

DEFAMATION AND THE INTERNET AFTER *DOW JONES & COMPANY INC V GUTNICK*

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[165] ABSTRACT

In *Dow Jones & Company Inc v Gutnick*, the High Court held that a Victorian plaintiff may maintain a defamation action in Victoria against an American online publisher in respect of material written, edited and uploaded to the Internet in the United States.

The High Court's decision is consistent with decisions of courts in England and Canada. An American court, faced with the same facts, might well have reached the same conclusion as the High Court. Nonetheless, the High Court's decision attracted widespread national and international criticism.

While the decision does have the potential to chill freedom of speech on the Internet, there are significant substantive and practical reasons why it will be unlikely to have the dire implications some have predicted. The ramifications of the decision might also be tempered — as the High Court has hinted — by the development of a new defence to Australian defamation law applying in cases where a publisher's conduct has occurred wholly outside the jurisdiction of the forum.

Introduction

In October 2000, *Barron's* magazine and its online cousin, *Barron's Online*, published a scathing 7000 word article about Australian businessman Mr Joseph Gutnick (Gutnick). It traversed a range of issues, accusing Gutnick of exploiting religious charities in the United States, of involvement in share manipulation and tax evasion, and of improper dealings with a gaol tax evader and money launderer, Mr Nachum Goldberg. Gutnick brought defamation proceedings against the American publisher of *Barron's* and [166] *Barron's Online*, Dow Jones & Company Inc (Dow Jones), in the Supreme Court of his home State, Victoria. Gutnick undertook to sue in respect of the article only in Victoria and only in respect of publication of the article occurring in Victoria.

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Dow Jones sold 305,563 copies of the relevant print edition of *Barron’s* magazine. Only fourteen of those copies were sold in Victoria. Access to Barron’s Online is restricted to persons who have applied for and obtained a user name and password from Dow Jones. At the relevant time, Barron’s Online had some 550,000 subscribers, including 1,700 in Australia and about 300 in Victoria. Dow Jones has its editorial offices in New York city. The servers on which Barron’s Online is stored are located in New Jersey.

Gutnick’s case has not yet reached a hearing on the merits. The case has been mired since its inception in arguments about jurisdiction: should Dow Jones, an American publisher, be held to account in a Victorian court? Or should Gutnick have to bring his proceeding in the courts of New York, where Dow Jones is based, or New Jersey, where its web servers are located?

At first instance, Hedigan J of the Victorian Supreme Court ruled in Gutnick’s favour, concluding that as the article had been seen, heard and comprehended by persons in Victoria, it had been published there,² and that as Gutnick lived, worked and had a reputation in Victoria, and had limited his claim to damage arising out of publication in Victoria, the Supreme Court was a convenient forum for the hearing and determination of the action.³

The Victorian Court of Appeal refused Dow Jones’ application for leave to appeal. In a short judgment, Buchanan and O’Byrne JJA concluded that Hedigan J’s decision was ‘plainly correct’.⁴

Dow Jones sought and obtained leave to appeal to the High Court. The High Court appeal attracted a great deal of international interest. International media outlets, including *The New York Times*, CNN, Bloomberg, Reuters and *The Wall Street Journal* intervened in the case, arguing that the jurisdictional issue had serious international implications. Hedigan J’s ruling, they argued, would mean that international publishers would have to restrict the availability of material online in

² *Gutnick v Dow Jones & Company Inc* [2001] VSC 305, [60].

³ *Ibid* [124].

⁴ *Dow Jones & Company Inc v Gutnick* [2001] VSCA 249 (Unreported, Victorian Supreme Court of Appeal, Buchanan JA and O’Byrne AJA, 21 September 2001).

Australia, to avoid the risk of being sued in Australian courts. Worse still, Hedigan J's ruling meant that online publishers could potentially be sued in the courts of hundreds of countries, making it all but impossible to protect against liability. The ruling, if upheld, would have a 'chilling effect' on freedom of speech.

Most of the debate before the High Court related to a narrow point, namely whether, for the purposes of defamation law, online material should be treated as having been published at the place where it is read, heard or seen, or at some other place, such as the place where it was written, edited or uploaded to a server.

The High Court unanimously upheld Hedigan J's decision on 10 December 2002. Gutnick may thus proceed with his defamation action against Dow Jones in the Supreme Court of Victoria. The jurisdictional debate before Hedigan J and the High Court was not, however, truly about questions of convenience and cost. There was a more fundamental underlying question. If the article had been published in Victoria, and Gutnick limited his claim to damage to his reputation in that State, then all of the elements of the cause of action for defamation occurred there and liability would fall to be determined exclusively according to Victorian defamation law. If, on the other hand, the article had been published in New York or New Jersey, then liability might fall to be determined according to the defamation law of those places, which is radically different from Victorian defamation law, principally because of the influence of the First Amendment to the United States Constitution which guarantees freedom of speech and of the press.⁵

[167] To put it crudely, Dow Jones was more likely to win the substantive case if it proceeded in, or was determined in accordance with the law of, New York or New Jersey. Gutnick was more likely to win if the case proceeded in Victoria in accordance with Victorian defamation law. The real issue between the parties was thus whether American publishers should have the benefit of the First Amendment to the United States Constitution when they publish material about foreigners which is

⁵ *United States Constitution* amend I (1791): 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press...'

accessible outside the United States, or whether they should have to pay regard to the vastly different legal standards which prevail in other countries.⁶

High Court Decision

The Internet

With the exception of Kirby J, none of the judges of the High Court was much impressed by the argument that the Internet is a medium of communication that is fundamentally different from its technological precursors. The joint judges, Gleeson CJ, McHugh, Gummow and Hayne JJ, with whom Gaudron J agreed, said that the problem of widely disseminated communications was ‘much older than the Internet and the World Wide Web.’⁷ They argued that the Internet was ‘no more or less ubiquitous than some [satellite] television services.’⁸

Callinan J was similarly unimpressed, observing that the Internet ‘is no more than a means of communication by a set of interconnected computers’.⁹ There was, his Honour said, nothing novel in the fact that online material is available to a potentially vast global audience:

Newspapers have always been circulated in many places. The reach of radio and television is limited only by the capacity of the technology to transmit and hear or view them, which already, and for many years, has extended beyond any one country.¹⁰

Kirby J was less dismissive. He observed that the Internet is ‘more than simply another medium of human communication’, represents ‘a revolutionary leap in the distribution of information, including about the reputation of individuals’, and is ‘a medium that overwhelmingly benefits humanity’ by advancing rights of access to

⁶ *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [74](Kirby J): ‘The jockeying over the issues in this appeal is thus not concerned only with large questions of law. For the parties, the stakes are more basic and more urgent.’ See also [200] (Callinan J): ‘I agree with the respondent’s submission that what the appellant seeks to do, is to impose upon Australian residents for the purpose of this and many other cases, an American legal hegemony in relation to Internet publications. The consequence, if the appellant’s submission were to be accepted would be to confer upon one country, and one notably more benevolent to the commercial and other media than this one, an effective domain over the law of defamation, to the financial advantage of publishers in the United States, and the serious disadvantage of those unfortunate enough to be reputationally damaged outside the United States.’

⁷ *Ibid* [38].

⁸ *Ibid* [39].

⁹ *Ibid* [180].

