adoption of the single publication rule and the "international hegemony of American culture" will result in the physical exodus of all web servers from Australia.

<sup>51</sup> GB Dinwoodie "A New Copyright Order: Why National Courts Should Create Global Norms" (2000) 149 U Pa LR 469, 535.

<sup>52</sup> PB Carter, "Defamation" in C McLachlan and P Nygh (eds), *Transnational Tort Litigation: Jurisdiction Principles*, Clarendon Press, Oxford, 1996, 106.

particular the strategic position taken by Mr Gutnick in limiting his cause of action to Victoria, meant that the High Court never had to address the real and very difficult issues of Internet defamation. If the High Court had been squarely faced with a plaintiff suing or threatening to sue in multiple jurisdictions, it might have had more incentive to cut the Gordian knot.

Although judges have been willing consciously to develop the common law to accommodate changing social expectations, any such developments have generally been incremental, with any sudden expansion or radical change being strongly resisted.<sup>53</sup> Calls for the reform of defamation law are not new,<sup>54</sup> but the reform sought in this case, if successful, would have completely changed the nature of the tort. The changes that Dow Jones was seeking required a major shift in thinking in respect of a tort where judges have largely been opposed to change, preferring instead that any alteration to the concepts of the tort should come from the legislature.<sup>55</sup> To achieve a successful result in terms of its litigation strategy, Dow Jones sought to redefine the settled and long-standing substantive elements of the tort. Had it succeeded, its proposals would not necessarily have had a consistent result.

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<sup>53</sup> Witness the development of the tort of negligence in the 1980s with the general application of the *Anns* two stage approach initially welcomed and then rejected as its alleged expansionary tendencies became the focus of both the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398 and the High Court of Australia in *Sutherland Shire v Heyman* (1985) 157 CLR 424.

<sup>54</sup> See, eg Justice Kenison in *Blanchard v Claremont Eagle Inc*, 63 A 2d 791, 792 (1949) (SC, New Hampshire): “For the most part any thoughtful consideration of the present state of the law of libel either begins or ends with a combined apology and lament.” And see also P Keeton (ed), *Prosser and Keeton on Torts*, 5th ed, West Pub Co, St Paul, Minn, 1984, 771-772: The tort of defamation “contains anomalies and absurdities for which no legal writer ever has had a kind word, and it is a curious compound of a strict liability imposed upon innocent defendants, as rigid and extreme as anything found in the law, with a blind and almost perverse refusal to compensate the plaintiff for a real and very serious harm”.

<sup>55</sup> The one major exception to this has been the change to the common law qualified privilege defence effected by *Lange v ABC* (1997) 189 CLR 520 in Australia; *Lange v Atkinson* [2000] 1 NZLR 257; [2000] 3 NZLR 385 in New Zealand; and *Reynolds v Times Newspapers* [1999] 4 All ER 609 in England.

First, it argued that the nature of publication should be altered so that the mere composition, writing or uploading of defamatory words was sufficient to meet the test. Not only can these acts, without more, not affect reputation, but such a test would inhibit freedom of communication, the very right that the defendant was seeking to protect and expand. Second, it sought to introduce a single publication rule in place of the long-standing common law rule that each and every communication of an offending article was a separate publication. Had the defendant succeeded in this aspect of its argument it would certainly have militated against the chilling effect that the common law rule must have on Internet publications. Quite apart from conflicts questions, the implementation of a single publication rule could dramatically reduce the chilling effect otherwise present in Internet publications of archival material.<sup>56</sup>

The majority's lack of willingness to countenance a radical (or indeed any) reformulation of the rules of tort law in the context of Internet defamation, and its refusal to recognise the Internet as truly revolutionary global technology that required a paradigm shift, was matched by a disappointingly dismissive attitude towards legitimate conflicts policy concerns about the status quo. Amongst the major aims of conflict of laws are the creation of efficiency, certainty and uniformity of result, lower transaction costs and overall justice by channelling litigation towards the most appropriate forum, thereby avoiding a wasteful and oppressive proliferation of multiple lawsuits in different jurisdictions, with the consequent potential for conflicting judgments and recognition and enforcement "gridlocks". These concerns, which were raised by Dow Jones, were deserving of more careful consideration. The majority's slightly snide characterisation of the argument that the single publication rule should apply in respect of Internet communications because of the unbounded nature of the publisher's liability

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<sup>56</sup> Every day that the back number of a newspaper remains on a website archive potentially gives rise to a new cause of action. See the discussion in *Loutchansky v Times Newspapers Ltd (No 2)* [2002] 1QB 783, 814 (CA).

and potential exposure to many a myriad of foreign defamation laws, as being one “which would evidently be convenient to the party putting material on a web server”,<sup>57</sup> simply does not engage with broader policy concerns of efficiency, comprehensiveness of adjudication and certainty of result. Similarly, the majority’s view of Dow Jones’ concerns about multiple suits being brought against publishers as “unreal ... in all except the most unusual of cases”,<sup>58</sup> fails to acknowledge that it was, in fact, Mr Gutnick’s restriction of his cause of action to Victoria that made *Gutnick* the most unusual of cases. Where the plaintiff in an Internet defamation case is a public figure or multinational company with an international reputation, the risk of multiple suits in different jurisdictions, or potential exposure to liability under an array of different defamation laws is both obvious and real.<sup>59</sup> This problem is further exacerbated by the conflicts rule on pleading of foreign law which provides that, where the plaintiff does not plead foreign law, it is presumed to be the same as the *lex fori* unless the defendant proves otherwise. On this approach, it is left to the defendant publisher to prove that it is *not* liable under however many foreign defamation laws may be relevant.<sup>60</sup> Further, the majority’s suggestion that the rules on quantification of damages and enforceability of foreign judgments will effectively limit multiple proceedings does not bear close scrutiny. As the facts of *Gutnick* itself perhaps demonstrate, plaintiffs seeking to vindicate their reputation will not

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<sup>57</sup> [2002] HCA 56 at [22].

