

**A CLEARLY INAPPROPRIATE FORUM? JURISDICTION, INTERNET DEFAMATION AND
THE HIGH COURT OF AUSTRALIA**

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Introduction

[59] When the High Court of Australia handed down its decision in *Dow Jones & Co Inc v Gutnick*² on 10 December 2002, it attracted international media coverage, a significant proportion of which was hostile.³ During the course of the appeal, the case also attracted international media participation, with prominent organisations, such as CNN, Guardian Newspapers, and Yahoo! [60] seeking and obtaining leave to intervene.⁴ This level of interest, and the very fact of an appeal to the High Court, seems incongruous with the nature of the dispute: a routine, preliminary skirmish. Melbourne businessman, Joseph Gutnick, sued Dow Jones for defamation; Dow Jones, a foreign defendant, sought to set aside the originating process or to have the proceedings permanently stayed. What distinguished this interlocutory dispute and what led to the appeal all the way to the High Court was that the case raised squarely the issue of jurisdiction over internet defamation. The High Court's judgment therefore has become the first decision of a court of final authority in the common law world to address the difficult question of jurisdiction over libel in cyberspace. What piqued the interest of the international media was that the High Court found in favour of Gutnick and against the media defendant, Dow Jones.

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² [2002] HCA 56 (Unreported, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne, Callinan JJ, 10 December 2002).

³ The international press coverage of the *Dow Jones v Gutnick* decision was substantial. For some examples of hostile criticism, see Editorial, 'Down (Under) With the Internet', *The Wall Street Journal*, Wednesday 11 December 2002, 18; Editorial, 'A Blow to Online Freedom', *The New York Times*, Wednesday 11 December 2002, 34; Mark Stephens, 'Libel is not the sort of tourism that countries want to encourage', *The Times*, Tuesday 17 December 2002, 2, 23.

⁴ The other interveners were: Amazon.com Inc; Associated Press; Association of Alternative Newsweeklies; Bloomberg LP; LLLP; Knight Ridder Inc; Media/Professional Insurance; The New York Times Co; News Ltd; Online News Association; Reuters Group plc; Time Inc; Tribune Co; The Washington Post Co; the Internet Industry Association; and, John Fairfax Holdings Ltd. They were granted leave to intervene at the outset of the hearing of the appeal on 28 May 2002: see High Court of Australia Transcripts <<http://www.austlii.edu.au/au/other/hca/transcripts/2002/M3/2.html>> at 30 May 2002. See also <<http://www.austlii.edu.au/au/other/hca/transcripts/2002/M3/1.html>> at 17 May 2002.

Facts⁵

Melbourne businessman, Joseph Gutnick, commenced proceedings for defamation against Dow Jones in the Supreme Court of Victoria. Gutnick's complaint related to an article by journalist, William Alpert, entitled 'Unholy Gains'. The article suggested that Gutnick was involved in the manipulation of share prices, tax evasion and money laundering through religious charities, as well as associating with a convicted tax evader and money launderer, Nachum Goldberg. It was published in the 28 October 2000 online edition of *Barron's Online* and included in the print copy of *Barron's Magazine*, published on 30 October 2000. Dow Jones, which also publishes the prestigious *Wall Street Journal*, provided access to *Barron's Online* via its website, WSJ.com to subscribers. Originally Gutnick confined his claim to the online publication but was granted leave by Hedigan J to amend his statement of claim to include the print copies which were circulated in Victoria. Given the negligible number of print copies sold in Victoria, the thrust of Gutnick's claim remained the online publication.

Because Dow Jones was a foreign defendant, Gutnick relied on the 'long-arm' jurisdiction provisions of the *Supreme Court (General Civil Procedure) Rules 1996* (Vic) in order to serve his initiating process. The two relevant rules are; r 7.01(1)(i) (para (i)), which allows for extraterritorial service of claims based on a tort committed within Victoria; and, r 7.01(1)(j) (para (j)), which allows for extraterritorial service of claims based on damage suffered wholly or partly in Victoria, irrespective of where the tort occurred.