¹⁰ *Ibid* [184].

information and freedom of expression.¹¹ Kirby J acknowledged that it is not possible 'to ensure with complete effectiveness the isolation of any geographic area on the Earth's surface from access to a particular website' and that 'there is presently no effective way for a website operator to determine, in every case, the geographic origin of the Internet user seeking access to the website.'¹² Kirby J accepted that the Internet's 'basic lack of locality suggests the need for a formulation of new legal rules to address the absence of congruence between cyberspace and the boundaries and laws [168] of any given jurisdiction'.¹³ Nonetheless, Kirby J ultimately agreed in the result with the rest of the Court, expressly declining the opportunity to modify existing principles to take account of the new medium, while asserting that national legislative attention and international discussion was warranted.¹⁴

Place of Publication

The core conclusion of the High Court's decision can be simply stated: material accessible via the Internet is published, for the purposes of defamation law, at the time when and place where it is downloaded in comprehensible form. The tort of defamation is committed each time and in each place where defamatory material is downloaded in comprehensible form, provided that the defamed person has a reputation in that place which is thereby damaged.¹⁵

The High Court's decision is an orthodox application of long-standing principles of Australian defamation law. Anglo-Australian defamation law has always treated material as being published at the place or places where it is read, heard or seen, rather than at the place from which the material originated.¹⁶ A newspaper or

¹¹ Ibid [164].

¹² Ibid [84].

¹³ Ibid [113].

¹⁴ Ibid [123]–[138], [166].

¹⁵ Ibid [44] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See also [151] (Kirby J) and [184], [197] (Callinan J).

¹⁶ *Pullman v Walter Hill and Co Ltd* [1891] 1 QB 524; *Hebditch v MacIlwaine* [1894] 2 QB 54, 61; *Joseph Evans & Sons v John G Stein & Company* (1904) 12 SLT 462; *Bata v Bata* [1948] WN 366; *Jenner v Sun Oil Co Ltd* [1952] 2 DLR 526, 536–7; *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6, 7; *Shevill v Presse Alliance SA* [1995] 2 AC 18, 41; *Shevill v Presse Alliance SA* [1996] AC 959, 983; *Lee Teck Chee v Merrill Lynch International Bank Ltd* [1998] 4 CLJ 188 (Malayan High Court), 194–5 (defamatory Internet material published in the place where it is accessed and read).

magazine will thus be published in each place where it is circulated. A national television program will be published in each state and territory of Australia.¹⁷

A similarly entrenched principle is that damage founds the cause of action for defamation, and that damage to reputation occurs on publication; that is, when defamatory material is read, heard or seen. Consequently, a separate cause of action potentially accrues each time and in each place where defamatory material is published.¹⁸

Dow Jones had invited the High Court to reformulate these principles insofar as they apply to online material. It argued that as the Internet is a global medium of communication, from which it is not possible to quarantine particular places or countries, the existing principles have the practical effect of requiring online publishers to take account of the law of every country in the world, every time material is uploaded. Dow Jones contended that a better rule would deem publication to have occurred at the place where the publisher maintained its web servers, unless that place was ‘merely adventitious or opportunistic’.¹⁹ The interveners sought a similar rule, based on the act of publication, determined ‘by reference to where the human being is, who uploads’, subject to a public policy exception.²⁰

All seven judges rejected those arguments. The bases for rejection were various but can be briefly stated. First, the proposed rule was likely to be uncertain in its application, as the meaning of words such as ‘adventitious’ and ‘opportunistic’ was more likely to generate debate than agreement.²¹ Secondly, the proposed rule would be likely to cause substantial prejudice to defamed persons, who would have no way of determining with any certainty the location of a publisher’s web servers.²² [169] Thirdly, the proposed rule would have dramatic implications not just for questions of jurisdiction, but also for the governing law in defamation actions and thus the

¹⁷ See, eg, *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6.

¹⁸ See, eg, *Meckiff v Simpson* [1968] VR 62.

¹⁹ Transcript of oral argument before the High Court on 28 May 2002, available at <<http://www.austlii.edu.au/au/other/hca/transcripts/2002/M3/2.html>>.

²⁰ *Ibid.*

²¹ *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [21] (Gleeson CJ, McHugh, Gummow and Hayne JJ), [131] (Kirby J).

²² *Ibid* [132] (Kirby J).

resolution of proceedings.²³ In a practical sense, it would mean that a disproportionate number of defamation actions would have to be heard and determined in the United States, or resolved according to United States law, simply because that country hosts a disproportionate number of web servers relative to other countries.²⁴ Fourthly, the proposed rule ignored the reality that words can have effects beyond the jurisdiction in which they are spoken or written; a reality which may properly be the concern of a number of different legal systems.²⁵ Finally, the proposed rule could encourage publishers to locate the uploading of harmful data in a place chosen for the purpose of evading defamation liability.²⁶

The Spectre of Global Liability

Plainly, it would be undesirable for persons defamed by material published in a number of jurisdictions to have to bring proceedings in each jurisdiction in order to vindicate their reputations. It would be similarly undesirable for defendants to have to defend a multitude of proceedings concerning the same material in a number of different places.

The spectre of global liability and its potentially chilling effect on freedom of speech was a theme in the arguments of Dow Jones and the interveners. The High Court was not, however, persuaded by the argument that online publishers are at risk of being sued in a multitude of places every time they upload material to a web server, for a combination of substantive and practical reasons.

First, as Gleeson CJ, McHugh, Gummow and Hayne JJ pointed out, there are well-established principles in Australian law to prevent vexation by separate suits involving the same parties and issues.²⁷ In addition, estoppel principles operate after judgment to prevent a party from re-litigating the same issue in the same or a different forum.²⁸

²³ Ibid [23]–[24] (Gleeson CJ, McHugh, Gummow and Hayne JJ), [133] (Kirby J).

²⁴ Ibid [133] (Kirby J), [200] (Callinan J).

²⁵ Ibid [24] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

²⁶ Ibid [130] (Kirby J), [199] (Callinan J).

²⁷ Ibid [36], citing authorities including *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345; *Maple v David Syme & Co Ltd* [1975] 1 NSWLR 97, 100–2; *Australian Broadcasting Corporation v Waterhouse* (1991) 25 NSWLR 519, 537 and *Meckiff v Simpson* [1968] VR 62, 65, 69.

²⁸ The principles include:

The effect of these principles in defamation actions is that where an Australian court has jurisdiction, the plaintiff may generally claim a remedy in respect of the worldwide publication of allegedly defamatory material. It will ordinarily be an abuse of process to issue more than one proceeding in [170] respect of different publications of the same material.²⁹ The fact that causes of action concerning the same material might have accrued in different places is a matter dealt with by the operation of choice of law rules.

Secondly, the risk of publishers having to defend defamation actions in every corner of the globe is tempered by three significant practical matters:

- courts will only be likely to award substantial damages in respect of publications occurring in a particular place if the plaintiff has a reputation in that place;³⁰
- plaintiffs will be unlikely to sue for defamation unless any judgment they obtain is capable of being enforced in a place where the defendant has assets;³¹ and
- ‘in all except the most unusual of cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person may resort.’³²

res judicata: the principle that where an action has been brought and judgment has been entered in that action, no other proceedings may be maintained on the same cause of action: *Blair v Curran* (1939) 62 CLR 464, 532 (Dixon J); *Jackson v Goldsmith* (1950) 81 CLR 446, 466 (Fullagar J); *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 597 (Gibbs CJ, Mason and Aickin JJ), 608–9 (Brennan J);

issue estoppel: the principle that a judicial determination directly involving an issue of fact or law disposes of the issue once and for all, so that it cannot afterwards be raised between the same parties or those who claim through them: *Blair v Curran* (1939) 62 CLR 464, 531 (Dixon J); *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 597 (Gibbs CJ, Mason and Aickin JJ), 609 (Brennan J); and

so-called *Anshun* estoppel: the principle that matters which were not raised but which reasonably could and should have been raised in prior proceedings may not be raised in later proceedings: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

²⁹ *Meckiff v Simpson* [1968] VR 62, 63–4, 69 (Menhennitt J). See also *Gorton v Australian Broadcasting Commission* (1973) 1 ACTR 6. Cf *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [202] (Callinan J): ‘For myself I would see no immediate reason why, if a person has been defamed in more than one jurisdiction, he or she, if so advised might not litigate the case in each of those jurisdictions.’