<sup>58</sup> *Ibid* at [54].

<sup>59</sup> See, generally, L Collins (ed), *Dicey and Morris Conflict of Laws*, 13th ed, Sweet & Maxwell, London, 2000, vol 2, pp 1567-1568. This risk is present to a lesser degree in respect even of intranational defamation: see, eg, *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6.

<sup>60</sup> See *University of Glasgow v The Economist* [1997] EMLR 495, 502, involving publication in 40 countries: “All the plaintiff has to do is to say that the tort is actionable in another country. He may if he so wishes, affirmatively set out what the law in that foreign country is in order to support that plea. If he chooses so to do of course he must plead the facts and matters upon which he relies. But he does not have to, because until and unless foreign law is shown by the defendant to be different by proper evidence the court will presume that English law applies and will apply it.”

necessarily be influenced by the quantum of damages or whether a defamation judgment that they obtain in a more plaintiff-friendly jurisdiction can be enforced in another jurisdiction where the defendant has assets.

By contrast, Kirby J's candid acknowledgment of the absurdity of solving "the present problem by reference to judicial remarks in England in a case, decided more than a hundred and fifty years ago, involving the conduct of the manservant of a Duke, despatched to procure a back issue of a newspaper of minuscule circulation"<sup>61</sup> is refreshing. His Honour adopted a decidedly more internationalist approach than the majority, noting that judges have adapted the common law to new technology in the past, and that the rules of private international law were developed, and continue to evolve as a result of changes in cross-border communication between people. Dow Jones' arguments about the need to reformulate the common law in respect of Internet defamation were persuasive and deserved to be taken seriously.<sup>62</sup> Although sympathetic to Dow Jones' view that the existing common law rules were deficient in respect of Internet publications, Kirby J ultimately concluded that the single publication rule proposed by Dow Jones was too simplistic, and that, in any event, such a fundamental reformulation of the common law exceeded the proper judicial function – law reform involving the careful evaluation of global competing interests and considerations could and should only be properly effected by national legislatures or by international agreement.

Whilst Kirby J's view of the limits of judicial law reform is probably correct, it offers little guidance and even less comfort for Internet publishers. As Kirby J himself noted, the Australian Law Reform Commission reviewed

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<sup>61</sup> [2002] HCA 56 at [92].

<sup>62</sup> Ibid at [123]. Cf [2001] VSC 305 at [70], where Hedigan J observed that the "trumpeting of cyber-space miracles does not add much to the sphere of debate here and occasionally degenerated into sloganeering, which decides nothing".

the area twice and proposed reforms, but these have not been implemented in Australia.<sup>63</sup> At around the same time that the High Court delivered its judgment in *Gutnick*, the English Law Commission characterised Internet defamation as an “intractable problem” and failed to recommend any meaningful reform, instead opining that “any solution would require an international treaty, accompanied by greater harmonisation of the substantive law of defamation”.<sup>64</sup> However, the “glacial progress”<sup>65</sup> of work on the Hague Conference on Private International Law’s Jurisdiction and Judgments Project, and the fact that the proposed jurisdiction provisions of the draft Convention do not, as yet, address the issues of Internet defamation raised in *Gutnick*,<sup>66</sup> do not encourage hope for an international solution in the near future. In the meanwhile, as the High Court underlined in *Gutnick*, publishing on the World Wide Web will remain a risky and expensive proposition.<sup>67</sup> For as long as this collective failure of will and imagination to deal with the very complex problems of transnational Internet defamation persists, and “the horse and buggy”<sup>68</sup> of traditional defamation law remains the only permitted

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<sup>63</sup> Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979); Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992).

<sup>64</sup> Law Commission, *Defamation and the Internet: A Preliminary Investigation*, Scoping Study No2, December 2002, p 39, para 4.54, <[www.lawcom.gov.uk/files/defamation2.pdf](http://www.lawcom.gov.uk/files/defamation2.pdf)> (at 25 March 2003).

<sup>65</sup> See D Harvey “Casenote – *Dow Jones v Gutnik* [sic]” (2003) 2 Tech Law Forum 5 n 30.

<sup>66</sup> See A D Haines, “The Impact of the Internet on the Judgments Project: Thoughts for the Future” (Preliminary Document No 17, Hague Conference on Private International Law, February 2002) paras 9, 17 <[ftp://ftp.hcch.net/doc/gen\\_pd17e.doc](ftp://ftp.hcch.net/doc/gen_pd17e.doc)> (at 25 March 2003), for a discussion of the possible adoption of “targeting” in a supplementary jurisdictional rule as a compromise between the extreme “country of destination” and “country of origin” approaches, and the problems inherent in targeting. Also see M A Geist, “Is There a There There? Toward Greater Certainty for Internet Jurisdiction” (2001) 16 Berkeley Technology LJ 1345.

<sup>67</sup> O Renault, “Jurisdiction and the Internet: Are Traditional Rules Enough?” Uniform Law Conference of Canada, July 1998, text at n 8 <<http://www.law.ualberta.ca/alri/ulc/current/ejurisd.htm>> (at 25 March 2003).

<sup>68</sup> See submissions of G Robertson QC regarding “the horse and buggy days of English libel law”: Transcript of *Dow Jones & Company Inc v Gutnick* M3/2002 (28 May 2002) <<http://www.austlii.edu.au/au/other/hca/transcripts/2002/M3/2.html>> (at 25 March 2003).

form of transport, the full potential of the electronic highway cannot and will not be realised.