Dow Jones filed a conditional appearance in the proceedings in order to challenge the service of the originating process or to obtain a permanent stay. It argued that the tort complained of by Gutnick occurred in New Jersey and, as such, the Supreme Court of Victoria ought not to exercise jurisdiction over the claim. Its submission in relation to the place of publication relied on the decided cases, its characterisation of the internet technologies in question and an appeal to policy considerations about the nature of the internet. Dow Jones argued that the concept of publication in defamation law required mere delivery of defamatory material to a person other than the plaintiff, not the

⁵ For a statement of the facts, see (2002) 194 ALR 433 at 436 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 476–7 (Callinan J).

actual comprehension by such a third party. It then submitted that the place where publication happens is where delivery of the defamatory material is effected, not where the actual comprehension by the third party occurs. Applying this to defamation via the internet, Dow Jones argued that publication occurred where the defendant delivered the defamatory material by uploading it onto its server, not where the third party downloaded and read the material.

[61] At first instance, Hedigan J emphatically rejected Dow Jones' submissions. His Honour applied the settled understanding of publication as the actual communication of defamatory material to a third party and found that this definition was medium-neutral.⁶ Consequently, Hedigan J held that publication of material via the internet occurred where it was downloaded and read (in this case, Victoria), not where it was uploaded onto the server.⁷ Given that Gutnick's cause of action arose in Victoria, *inter alia*, His Honour held that the Supreme Court of Victoria had jurisdiction by virtue of both relevant rules⁸ and was not a clearly inappropriate forum.⁹ Therefore, Hedigan J refused to set aside Gutnick's statement of claim and declined a permanent stay of proceedings.

On 21 September 2001, leave to appeal to the Victorian Court of Appeal was refused on the ground that there was no appealable error in Hedigan J's judgment.¹⁰

On appeal, the High Court had to decide whether Hedigan J had erred in his findings as to jurisdiction and *forum non conveniens*. Before the High Court, Dow Jones relied solely on policy considerations to effect a change in the law.¹¹ It submitted that the revolutionary nature of the internet necessitated a fundamental re-assessment of the basic principles of defamation law and private international law relating to jurisdiction over claims of cyberspace libel.¹² Dow Jones advocated at least a change to the extent that there should be a 'single publication' rule for internet publications with the place of publication being the place of uploading material onto a web

⁶ *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 (Unreported, Hedigan J, 28 August 2001) [60].

⁷ *Ibid.*

⁸ *Ibid* [84].

⁹ *Ibid* [130].

¹⁰ *Dow Jones & Co Inc v Gutnick* [2001] VSCA 249 (Unreported, Buchanan JA and O'Bryan AJA, 21 September 2001).

¹¹ (2002) 194 ALR 433 at 439 (Gleeson CJ, McHugh, Gummow and Hayne JJ); 453 (Kirby J).

server.¹³ The interveners supported the thrust of Dow Jones' argument but preferred to cast its test in terms of the place where the internet publisher last exercised control over the dissemination of the defamatory material.¹⁴ Both Dow Jones and the interveners allowed for a flexible exception in cases where the forum selected by the internet operator for locating its servers was 'merely adventitious or opportunistic'.¹⁵

The Definition of Publication

The basic principles of defamation law and private international law, as they related to multistate defamation, favoured Gutnick's case. It is useful to identify them before examining how the submissions of Dow Jones and the interveners sought to challenge them.

The members of the High Court all reaffirmed the common understanding of [62] the concept of publication in defamation law. They agreed that the essence of defamation law in Australia was publication causing damage to reputation.¹⁶ Such damage only occurs when and where a defamatory publication is comprehended by the reader, listener or observer.¹⁷ This requirement of comprehension by a recipient indicates, as the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ emphasises, that publication, for the purposes of defamation law, is a bilateral act, involving both the publisher and the recipient, not a unilateral act on the part of the publisher alone.¹⁸

The Place of Publication

Accepting that publication is a bilateral act, the joint judgment then posed the question: 'If the place in which the publisher acts and the place in which the publication is presented in comprehensible form are in two different jurisdictions, where is the tort of defamation committed?'¹⁹

The joint judgment held that the applicable test for identifying the place of the commission of the tort was ultimately where the substance of the cause of action

¹² Ibid 439 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 453 (Kirby J), 481 (Callinan J).

¹³ Ibid 439 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 451 (Kirby J), 482 (Callinan J).

¹⁴ Ibid 467 (Kirby J). See also, ibid 439 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

¹⁵ Ibid 439.

¹⁶ Ibid 440 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 464 (Kirby J), 479 (Callinan J).

¹⁷ Ibid.