³⁰ *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [53] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

³¹ *Ibid.* See also [165] (Kirby J).

³² *Ibid* [54].

Having regard to these substantive and practical matters, the High Court rejected the argument that Australian law should adopt a ‘single publication’ rule of the kind which applies in a majority of American States to prevent a multiplicity of suits arising out of the widespread publication of the same material. The effect of the single publication rule is that only one cause of action arises out of, and only one action for damages may be maintained in relation to ‘[a]ny one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication’.³³ The rule is fundamentally different from the Australian position, which is that separate causes of action accrue each time defamatory material is published; that is, read, heard or seen.³⁴ The single publication rule has also been rejected in England.³⁵

In *Firth v State of New York*,³⁶ the New York Court of Appeals held that the single publication rule applies to online material, so that at least in the absence of some alteration or change in form, only one cause of action may be maintained in respect of online material. A seemingly different result was reached in *Swafford v Memphis Individual Practice Association*.³⁷ In that case, the Court of Appeals of Tennessee held that the single publication rule did not apply to allegedly defamatory material contained in an online health care databank.

In those American States where it applies, the single publication rule also generally influences or determines the substantive law governing the resolution of defamation actions. In their joint judgment, Gleeson CJ, McHugh, Gummow and Hayne JJ argued that applying the single publication rule to influence or determine governing law ‘confuses two separate questions: one about how to prevent [171] multiplicity of suits and vexation of parties, and the other about what law must be applied to determine substantive questions arising in an action in which there are foreign elements.’³⁸

³³ American Law Institute, *Restatement of the Law*, Second, Torts (1977), §577A.

³⁴ See, eg, Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (1998) 82.

³⁵ *Loutchansky v Times Newspapers Ltd* [2002] QB 321.

³⁶ 775 NE 2d 463 (Ct App 2002).

³⁷ (Unreported, Court of Appeals of Tennessee, 2 June 1998); text of decision available at <<http://www.tsc.state.tn.us/opinions/tca/PDF/982/swafforg.pdf>>.

³⁸ *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [35] (Gleeson CJ, McHugh, Gummow and Hayne JJ), [138] (Kirby J), cf [57]–[58] (Gaudron J). See also Note, ‘The Single Publication Rule in Libel: A Fiction Misapplied’ (1949) 62 *Harvard Law Review* 1041; Debra Cohen, ‘The single publication rule: one action, not one law’ (1966) 62 *Brooklyn Law Review* 921.

Result

As Gutnick had sued only in respect of publication of the article occurring in Victoria and had limited his claim to damage to his reputation in that State, his claim related entirely to causes of action accruing in Victoria and fell to be determined according to Victorian defamation law. Although the article had been written and edited in New York, and uploaded to web servers located in New Jersey, those matters were not relevant to locating the place of the tort. No choice of law question thus arose.

The High Court dismissed Dow Jones’ appeal with costs. Unless the matter is settled or otherwise disposed of, it will reach trial in the ordinary course before the Supreme Court of Victoria.

The International Context

While the High Court’s decision is the first decision of an ultimate appellate court to consider questions of jurisdiction in respect of online defamation, there have been many similar decisions in relation to traditional media of communication, and a number of similar decisions of lower courts concerning online material. A brief survey of decisions from other jurisdictions compels the conclusion that the High Court’s decision is neither novel nor anomalous.

England

Perhaps the most notable English case on similar facts to *Dow Jones & Company Inc v Gutnick* is the House of Lords’ decision in *Berezovsky v Michaels*.³⁹ The case concerned allegations published in *Forbes*, a business magazine written, edited and circulated primarily in the United States, concerning two prominent Russian citizens. The magazine had a circulation of around 785 710 copies in North America, 13 copies in Russia, and 1 915 copies in England and Wales. The plaintiffs confined their claim for damages to publication of the magazine in England and Wales, including distribution of hard copies of the magazine, and publication of the offending material in England and Wales via the Internet. The publisher sought to stay the action, on the ground that England was not the appropriate forum. By a majority, the House of Lords refused the publisher’s application.

³⁹ [2000] 2 All ER 986.

Lord Steyn, with whom Lord Hobhouse agreed, delivered the leading opinion. His Lordship held:

The present case is a relatively simple one. It is not a multi-party case: it is, however, a multi-jurisdictional case. It is also a case in which all the constituent elements of the torts occurred in England. The distribution in England of the defamatory material was significant. And the plaintiffs have reputations in England to protect. In such cases it is not unfair that the foreign publisher should be sued here.⁴⁰

Lord Steyn declined to discuss specific issues arising out of the publication of the offending magazine via the Internet, concluding that there had been insufficient evidence before the House to enable that ‘important issue’ to be considered satisfactorily.⁴¹

[172] Lord Nolan reached the same conclusion, holding that:

This case is solely concerned with the plaintiffs’ reputations in England. They seek to have their reputations judged by English standards. The Court of Appeal thought for this purpose England was the natural forum, and I agree with them. I do not follow the relevance of the [first instance] judge’s remark that the article has ‘no connection with anything which has occurred in this country’. A businessman or politician takes his reputation with him wherever he goes, irrespective of the place where he has acquired it.⁴²

In a strong dissent, Lord Hoffman held that the plaintiffs were ‘forum shoppers in the most literal sense’.⁴³ In his Lordship’s opinion, the plaintiffs were seeking to avoid having to litigate in the United States, because the decision in *New York Times Co v Sullivan*⁴⁴ made it too likely that they would lose. At the same time, they did not want to sue in Russia ‘for the unusual reason that other people might think it was too likely’ that they would win.⁴⁵ His Lordship would have stayed the English proceedings.

⁴⁰ Ibid 994.

⁴¹ Ibid.

⁴² Ibid 998.

⁴³ Ibid 1005.

⁴⁴ 376 US 254 (1964).

⁴⁵ *Berezovsky v Michaels* [2000] 2 All ER 986, 1005.

Lord Hope could find no error in the first instance judge’s exercise of discretion. His Lordship thought it would be regrettable if defamation actions could be brought in England against foreign publishers in respect of things said or done elsewhere by persons with established international reputations who have formed no long-standing or durable connections with England, and who are unable to demonstrate that the publication has had any material effect upon business or other transactions by them in England.⁴⁶

The decision in *Berezovsky v Michaels* is thus consistent with the High Court’s decision in *Dow Jones & Company Inc v Gutnick*. In both cases, the court was prepared to exercise jurisdiction over conduct occurring outside the forum upon the plaintiffs limiting their claims to publication occurring and harm suffered within the forum, and upon being satisfied that the plaintiffs had reputations worthy of protection in the forum. It can be argued that *Berezovsky v Michaels* involved a more extravagant exercise of jurisdiction than *Dow Jones & Company Inc v Gutnick*. In the latter case, the plaintiff was a resident of the forum with most of his business and personal ties there. In *Berezovsky v Michaels*, the plaintiffs’ links with the forum were considerably more remote: they were Russian citizens, suing in England in respect of a publication written and edited in the United States.