¹⁸ Ibid 440.

arose,²⁰ the test formulated by Lord Pearson in *Distillers Co (Biochemicals) Ltd v Thompson*.²¹ As the substance of the tort of defamation was the damage to reputation and that damage occurred only when defamatory material was comprehended by a recipient, the joint judgment found that the place of the commission of the tort of defamation was where the recipient comprehended the material.²² As the article in question was downloaded in Victoria, the place of publication was Victoria.

Kirby and Callinan JJ agreed with this outcome but not this reasoning. In Kirby J's view, the *Distillers* test did not provide a 'single overly-generalised criterion' for locating the place of the commission of all torts.²³ Similarly, Callinan J did not accept that the applicable test was Lord Pearson's *Distillers* formulation. Instead, His Honour found that defamation law had its own distinct principles for determining the place of the commission of defamation.²⁴

Not only did the members of the High Court ultimately agree as to the location of the place of publication, they also allowed that there may be multiple places of publication. They all found that the principle that each publication constitutes a separate cause of action, the 'multiple publication' rule derived from the 1849 decision in *Duke of Brunswick v Harmer*,²⁵ was well-established in Australian defamation law.²⁶ The consequence of the 'multiple publication' rule was that it was unnecessary to identify only one place as the place of the commission of the tort of defamation.²⁷ As Gaudron J noted, the 'multiple publication' rule in Australia, applied in multistate defamation suits arising out of national television broadcasts, such as *Gorton v Australian Broadcasting Commission*,²⁸ has demonstrated that having multiple places of publication is manageable.²⁹

¹⁹ *Ibid.*

²⁰ *Ibid* 445.

²¹ [1971] AC 458, 468.

²² (2002) 194 ALR 433, 445.

²³ *Ibid* 471.

²⁴ *Ibid* 482.

²⁵ (1849) 14 QB 185; (1849) 117 ER 75.

²⁶ (2002) 194 ALR 433, 440 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 464, 466 (Kirby J), 482 (Callinan J).

²⁷ *Ibid* 443.

²⁸ (1973) 22 FLR 181.

²⁹ (2002) 194 ALR 433, 448.

[63] Thus, the established, principled approach to the concept of publication and the identification of the place of publication suggested an outcome favourable to Gutnick. To reach a different outcome, Dow Jones and the interveners needed to appeal to policy considerations.

Nature of the Internet

Dow Jones and the interveners essentially relied upon the revolutionary nature of the internet as the policy basis for its proposed change to the law. Although the expert evidence on the internet before Hedigan J and the additional evidence adduced before the High Court was undisputed,³⁰ the judges nevertheless characterised the technology in question in markedly different ways, which, in turn, informed their varying degrees of willingness to entertain the possibility of law reform.

Kirby J was highly sympathetic to the claims made on behalf of the internet by Dow Jones, which His Honour canvassed at length.³¹ Unlike Hedigan J,³² Kirby J did not view them as 'mere slogans'.³³ According to Kirby J:

The internet is essentially a decentralised, self-maintained telecommunications network ... It is ubiquitous, borderless, global and ambient in its nature.³⁴

His Honour was willing to accept that the internet represents 'a quantum leap of technological capacity' over all pre-existing technologies³⁵ and that the global character of the internet means that there is no ready congruence between cyberspace and the jurisdictional boundaries of law areas.³⁶ Finally, in praise of the internet, Kirby J added:

It is a medium that overwhelmingly benefits humanity, advancing as it does the human right of access to information and to free expression.³⁷

³⁰ Ibid 437 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 452 (Kirby J), 478 (Callinan J).

³¹ Ibid 452–6.

³² *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 [70].

³³ (2002) 194 ALR 433, 464.

³⁴ Ibid 453.

³⁵ Ibid 455, 474.

³⁶ Ibid 460.

³⁷ Ibid 474.

Given such views on the nature and impact of the internet, it is unsurprising that Kirby J was the member of the High Court most willing to countenance, though not to adopt, the reformulation of the relevant legal principles advocated by Dow Jones. His Honour expressly stated his view that the call to reform was urgent,³⁸ requiring ‘a greater sense of legal imagination’ than had otherwise been demonstrated.³⁹ Kirby J also doubted the utility of applying the decision in *Duke of Brunswick v Harmer*⁴⁰ to cases of internet defamation:

[64] The idea that this Court should solve 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 is not immediately appealing to me.⁴¹

By contrast, Callinan J was highly unsympathetic to the claims made about the internet. His Honour described the internet as ‘no more than a means of communication by a set of interconnected computers’.⁴²

Callinan J reasoned that, if a company like Dow Jones exploited the ubiquity of the internet to disseminate its publication to the widest possible audience, thereby maximising its subscriber base and its advertising revenue, it should be prepared to assume the risks of such publication, including the possibility of defamation.⁴³ His Honour was cynical about the tenor of Dow Jones’ submissions, cast in ‘exclusively high-minded’ terms,⁴⁴ invoking concepts such as freedom of speech and the ‘marketplace of ideas’⁴⁵ without reference to the profit imperative.⁴⁶ For Callinan J, Dow Jones was simply engaged in multinational business. Like other transnational enterprises, His Honour reasoned that Dow Jones should itself expect to be required to, and should in fact, comply with the local laws of the jurisdictions in which its

³⁸ Ibid 456.

³⁹ Ibid.

⁴⁰ (1849) 14 QB 185; (1849) 117 ER 75.

⁴¹ (2002) 194 ALR 433, 456.

⁴² Ibid 479.

⁴³ Ibid. See also ibid 444 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁴⁴ Ibid.

⁴⁵ Ibid 481.

⁴⁶ Ibid 479.

business operates.⁴⁷ For Callinan J, Dow Jones was essentially a multinational media organisation seeking to insulate itself from the risks of doing business.

The view of internet technologies adopted by the joint judgment was less expansive than that adopted by Kirby J but less cynical than that advanced by Callinan J. Gleeson CJ, McHugh, Gummow and Hayne JJ were willing to accept the claims of Dow Jones and the expert witnesses that the internet was a revolutionary medium of communication, although they observed that the evidence before them was not sufficient to provide a complete and accurate description of internet technologies.⁴⁸

However, according to the joint judgment, the fundamental issue was not the nature of the technology itself but the problem of widely disseminated publications. Accepting that the internet was unique did not mean that one had to accept that the widely disseminated publications were also an innovation⁴⁹ or that global publications had never occurred before.⁵⁰ Kirby J agreed that the problem of widely disseminated publications was not novel and catalogued the existing forms:

... newspapers distributed (and sometimes printed) internationally; syndicated telegraph and wire reports of news and opinion; newsreels and film distributed internationally; newspaper articles and photographs reproduced simultaneously by international telefacsimile; radio, including shortwave radio; syndicated television programmes; motion pictures; videos and digitalised images; television transmission; and cable television and satellite broadcasting.⁵¹

Kirby J's analysis went further, with His Honour explicitly stating that it was undesirable to devise a [65] technology-specific rule to accommodate the challenges posed by internet technologies,⁵² a position implicitly endorsed by the joint judgment.

By characterising the real issue for determination as the problem of widely disseminated publications, the joint judgment rejected Dow Jones' submission that the

⁴⁷ Ibid 480, 481.

⁴⁸ Ibid 437.

⁴⁹ Ibid 479.

⁵⁰ Ibid.

⁵¹ Ibid 465. See also 478, 481 (Callinan J).

⁵² Ibid.

distinctive nature of the internet required a change in the law. The failure of the majority of the High Court to accept the revolutionary nature of the internet was ultimately fatal to Dow Jones' appeal.

The Risk of Global Liability?

The judges of the High Court also explored the chief implication which Dow Jones and the interveners argued would follow from the failure to adopt a 'single publication' rule for internet publications, namely the exposure of internet publishers to the risk of global liability for defamation. They variously described this suggestion as 'unreal'⁵³ and 'exaggerated',⁵⁴ for several reasons.

A number of practicalities were identified by the members of the High Court which would discourage forum shopping by defamation plaintiffs. All litigation is costly and risky when conducted domestically. The costs and risks are only magnified when they are exported. For most plaintiffs, it would be practically impossible to maintain proceedings in a foreign jurisdiction.⁵⁵ In addition, the power balance between the parties in defamation litigation between an individual plaintiff and a media organisation tends to favour the latter.⁵⁶ Plaintiffs tend to sue where they reside, which is where their reputations are most likely to be. The class of plaintiffs whose reputations are as ubiquitous as the internet is small. If plaintiffs sue in foreign jurisdictions where they have little or no reputation, they will not receive substantial damages sufficient to justify the expense and difficulties associated with litigation.⁵⁷ Plaintiffs also tend to sue where defendants have assets in order to ensure that they are able to enforce any favourable verdict they ultimately receive.⁵⁸ If plaintiffs sue where defendants have no assets, defendants may elect to ignore the proceedings and leave plaintiffs with the task of seeking to enforce their judgments in a foreign jurisdiction.⁵⁹

⁵³ Ibid 447.