Other English decisions applying the same principles in defamation actions involving print publications include *Schapira v Ahronson*⁴⁷ and *Chadha v Dow Jones & Company Inc*.⁴⁸

In *Schapira v Ahronson*, Peter Gibson LJ refused to stay proceedings brought by an Israeli citizen, domiciled in London, in respect of allegedly defamatory material published in an Israeli newspaper with a very small circulation in London. The plaintiff limited his claim to publication of the newspaper within England.

In *Chadha v Dow Jones & Company Inc*, the English Court of Appeal applied analogous principles to reach a different result. The Court declined to allow an

⁴⁶ Ibid 1013.

⁴⁷ [1999] EMLR 735.

⁴⁸ [1999] EMLR 724.

American resident and a company incorporated in California to serve English defamation proceedings against Dow Jones in respect of an article appearing in the print edition of Barron's magazine. The Court concluded that England was an inappropriate forum for the hearing of the action, having regard in particular to the fact that the plaintiffs did not appear to have reputations worthy of vindication in that country.⁴⁹

[173] The High Court's decision in *Dow Jones & Company Inc v Gutnick* was applied by Eady J in *Harrods Ltd v Dow Jones & Company Inc*.⁵⁰ Eady J ruled that an English claimant could proceed with a defamation action against Dow Jones concerning an item that appeared in the American edition of The Wall Street Journal and its online cousin, www.wsj.com. The evidence was that only ten copies of the print edition of The Wall Street Journal had been sent to subscribers in the United Kingdom. The Wall Street Journal has a national distribution within the United States of around 1.8 million copies. The evidence was that there had been only a very small number of 'hits' on the offending item on the web. Eady J permitted the action to proceed, noting that the claimant was an English company with a trading reputation in England and that the claimant had limited its claim to publications which had taken place in England. Before Eady J ruled, the defendant applied to the United States District Court for the Southern District of New York for intervention, 'with a view to avoiding the enormous expense and uncertainty as to whether it might continue to publish the offending article.'⁵¹ Judge Victor Marrero declined the application, ruling that the English proceeding offered 'a more appropriate alternative remedy' for the parties.⁵² The judge recognised that if Dow Jones failed in the English proceedings, it might nonetheless have a remedy in the United States, presumably because an American court might decline to enforce the English judgment based on the principles in *Bachchan v India Abroad Publications Inc*⁵³ and *Telnikoff v Matusevitch*,⁵⁴ discussed below.

⁴⁹ Ibid 734. See also *Kroch v Russell et Compagnie Société des Personnes à Responsabilité Limitée* [1937] 1 All ER 725.

⁵⁰ [2003] EWHC 1162 (QB) (22 May 2003).

⁵¹ Ibid.

⁵² Ibid.

⁵³ 585 NY 2d 661 (NY County SC, 1992).

⁵⁴ 702 A 2d 230 (Md CA, 1997).

Canada

A first instance Canadian case with some similarities to *Dow Jones & Company Inc v Gutnick* is *Kitakufe v Oloya*.⁵⁵ In that case, an Ugandan-born Toronto doctor sued a journalist over a report in an Ugandan newspaper, *New Vision*, accusing him of fraud, professional misconduct and unethical practices. The online edition of the newspaper was available in Canada, but not the print edition. The Canadian court allowed the case to proceed. The judge thought the doctor was entitled to sue in the place where he lived and worked, and should not have to suffer the inconvenience of shutting down his practice and travelling to Uganda to enforce his rights.

United States

American courts will exercise jurisdiction over conduct occurring outside the forum only where jurisdiction is proper under the applicable ‘long-arm’ statute and consistent with the Fourteenth Amendment to the United States Constitution,⁵⁶ which guarantees due process. The long-arm statutes of the American States typically permit jurisdiction to the extent permitted by the Fourteenth Amendment, so that ‘the statutory inquiry ... merges with the constitutional inquiry, and the two inquiries essentially become one.’⁵⁷

The Fourteenth Amendment has been interpreted as permitting a court to exercise jurisdiction over conduct occurring outside the forum when: [174]

- the defendant has purposefully availed himself or herself of the benefits and protections of the forum state by establishing ‘minimum contacts’ with that state; and
- the exercise of jurisdiction over the defendant does not offend ‘traditional notions of fair play and substantial justice.’⁵⁸

⁵⁵ (Unreported, Ontario Court of Justice, Himel J, 2 June 1998).

⁵⁶ *United States Constitution*, amend XIV (1868), s 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

⁵⁷ *Stover v O’Connell Associates Inc*, 84 F 3d 132, 135–6 (4th cir, 1996).

⁵⁸ The most important United States Supreme Court decisions establishing and explaining these principles include *Milliken v Meyer*, 311 US 457, 463 (1941); *International Shoe Company v Washington*, 326 US 310, 316 (1945); *World Wide Volkswagen Corporation v Woodson*, 444 US 286,

Where the ‘contacts’ between a defendant and a state are extensive, wide-ranging, substantial, continuous and systematic, ‘general’ jurisdiction may exist in respect of all causes of action against the defendant arising out of conduct occurring outside the forum, even if there is no connection between those contacts and the particular claim asserted against the defendant.⁵⁹

In cases where general jurisdiction does not exist, ‘specific’ jurisdiction may be exercised in respect of conduct occurring outside the forum if the particular claim asserted against the defendant arises out of his or her contacts with the forum state.⁶⁰

The leading American decision concerning jurisdiction in a defamation action in respect of conduct occurring outside the forum is *Calder v Jones*.⁶¹ Jones was a professional entertainer who lived and worked in California. She claimed that she was defamed by an article published in 1979 in *The National Enquirer*, a Florida publication with a higher circulation in California than in any other American State. The article was written and edited in Florida. The journalist made a number of phone calls to sources in California in the course of preparing the article.

Rehnquist J delivered the opinion of the United States Supreme Court. His Honour said that as ‘the brunt of the harm, in terms both of [Jones’] emotional distress and the injury to her professional reputation, was suffered in California’, jurisdiction was ‘therefore proper in California based on the “effects” of [the] Florida conduct in California.’ Rehnquist J noted that the conduct of the defendants had been intentional and expressly aimed at California, and that the defendants knew that the article would have a potentially devastating impact on Jones in that State, where she lived and worked and where *The National Enquirer* had its largest circulation. His Honour said that the defendants ‘must “reasonably anticipate being haled into court there” to answer for the truth of the statements made in their article’. The test applied by the Supreme Court in *Calder v Jones* has come to be known as the ‘effects test’.

295 (1980); *Keeton v Hustler Magazine Inc*, 465 US 770, 774 (1984); *Burger King Corporation v Rudzewicz*, 471 US 462, 475 (1985).

⁵⁹ See for example *International Shoe Company v Washington*, 326 US 310, 316 (1945); *Mansour v Superior Court*, 38 Cal App 4th 1750, 1758 (1995); *Mink v AAAA Development LLC*, 190 F 3d 333, 336 (5th cir, 1999).

⁶⁰ *Ibid.*

⁶¹ 465 US 783 (1984).