⁵⁴ Ibid 475.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid 447 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 479 (Callinan J).

⁵⁸ Ibid 447.

⁵⁹ Ibid.

In addition to these practical considerations, there exist a number of principles of defamation law and private international law which would similarly discourage forum shopping. If plaintiffs sue in foreign jurisdictions where they have little or no reputation, they may be confronted with an application to stay their proceedings on the basis of the doctrine of *forum non conveniens*.⁶⁰ A plaintiff is not allowed to maintain multiple proceedings against a defendant in different jurisdictions because this constitutes an abuse of [66] process.⁶¹ Such a plaintiff may also be restrained by an anti-suit injunction.⁶² Plaintiffs may also bring a single action for defamation and claim damages for publication, wherever occurring, arising from the same defamatory material. In dealing with such proceedings, the laws of the different jurisdictions in which publication is alleged will be applied.⁶³ Indeed, the principle of *Anshun* estoppel may require a single action so that all the issues arising from the allegedly defamatory material may be dealt with completely.⁶⁴ Thus, the principle of *Anshun* estoppel, as well as the principles of *res judicata* and issue estoppel, could prevent multiple, successive defamation proceedings in relation to the same publication.⁶⁵

The members of the High Court also identified a limitation, inherent in the nature of internet publications, which would curtail the risk of global liability. Gleeson CJ, McHugh, Gummow and Hayne JJ expressed the view that internet publishers would not be compelled to consider 'the defamation laws of every country from Afghanistan to Zimbabwe'.⁶⁶ These judges suggest that the identity of the plaintiff will automatically indicate the law areas in which he or she might seek to vindicate their reputation. In particular, the law of the place of the plaintiff's residence will be the most apposite. Kirby J agreed, stating that it was not 'an excessive burden' for internet publishers to be forced to consider the law of the place of the plaintiff's residence prior to publication.⁶⁷

However, the High Court's view in this particular respect is not realistic. By focusing on the identity of an individual plaintiff, this approach fundamentally misunderstands

⁶⁰ Ibid 479.

⁶¹ Ibid 443, citing, inter alia, *Maple v David Syme & Co Ltd* [1975] 1 NSWLR 97, 100–2.

⁶² Ibid 446.

⁶³ Ibid 443 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 448 (Gaudron J).

⁶⁴ Ibid 448.

⁶⁵ Ibid 443.

⁶⁶ Ibid 446.

the way in which media organisations operate. Assume that an online news service publishes 100 articles on one day. Rather than checking each of the 100 articles against each of the 190 defamation laws worldwide, the publishers would only need to identify the connecting factors of each person or entity discussed and then only check the defamation laws of those jurisdictions, according to the approach suggested by the joint judgment. Yet, no news service focuses on only one individual. What may be effective risk management in relation to one individual quickly becomes impractical when applied on a larger scale. Given the constraints of time and resources under which many of the interveners operate, it is unrealistic to expect that media organisations could undertake such extensive, pre-publication vetting of their material in relation to all the people and entities about which they write. Although it lessens the risk of global liability somewhat, the proposed burden, suggested by Gleeson CJ, McHugh, Gummow and Hayne JJ and Kirby J in their respective judgments, is still not insignificant.

Overall, however, the judges of the High Court present convincing reasons for why the threat to internet publishers posed by the decision in *Dow Jones v Gutnick* should not be overstated.

A Single Publication Rule?

Ultimately, the High Court refused to introduce a ‘single publication’ rule for three principal reasons.

First, the ‘single publication’ rule formulated by *Dow Jones* contained real definitional difficulties. In relation to the ‘flexible exception’, Gleeson CJ, McHugh, Gummow and Hayne JJ noted that:

‘Adventitious’ and ‘opportunistic’ are words likely to produce considerable debate. Does a publisher’s decision to have a server in a country where the costs of operation are low, or the benefits offered for setting up business as [67] high, warrant either of these descriptions? Does a publisher’s decision to have two servers in two, widely separated, states or even countries warrant either description, or is it simply a prudent business decision to provide security and continuity of service? How is the user to

⁶⁷ *Ibid* 472.

know which server dealt with a particular request? Is the fact that one rather than the other server met the request 'adventitious'?⁶⁸

Replacing the 'multiple publication' rule with a 'single publication' rule could encourage 'the adoption of locational stratagems'⁶⁹ by internet publishers, especially given the evidentiary difficulties that a plaintiff would confront when attempting to prove that a server location was merely adventitious or opportunistic.⁷⁰ The High Court held that a proposed change to the law which has significant defects does not deserve to be endorsed.

Secondly, the High Court found that Dow Jones and the interveners emphasised their own convenience and certainty of conduct at the expense of any other legitimate juridical advantages to which Gutnick might be entitled. As the joint judgment emphasised, defamation requires a balancing between competing rights and interests, between the plaintiff's right to protect his or her reputation and the defendant's freedom of speech. Kirby J added that it was legitimate for the parties to seek to exploit their respective juridical advantages,⁷¹ which again would require a balancing exercise rather than the unilateral imposition of one party's interests on the other.

The members of the High Court also took issue with the way that Dow Jones defined the certainty it sought. The joint judgment accepted that pre-publication certainty was desirable and necessary for media defendants so they could order their affairs prior to publication but noted that 'certainty does not necessarily mean singularity'.⁷² It held that the appellants' attempt to localise the tort of defamation exclusively in the law area where the media defendant operated minimised the legitimate role that other legal systems might have in the determination of such disputes, stating that:

Activities that have effects beyond the jurisdiction in which they are done may properly be the concern of the legal systems in each place.⁷³

⁶⁸ Ibid 439.

⁶⁹ Ibid 462.

⁷⁰ Ibid 466 (Kirby J), 483 (Callinan J).

⁷¹ Ibid 451.

⁷² Ibid 439.

⁷³ Ibid.

Thirdly and importantly, the members of the High Court agreed with the view, expressed by Samuels JA in *Australian Broadcasting Corporation v Waterhouse*,⁷⁴ that a 'single publication' rule could only be introduced in Australia by means of legislation.⁷⁵ Given the impact that a 'single publication' rule would have on established principles of defamation law particularly, a court, even of high appellate authority, was incapable of effecting such a [68] reform. For Kirby J especially, having expressed the view that law reform was necessary to remedy the 'real defects'⁷⁶ demonstrated by Dow Jones in applying existing principles to internet defamation, the limits on the court's ability to change the law was the decisive factor in his dismissal of Dow Jones' appeal. In Kirby J's view, the defects identified by Dow Jones:

... appear to warrant national legislative attention and to require international discussion in a forum as global as the internet itself. In default of local legislation and international agreement, there are limits on the extent to which national courts can provide radical solutions that would oblige a major overhaul of longstanding legal doctrine in the field of defamation law. Where large changes to settled law are involved, in an area as sensitive as the law of defamation, it should cause no surprise when the courts decline the invitation to solve problems that others, in a much better position to devise solutions, have neglected to repair.⁷⁷

The Applicable Law

Having found that the place of publication was the place of downloading, Victoria, and Gutnick himself having confined his claim to Victoria,⁷⁸ the High Court had no difficulty finding that the applicable law was Victorian law.⁷⁹ Gutnick's claim was thus a local, not a foreign, tort, so strictly no question of choice of law arose.⁸⁰

⁷⁴ (1991) 25 NSWLR 519, 537.

⁷⁵ (2002) 194 ALR 433, 437 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 465 (Kirby J), 482 (Callinan J).

⁷⁶ *Ibid* 468.

⁷⁷ *Ibid* 475.

⁷⁸ (2002) 194 ALR 433.

⁷⁹ *Ibid* 446 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 473 (Kirby J).

⁸⁰ *Ibid*. See also PE Nygh and Martin Davies, *Conflict of Laws in Australia* (7th ed, 2002) [22.15].

Jurisdiction under the Supreme Court (General Civil Procedure) Rules 1996 (Vic)

Given the High Court's findings in relation to the place of publication and the applicable law, as well as Gutnick's limitation of his claim,⁸¹ the issue of whether Hedigan J erred in finding that the Supreme Court of Victoria was entitled to exercise its 'long-arm' jurisdiction over Dow Jones was straightforward.