The ‘effects test’ was recently applied in an online defamation action in *Planet Beach Franchising Corporation v C3ubit Inc*, a decision of the United States District Court for the Eastern District of Louisiana made on 12 August 2002.⁶² Pennsylvania-based defendants had posted an article on a web site which was critical of the financial viability and practices of the Louisiana-based plaintiff and its president. The court held that it had jurisdiction to hear and determine the action. The defendants had ‘published a controversial, allegedly defamatory article about a corporation that [the] defendants knew to be based in Louisiana.’ The defendants had obtained information from persons in Louisiana before publication. The court said that the article was directed towards a specialised audience that was very likely to include franchisees of the plaintiff corporation. In the circumstances, Louisiana was a convenient forum for the hearing and determination of the dispute.⁶³

[175] The approach adopted in *Planet Beach Franchising Corporation v C3ubit Inc* is difficult to reconcile, however, with the prevailing trend in American cases concerning jurisdiction in respect of online conduct occurring outside the forum. That trend involves courts distinguishing between different forms of Internet conduct based on a ‘sliding scale’ of interactivity.

The ‘sliding scale’ approach was defined in an Internet domain name case, *Zippo Manufacturing Company v Zippo Dot Com Inc*.⁶⁴ The plaintiff in that case was a Pennsylvanian corporation. The defendant was a Californian corporation. The plaintiff sued the defendant in Pennsylvania, alleging that the defendant had infringed its trademark through the registration and use of certain domain names. The evidence was that the defendant offered access to newsgroups to some 140 000 paying subscribers, including 3000 subscribers in Pennsylvania. The defendant had entered into seven contracts with Internet access providers to furnish its services to customers

⁶² 2002 WL 1870007 (ED La, 2002).

⁶³ It should be noted that the court relied, in part, on the first instance decision in *Young v New Haven Advocate*, 184 F Supp 2d 498 (WD Va, 2001), which was subsequently overturned on appeal: *Young v New Haven Advocate*, 315 F 3d 256 (4th cir, 2002), discussed below.

⁶⁴ 952 F Supp 1119 (WD Pa, 1997). The Third Circuit Court of Appeals recently called the decision ‘a seminal authority regarding personal jurisdiction based upon the operation of an Internet web site’: *Toys ‘R’ Us Inc v Step Two, SA*, 318 F 3d 446 (3rd cir, 2003). See also *Cybersell, Inc v Cybersell Inc*, 130 F 3d 414 (1997).

in Pennsylvania. The question for the court was whether those contacts with Pennsylvania were sufficient to found jurisdiction.

The court established a 'sliding scale' test for assessing whether jurisdiction existed in cases involving online conduct occurring outside the forum:

The cases are scant. Nevertheless, our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and nature of the exchange of information that occurs on the Web site.⁶⁵

The court held that the defendant's activities in and in respect of Pennsylvania were sufficient to found jurisdiction:

Dot Com [the defendant] repeatedly and consciously chose to process Pennsylvania residents' applications and to assign them passwords. Dot Com knew that the result of these contracts would be the transmission of electronic messages into Pennsylvania. The transmission of these files was entirely within its control. Dot Com cannot maintain that these contracts are 'fortuitous' or 'coincidental'. When a defendant makes a conscious choice to conduct business with the residents of a forum state, 'it has clear notice that it is subject to suit there.' Dot Com was under no obligation to sell its services to Pennsylvania residents. It freely chose to do so, presumably in order to profit from those transactions. If a corporation determines that the risk of being subject

⁶⁵ 952 F Supp 1119, 1124 (WD Pa, 1997) (footnotes and references omitted).

to personal jurisdiction in a particular forum is too great, it can choose to sever its connection to that state. If Dot Com had not wanted to be amenable to jurisdiction in Pennsylvania, the solution would have been simple — it could have chosen not to sell its services to Pennsylvania residents.⁶⁶

[176] The sliding scale test has come to be a convenient rule of thumb for predicting the circumstances in which American courts will exercise jurisdiction over online conduct occurring outside the forum. It has been applied in a number of defamation actions, some notable examples of which include *Blumenthal v Drudge*,⁶⁷ *Barrett v Catacombs Press*,⁶⁸ *Blakey v Continental Airlines Inc*,⁶⁹ *Jewish Defense Organization Inc v Superior Court of Los Angeles County*,⁷⁰ *Bochan v La Fontaine*⁷¹ and *Bailey v Turbine Design Inc*.⁷²

The current trend in the American authorities concerning jurisdiction in defamation actions can be illustrated by reference to two recent decisions of appellate courts. *Revell v Lidov*⁷³ is a decision of the Fifth Circuit Court of Appeals handed down on 31 December 2002. It concerned an article posted on an Internet bulletin board hosted by Columbia University in New York by an academic at Harvard University in Boston, Massachusetts. The article alleged, among other things, that the plaintiff, a Texan resident who was formerly the Associate Deputy Director of the FBI, had been complicit in a conspiracy whereby the United States government had failed to stop the terrorist attack on Pan Am Flight 103 over Lockerbie, Scotland in 1988, despite having clear advance warnings. The plaintiff sued in Texas.

The Texan court held that the Columbia University bulletin board was interactive, and thus within the middle category described in *Zippo Manufacturing Company v Zippo Dot Com Inc*. It was interactive because it involved an ‘open forum’ in which any visitor to the site could participate. In assessing whether personal jurisdiction existed, the court then went on to consider the application of the effects test in *Calder v Jones*,

⁶⁶ *Ibid*, 1126–7.

⁶⁷ 992 F Supp 44 (DDC, 1998).

⁶⁸ 64 F Supp 2d 440 (ED Pa, 1999).

⁶⁹ 730 A 2d 854 (NJ Super AD, 1999).

⁷⁰ 72 Cal App 4th 1045 (Ca CA, 1999).

⁷¹ 68 F Supp 2d 692 (ED Va, 1999).

⁷² 86 F Supp 2d 790 (Tenn DC, 2000).

⁷³ 317 F 3d 467 (5th cir, 2002).

ultimately concluding that the test did not support a finding of personal jurisdiction. Among other things, the article did not contain any references to Texas or to the Texan activities of the plaintiff and was not specifically directed at Texan readers.

The approach of the court in *Revell v Lidov* was thus to treat the effects test as being relevant only because the site in question was interactive, and therefore within the 'middle ground' of the sliding scale. Viewed in this way, the court said it saw no 'tension' between the sliding scale test and the effects test. The court expressly declined to decide whether a 'passive' web site could still give rise to personal jurisdiction under *Calder*.

Another instructive recent American case concerning jurisdiction in respect of online defamation is *Young v New Haven Advocate*,⁷⁴ a decision handed down on 13 December 2002, three days after the High Court decision in *Dow Jones & Company Inc v Gutnick*. Two Connecticut newspapers published online articles discussing that State's policy of housing its prisoners in correctional facilities in Virginia. Defamation proceedings were brought in Virginia by a warden of a Virginian prison, who alleged that the articles had imputed that he was a racist and an advocate of racism, and that he had encouraged the abuse of inmates by guards. The articles were written entirely in Connecticut. Some telephone calls were made by reporters to Virginia for the purpose of gathering information for the articles. Neither newspaper solicited subscribers from Virginia or had any offices, employees, assets or business relationships there. One of the newspapers had eight subscribers in Virginia, while the other had none at all.

The Fourth Circuit Court of Appeals held that the Virginian court did not have jurisdiction to hear and determine the action. The Court said:

[T]he fact that the newspapers' websites could be accessed anywhere, including Virginia, does not by itself demonstrate that the newspapers were intentionally directing their website content to a Virginia audience. [177] Something more than posting and accessibility is needed... The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers.