At first instance, Hedigan J held that the Supreme Court of Victoria was entitled to exercise jurisdiction over Gutnick's defamation either on the basis that the tort occurred within Victoria (para (i)) or that Gutnick alleged he had suffered damage to his reputation wholly or partly within Victoria (para (j)).⁸²

On appeal, the members of the High Court first addressed whether Gutnick could rely on para (j) to invoke the jurisdiction of the Supreme Court of Victoria. Given that Gutnick alleged he suffered damage to his reputation in Victoria as a result of Dow Jones' publication, the High Court found that he had properly invoked the jurisdiction of the Supreme Court of Victoria. The judgments emphasised that, for the purpose of para (j), it was irrelevant where the defendant's allegedly tortious conduct occurred; the basis of jurisdiction under para (j) was the location of the damage allegedly suffered.⁸³

It was strictly unnecessary to decide whether the Supreme Court of Victoria was entitled to exercise jurisdiction over Gutnick's claim on the basis of para (i).⁸⁴ Nevertheless, the joint judgment implicitly found that such a jurisdictional basis was also established because the alleged tort occurred in Victoria.⁸⁵

Given the expansive terms of para (j), Dow Jones' submissions on the place of publication were ultimately irrelevant to the issue of whether the Supreme Court of Victoria was entitled to exercise jurisdiction over Gutnick's claim. They were, however, more relevant to the issue of whether Hedigan J should have exercised his discretion to decline jurisdiction on the basis of the doctrine of *forum non conveniens*.

⁸¹ (2002) 194 ALR 433.

⁸² *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 (Unreported, Hedigan J, 28 August 2001) [83].

⁸³ (2002) 194 ALR 433, 445 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 457 (Kirby J).

⁸⁴ *Ibid* 446 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 458 (Kirby J).

⁸⁵ *Ibid* 446.

[69] *Forum Non Conveniens*

Given the High Court's findings in relation to the place of publication and the applicable law, as well as Gutnick's limitation of his claim,⁸⁶ the issue of whether Hedigan J erred in the exercise of his discretion to decline jurisdiction on the basis of the doctrine of *forum non conveniens* was also straightforward.

The members of the High Court identified a number of geographical connections between various jurisdictions and the parties and their conduct. Gutnick resides in Victoria. His business headquarters are located in Melbourne. He conducts his business largely in Victoria, although he invests and trades shares in the United States as well. Gutnick is prominent within the Jewish community in Victoria. He contributes to charities in Australia, the United States and Israel. He also has a high profile association with the Melbourne Demons Australian Rules Football Club.⁸⁷

On the other hand, Dow Jones is a Delaware corporation. The editing of the article in question occurred in New York, where Dow Jones' editorial offices are located. Where the article itself was composed is unclear. The article was uploaded onto Dow Jones' server at its corporate campus in New Jersey.⁸⁸

Given the substantial connecting factors with Victoria, the High Court unanimously found that that jurisdiction was not a clearly inappropriate forum for Gutnick's claim.⁸⁹ Callinan J went further, stating that Victoria was a clearly appropriate forum.⁹⁰ The High Court found that Hedigan J did not err in refusing to decline to exercise jurisdiction over Gutnick's defamation claim.

Future Developments

Although the High Court did not accept Dow Jones' policy-based arguments for changing the law to take account of the development of the internet, the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ did signal possible

⁸⁶ High Court of Australia Transcripts <<http://www.austlii.edu.au/au/other/hca/transcripts/2002/M3/2.html>> at 30 May 2002.

⁸⁷ As to Gutnick's connecting factors, see (2002) 194 ALR 433, 444 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 473 (Kirby J), 476 (Callinan J).

⁸⁸ As to Dow Jones' connecting factors, see *ibid* 438, 444 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 451 (Kirby J).

⁸⁹ *Ibid* 446 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 448 (Gaudron J), 474 (Kirby J).

developments of Australian defamation laws in a manner favourable to media defendants. It suggested that, where a publisher's conduct had occurred entirely outside the jurisdiction invoked by the plaintiff, the court may take into account the reasonableness of the publisher's conduct. The standard of reasonableness to be applied in such circumstances could include the defamation law or laws of the place or places in which the publisher's conduct occurred.⁹¹

The possibility of such developments, particularly the specific consideration of the reasonableness of the publisher's conduct, was welcomed by Dow Jones in its corporate response to the High Court's decision.⁹² However, it is necessary [70] to note that these developments have only been suggested; they have not occurred. If, when and how such defences will be developed and applied remains to be seen.

Ultimately, the development of such defences still does not overcome Dow Jones' fundamental objection of being subjected to the jurisdiction of a foreign court. Nor would it placate another intervener in *Dow Jones v Gutnick — The New York Times*, which editorialised that 'Mr Gutnick is entitled to his day in court, but that court should be on this side of the Pacific'.⁹³

A Satisfactory Outcome?

Reflecting on the outcome in this case, Kirby J described it as 'less than wholly satisfactory'.⁹⁴ Indeed, His Honour styled it 'a result contrary to intuition'.⁹⁵ Although persuaded by the policy considerations related to the internet raised by Dow Jones,⁹⁶ Kirby J found that the problem was too complex and the submissions of Dow Jones 'too simplistic'⁹⁷ for the courts to effect the suggested change in the law. The solution to the problem, in Kirby J's view, required both international discussion and national legislation.⁹⁸

⁹⁰ Ibid 484.

⁹¹ Ibid 446.

⁹² See *Corporate Response High Court of Australia Decision; Dow Jones v Gutnick* (10 December 2002) Dow Jones <<http://www.dowjones.com/corpresponse.html>> at 2 January 2003.

⁹³ Above n 2.

⁹⁴ (2002) 194 ALR 433, 475.

⁹⁵ Ibid 474.

⁹⁶ Ibid.

⁹⁷ Ibid 468.

⁹⁸ *Gutnick v Dow Jones & Co Inc* [2001] VSC 305 (Unreported, Hedigan J, 28 August 2001) [166].

A similar conclusion was reached by a peak national law reform body. Less than a week after the High Court handed down its decision in *Dow Jones v Gutnick*, the Law Commission for England and Wales released a scoping study on defamation and the internet.⁹⁹ In its examination of jurisdiction over internet libels, for which it canvassed the opinions of media organisations, newspapers, internet service providers, advocacy groups and legal practitioners,¹⁰⁰ the commission explored many of the issues raised in *Dow Jones v Gutnick*. It found the potential defendants wanted to be bound only by the defamation laws of the jurisdictions in which they operated, like Dow Jones, and that potential plaintiffs wanted to be able to sue where their reputations were damaged, like Gutnick.¹⁰¹ The commission examined the arguments for and against the application of a 'single publication' rule.¹⁰² It noted the 'culture clashes' between the American and Anglo-Australian treatment of freedom of expression.¹⁰³ The commission acknowledged the global risks to which media defendants would be exposed by the application of existing principles of defamation law and private international law.¹⁰⁴ Ultimately, however, the commission concluded that the jurisdictional problems posed by defamation on the internet are intractable.¹⁰⁵ In its view, the only complete, viable solution would be an international treaty, accompanied by the harmonisation of the substantive law of defamation. National legislation by individual countries alone would be ineffective. Unsurprisingly, the commission was not optimistic about such a solution being reached in the short to medium term.¹⁰⁶

[71] It was unrealistic to expect that the High Court could have remodelled basic principles of defamation law and private international law in the manner advocated by Dow Jones and the interveners. The outcome in *Dow Jones v Gutnick* effects justice as between the parties. It is appropriate that Gutnick, as a Victorian resident, be allowed to seek to vindicate his reputation in Victoria for the damage done to it there.

⁹⁹ Law Commission for England and Wales, *Defamation and the Internet: A Preliminary Investigation* (December 2002, Scoping Study No 2) <<http://www.lawcom.gov.uk/files/defamation2.pdf>> at 2 January 2003.

¹⁰⁰ *Ibid* Appendix B.

¹⁰¹ *Ibid* [4.34].

¹⁰² *Ibid* [4.31]–[4.35].

¹⁰³ *Ibid* [4.24], [4.26]–[4.27], [4.30].

¹⁰⁴ *Ibid* [4.21]–[4.22].

¹⁰⁵ *Ibid* [4.25], [4.53].

¹⁰⁶ *Ibid* [4.54].

Rolph, 'Case Note'

The suggestion that the decision sets an undesirable precedent, with the implication that the High Court should have undertaken a radical reformulation of the common law, overlooks the clear limitations on a court's power to change the law. National legislatures and international bodies, rather than courts, even high appellate ones, are the appropriate *fora* to deal with the complex, competing policy considerations raised by the issue of jurisdiction over cyberspace libel claims. Yet, as the recent conclusions of the Law Commission for England and Wales' report into defamation on the internet indicate, the process of finding such a principled but practical solution has only just begun.