⁷⁴ 315 F 3d 256 (4th cir, 2002).

The Court concluded that the articles had been aimed at a Connecticut audience, in circumstances where the newspapers could not have reasonably anticipated being haled into court in Virginia to answer for the truth of the statements made in their articles.⁷⁵

Conclusions

There are two main differences between the way in which American and Australian courts approach the question of jurisdiction in respect of Internet conduct occurring outside the forum. First, Australian courts do not overtly apply an effects test or a sliding scale test. Under Australian law, the relevant question is whether the court should decline to exercise jurisdiction over a proceeding that has been validly commenced and served on the ground that it is a ‘clearly inappropriate forum’.⁷⁶ Factors relevant to the clearly inappropriate forum test include matters affecting convenience and expenses, the place of domicile of the parties, the place where the relevant events occurred, the location of witnesses and any legitimate personal or juridical advantage available to the plaintiff in the forum which would not be available in an alternative forum.⁷⁷

The Australian test thus involves consideration of a broad range of matters, including particularly the domicile and convenience of the plaintiff. The American test, by contrast, concentrates on the intention and expectations of the defendant, the extent of the defendant’s business or other contacts with the forum and the geographic focus of the offending material.

Secondly, it is clear that the High Court considers that foreign publishers should almost always anticipate the risk of being haled into Australian courts to answer for defamatory material they publish of and concerning Australians. As Kirby J put it:

⁷⁵ See *Burger King Corporation v Rudzewicz*, 471 US 462, 474 (1985).

⁷⁶ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559 (Mason CJ, Deane, Dawson and Gaudron JJ), following Deane J in *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197, 241–57.

⁷⁷ *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460, 478; *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197, 245 (Deane J), adopted in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 564–5 (Mason CJ, Deane, Dawson and Gaudron JJ).

Where a person or corporation publishes material which is potentially defamatory of another, to ask the publisher to be cognisant of the defamation laws of the place where the person resides and has a reputation is not to impose on the publisher an excessive burden. At least it is not to do so where the potential damage to reputation is substantial and the risks of being sued are commensurately real. Publishers in the United States are well aware that few, if any, other jurisdictions in the world observe the approach to the vindication of reputation adopted by the law in that country.⁷⁸

Callinan J was more blunt:

If a publisher publishes in a multiplicity of jurisdictions it should understand, and must accept, that it runs the risk of liability in those jurisdictions in which the publication is not lawful and it inflicts damage.⁷⁹

American courts take a different approach. In *Revell v Lidov*,⁸⁰ for example, the court said:

[178] Lidov must have known that the harm of the article would hit home wherever Revell resided. But that is the case with virtually any defamation. A more direct aim is required than we have here. In short, this was not about Texas. If the article had a geographic focus, it was Washington, DC.

In short, Australian courts have a more expansive and parochial approach towards the circumstances in which jurisdiction may be exercised over conduct occurring outside the forum than American courts.

Despite the differences in approach between Australian and American law towards jurisdiction in respect of online conduct occurring outside the forum, however, it is by no means clear that an American court would have reached a different conclusion from the High Court on the facts in *Dow Jones & Company Inc v Gutnick*.

While the Barron's Online web site under examination in *Dow Jones & Company Inc v Gutnick* was essentially a 'passive' web site with little or no interactivity within the

⁷⁸ *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [151].

⁷⁹ *Ibid* [192].

⁸⁰ United States Court of Appeals for the Fifth Circuit, 31 December 2002.

meaning of the sliding scale test set out in *Zippo Manufacturing Company v Zippo Dot Com Inc*, it was a subscription site; that is, a site on which most content was available only to persons who had applied to Dow Jones for a username and password, generally by providing a name, address and credit card number. Dow Jones chose to process subscription applications from some 300 Victorian residents and to assign them passwords. By accepting their applications, Dow Jones formed a contractual relationship with each of those subscribers. Dow Jones knew that the result of accepting their applications would be the transmission of the content of Barron’s Online into Victoria. Dow Jones was under no obligation to accept subscriptions from residents of Victoria. The transmission of Barron’s Online into Victoria was within Dow Jones’ control.

The nature and quality of commercial activity conducted by Dow Jones via the Barron’s Online site was thus analogous in many respects to that conducted by the defendant in the *Zippo* case.⁸¹ The ‘contacts’ between Dow Jones and Victoria were in the relevant sense stronger than the contacts between the defendants and the forum in cases such as *Planet Beach Franchising Corporation v C3ubit Inc*, *Revell v Lidov* and *Young v New Haven Advocate*. It is therefore at least arguable that an American court would have reached the same conclusion as the High Court on the facts in *Dow Jones & Company Inc v Gutnick*.

An interesting recent decision, analogous in some respects to *Dow Jones & Company Inc v Gutnick*, in which a Californian court held that it had jurisdiction in respect of a foreign defendant is *Metro-Goldwyn-Mayer Studios v Grokster Ltd*.⁸² A corporation incorporated in Vanuatu but with its business principally based in Australia, Sharman Network Ltd (Sharman), had distributed file sharing software which enabled Internet users to search through and download files from the computers of other Internet users, including music and video files. The software had been downloaded some 143 million times worldwide, including around two million times in California. The defendant did not charge for the software, although it derived income from advertising bundled with

⁸¹ See also *CompuServe Inc v Patterson*, 89 F 3d 1257 (6th cir, 1996); *Edias Software International, LLC v Basis International Ltd*, 947 F Supp 413 (D Ariz, 1996); *Telco Communications v An Apple a Day*, 977 F Supp 404 (ED Va, 1997).

⁸² 2003 WL 186657 (CD Cal, 2003).

its software. The plaintiffs alleged that Sharman was liable for contributory and vicarious copyright infringement. The court held that it had jurisdiction:

Sharman has not denied and cannot deny that a substantial number of its users are California residents, and thus that it is, at a minimum, constructively aware of continuous and substantial commercial interaction with residents of this forum. Further, Sharman is well aware that California is the heart of the entertainment industry, and that the brunt of the injuries described in these cases is likely to be felt here. It is hard to imagine on these bases alone that Sharman would not reasonably anticipate being haled into court in California.

Generally speaking, however, it seems likely that Australian courts would be more likely to exercise jurisdiction in defamation actions involving publications originating outside the forum appearing on 'passive' web sites than American courts, at least in the absence of evidence that the publisher had strong [179] business or other contacts with the forum or the publication in question was intentionally targeted at and focused on readers in the forum.

Reaction and Implications

The High Court's judgment received an enormous amount of national and international media attention, much of which was critical of the result. An editorial in the late edition of *The New York Times* on 11 December 2002, for example, expressed the view that the High Court decision 'could strike a devastating blow to free speech online.' An editorial in *The Australian* newspaper on 11 December 2002 was even more breathless. It opined that the High Court judges remained 'entrapped by the arcane art of the common law and the inglorious history of defamation law as a tool of the powerful.' It warned that the judges, in their speeches posted on the High Court's website, 'should be wary of saying anything derisory of Zimbabwe's Robert Mugabe, of Malaysia's Mahathir Mohamad or of any of the litigious-happy ruling elite of Singapore', lest they find themselves served with a defamation writ while waiting 'in the transit lounge on the way to human rights and international law conferences abroad'.

The Chilling Effect

While the ramifications of the High Court’s decision are difficult to predict, it cannot be doubted that it has the potential to chill freedom of speech: as a result of the decision, foreign publishers may decide to water down or not publish material which has the potential to damage the reputations of Australians, not publish such material online, or try to restrict Australians from having access to their sites.

The decision may prove to be a boon to Australian defamation lawyers. Foreign publishers will be more likely, as a result of the decision, to seek advice in relation to Australian defamation law before uploading material which is critical of Australians to generally accessible websites.

The decision is likely to cause Australian media outlets to think twice before uploading material which is critical of public figures in countries with laws which are assumed to be highly restrictive of freedom of expression, such as Malaysia, Singapore and Zimbabwe. Some Australian media outlets have already adopted the practice of not publishing online some articles which are available in their print editions in order to minimise the risk of foreign defamation actions.

The decision has rapidly achieved international notoriety. Anecdotal inquiries among Australian defamation lawyers and my own experience has been that since the first instance decision in *Gutnick v Dow Jones & Company Inc* was handed down by Hedigan J in August 2001, American online content and Internet service providers have been more inclined to accede to demands that material which is potentially defamatory of Australians be removed from their servers. Having made those points, however, the implications of the High Court’s decision should not be exaggerated or overstated.

International Comparisons

In the first place, as demonstrated above, the High Court’s decision is part of a growing body of international jurisprudence. It is consistent with the approach adopted so far by courts in England and Canada. It is by no means clear that an American court, faced with the same facts, would have reached a different outcome.

Practical Impediments

Secondly, there are significant practical reasons why foreign publishers will be sued only rarely in Australian courts in respect of online material. Plaintiffs are only likely to sue in places where they have a substantial reputation, and will usually only be likely to sue in the place where they reside. In most cases, foreign publishers will know the places in which they are most likely to be legally exposed.⁸³

[180] Foreign publishers can minimise the risk of liability by seeking appropriate advice and acting on it before publication. There is nothing new about American publishers seeking advice as to foreign law. Long before the advent of the Internet, major American publishers were aware of the risk of being sued in the courts of countries with plaintiff-friendly defamation laws.

In addition, defamed persons are unlikely to go to the trouble and expense of defamation proceedings in Australia against foreign defendants unless they know that any judgment they obtain will be enforceable in a place where the defendant has assets.⁸⁴

In *Bachchan v India Abroad Publications Inc*⁸⁵ and *Telnikoff v Matusevitch*,⁸⁶ American courts refused to recognise English defamation judgments on the ground that English defamation law is antithetical to the guarantee of freedom of speech and of the press in the First Amendment to the United States Constitution. There can be no real doubt that those cases would have been similarly decided had the judgments in question been Australian rather than English.

In practical terms, therefore, there may be little point in Australians suing American defendants for defamation in Australia unless those defendants have a presence and assets here against which a judgment could be executed, or unless they are prepared to run their case again in order to satisfy an American court that the publication would give rise to liability according to American standards. Such applications are likely to

⁸³ *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [54] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁸⁴ *Ibid* [53] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

⁸⁵ 585 NY 2d 661 (NY County SC, 1992).

⁸⁶ 702 A 2d 230 (Md CA, 1997); affirmed without further reasons being given in *Matusevitch v Telnikoff*, 159 F 3d 636 (DC Cir, 1998).

be out of reach to almost all Australian plaintiffs.⁸⁷ Bringing defamation proceedings against small foreign publishers, as opposed to large media outlets with a multinational presence, is likely to prove particularly futile. Such a publisher may choose not to contest the proceedings, and to ‘save its contest to the courts of its own jurisdiction’ at the time the plaintiff seeks to enforce the Australian judgment overseas.⁸⁸

The hazards involved in obtaining judgments which are unenforceable in a place where the defendant has assets was illustrated by the litigation arising out of a web site maintained by the American Internet service provider, Yahoo! Inc (Yahoo) which was associated with the online auctioning of Nazi memorabilia. The sale of such memorabilia is prohibited in France, but not the United States. In *LICRA v Yahoo! Inc*, Premier Vice-Président Gomez of the Tribunal de Grande Instance de Paris granted an injunction compelling Yahoo and its French subsidiary to take any and all steps to prevent the web site from continuing to be accessible in France. Yahoo subsequently obtained a declaratory judgment from the United States District Court in California that the French Court’s orders were ‘neither cognizable nor enforceable’ under the laws of the United States. In granting the relief sought, Judge Fogel said:

What is at issue here is whether it is consistent with the Constitution and laws of the United States for another nation to regulate speech by a United States resident within the United States on the basis that such speech can be accessed by Internet users in that nation. In a world in which ideas and information transcend borders and the Internet in particular renders the physical distance between speaker and audience virtually meaningless, the implications of this question go far beyond the facts of this case. The modern world is home to widely varied cultures with radically divergent value systems. There is little doubt that Internet users in the United States routinely engage in speech that violates, for example, China’s laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom’s restrictions on freedom of the press.⁸⁹

[181] His Honour went on to say:

⁸⁷ Cf *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [165] (Kirby J).

⁸⁸ *Ibid.*

⁸⁹ *Yahoo! Inc v LICRA*, 169 F Supp 2d 1181, 1186–7 (ND Cal, 2001).

Although France has the sovereign right to regulate what speech is permissible in France, this court may not enforce a foreign order that violates the protections of the United States Constitution by chilling protected speech that occurs simultaneously within our borders.⁹⁰

At the time of writing, an appeal of Judge Fogel's decision was pending before the Ninth Circuit Court of Appeals.

Forum Non Conveniens

Finally, it seems unlikely that Australia will become a magnet for defamation actions between foreign plaintiffs and foreign defendants. Forum non conveniens principles will operate to prevent plaintiffs from bringing defamation proceedings in Australia where Australia is a 'clearly inappropriate forum' for the hearing and determination of the proceeding.⁹¹

There is a very real question as to whether the 'clearly inappropriate forum' test ought to be revisited. The test appears to be unique to Australia. English, Scottish and Canadian courts, by contrast, apply a 'clearly more appropriate forum' test, under which they seek to identify the natural forum for the hearing and determination of a proceeding; that is, the court with which the action has the most real and substantial connection.⁹² The Australian test favours the retention of proceedings by Australian courts, because it focuses on the inappropriateness of the local court, rather than the comparative appropriateness of any suggested foreign forum.⁹³ The prospect of the Australian test being revisited seems remote.⁹⁴

⁹⁰ Ibid 1192.

⁹¹ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 559 (Mason CJ, Deane, Dawson and Gaudron JJ), following Deane J in *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197, 241–57.

⁹² For example, *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460, 477–8 (Lord Goff), adopting *The Abidin Daver* [1984] AC 398, 415 (Lord Keith); *Cumming v Scottish Daily Record and Sunday Mail Ltd* [1995] EMLR 538; *Shell UK Exploration and Production Ltd v Innes* 1995 SLT 807; *Berezovsky v Michaels* [2000] 2 All ER 986; *Dickhoff v Armadale Communications Ltd* (1992) 103 Sask R 307, reversed on other grounds: (1993) 108 DLR 4th 464; *Braintech, Inc v Kostiuik* (1999) 171 DLR 4th 46 (BCCA); cf *Olde v Capital Publishing Ltd* (1998) 108 OAC 304, affirming (1996) 5 CPC 4th 95.

⁹³ *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 565 (Mason CJ, Deane, Dawson and Gaudron JJ).

⁹⁴ *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [157] (Kirby J).

Nonetheless, an Australian state or territory will be likely to be a clearly inappropriate forum for the hearing and determination of defamation proceedings if there is no evidence of publication within the forum, if the plaintiff has no reputation in the forum, or if it would cause great inconvenience or cost to the parties for the matter to be heard and determined in the forum.⁹⁵

New Defence for Defamation Law?

Those who oppose the High Court’s decision tend not to couch their opposition in terms of shortcomings in the Australian test for forum non conveniens or the cost and inconvenience of having to defend defamation proceedings in far flung countries. Rather, they tend to argue that the High Court’s decision means that restrictive Australian defamation laws will have a kind of extra-territorial operation, and illustrate their point by hypothetical examples referring to countries assumed to have even more restrictive laws such as Malaysia, Singapore and Zimbabwe. It can thus be argued that criticisms of the [182] High Court’s decision are driven not by the jurisdictional questions which were in dispute before the Court, but by an assessment of the relative merits of Australian and United States defamation law principles.

Compelling arguments can certainly be put to the effect that Australian defamation law is absurdly complicated, tilts the balance too far in favour of plaintiffs, and provides inadequate protection for the right to freedom of expression. Most comparable countries sharing a common law heritage — including England — have less restrictive defamation laws than Australia.⁹⁶ It can be argued with equal force, however, that American defamation law goes too far in the opposite direction, treating qualitatively different forms of speech as of equal worth and most attacks on

⁹⁵ See for example the factors discussed in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460, 476–8, 482–4; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 564–6 (Mason CJ, Deane, Dawson and Gaudron JJ). For an English case in which jurisdiction was declined on the ground that the forum was inappropriate, see *Chadha v Dow Jones & Company Inc* [1999] EMLR 724.

⁹⁶ For some recent comparisons of the position in Australia relative to various other countries, see Erin O’Dwyer, ‘Qualified privilege and public leaders in political debate: diverging defamation law after *Lange, Reynolds and Atkinson*’ (2003) 8 *Media & Arts Law Review* 91; Roy Baker, ‘Extending common law qualified privilege to the media: a comparison of the English and Australian approaches’ (2002) 7 *Media & Arts Law Review* 87 and Bede Harris, ‘Defamation and freedom of political expression in Australia and South Africa — the opportunities missed in *Lange*’ (2001) 6 *Media & Arts Law Review* 79. I explored some of the complications arising out of the fact that Australia does not have uniform defamation laws in ‘Choice of law in defamation after *John Pfeiffer Pty Ltd v Rogerson*’ (2001) *Media & Arts Law Review* 171 and ‘Defamation law reform in New South Wales (again)’ (2003) 8 *Media & Arts Law Review* 113.

reputation as fair game. Put another way, neither country's defamation laws appropriately strike the balance between freedom of expression and the right to reputation.

The argument that jurisdictional rules should be employed to overcome restrictive substantive principles of defamation law is to confuse two different concepts. Kirby J recognised this point in *Dow Jones & Company Inc v Gutnick*, when he said that the 'chilling effect' which potential liability in defamation for the publication of material on the Internet might have on free speech is a consequence of 'the absence of uniformity in defamation laws, combined with an ability to access and broadcast material across national boundaries (which is not limited to the Internet) and the absence of international treaties or reciprocal laws to govern those issues.'⁹⁷

It seems highly unlikely, at least in the short-term, that there will be any international consensus as to the circumstances in which courts should exercise jurisdiction over the foreign conduct of publishers. While special jurisdictional rules apply among Member States of the European Union,⁹⁸ international agreement has otherwise proved elusive. The Hague Conference on Private International Law adopted a draft Convention on jurisdiction and foreign judgments in civil and commercial matters on 30 October 1999 which would have the effect of permitting plaintiffs to recover the whole of the damages suffered by reason of a defamatory Internet publication by suing in the courts of the state in which the defendant or the plaintiff is habitually resident. The plaintiff could also sue in the courts of any other state in which publication or damage occurred, but only in respect of such damage as was suffered in that state.⁹⁹ The future of the draft Convention is, however, uncertain.¹⁰⁰

⁹⁷ *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [152]. See also [188], [192] (Callinan J).

⁹⁸ The most important European instrument is Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and the enforcement of judgments in civil and commercial matters, Official Journal L 12, 16 January 2001. See further Matthew Collins, *The Law of Defamation and the Internet* (2001) [24.23]–[24.21].

⁹⁹ Draft Convention on jurisdiction and foreign judgments in civil and commercial matters, proposed by the Hague Conference on Private International Law, adopted by the Special Commission on 30 October 1999, arts 3, 10(1), 10(4); text available at <<http://www.hcch.net/e/conventions/draft36e.html>>

¹⁰⁰ See also the Interim Text produced as a result of Part One of the Nineteenth Diplomatic Session of the Hague Conference held from 6–20 June 2001; text available for downloading from <ftp://ftp.hcch.net/doc/jdgm2001draft_e.doc>.

Perhaps of more interest is the prospect raised by Gleeson CJ, McHugh, Gummow and Hayne JJ in *Dow Jones and Company Inc v Gutnick* that Australian defamation law may need to develop a new defence in [183] cases where a publisher’s conduct has occurred wholly outside the jurisdiction of the forum, but was reasonable having regard to all the circumstances, including where the conduct occurred and what rules about defamation applied in that place.¹⁰¹ Their Honours said that ‘some comparison might be made in this regard with the common law developing by recognising a defence of innocent dissemination to deal with the position of the vendor of a newspaper and to respond to the emergence of new arrangements for disseminating information like the circulating library.’¹⁰²

Although not addressing directly the question of whether Australian defamation law should develop a new defence in cases where a publisher’s conduct has occurred wholly outside the jurisdiction of the forum, Kirby J noted that Australian defamation law must provide an effective remedy for the tort of defamation committed by the use of the Internet.¹⁰³ Citing instruments of international human rights law which recognise the obligation to respect the reputation of others, his Honour said ‘any development of the common law of Australia ... should provide effective legal protection for the honour, reputation and personal privacy of individuals.’¹⁰⁴

In order to explore how a new defence along the lines suggested by Gleeson CJ, McHugh, Gummow and Hayne JJ might be formulated and operate in practice, it is helpful to have regard to the three main circumstances in which the reasonableness of a publisher’s conduct is relevant under existing principles of Australian defamation law.

First, under s 22(1) of the *Defamation Act 1974* (NSW), a statutory defence of qualified privilege applies in respect of publications where:

- (a) the recipient has an interest or apparent interest in having information on some subject;

¹⁰¹ *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [51].

¹⁰² *Ibid.*

¹⁰³ *Ibid* [115].

¹⁰⁴ *Ibid* [116].

- (b) the matter is published to the recipient in the course of giving to him information on that subject; and
- (c) the conduct of the publisher in publishing that matter is reasonable in the circumstances.

Subsection 22(2A) contains a non-exhaustive list of matters which courts may take into account in determining whether the conduct of a publisher was reasonable in the circumstances for the purposes of this defence. The matters are:

- the extent to which the matter published is of public concern,
- the extent to which the matter published concerns the performance of the public functions or activities of the person,
- the seriousness of any defamatory imputation carried by the matter published,
- the extent to which the matter published distinguishes between suspicions, allegations and proven facts,
- whether it was necessary in the circumstances for the matter to be published expeditiously,
- the sources of the information in the matter published and the integrity of those sources,
- whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the publisher to obtain and publish a response from the person,
- any other steps taken to verify the information in the matter published.

Subsection 22(2A) was inserted into the *Defamation Act 1974* (NSW) by the *Defamation Amendment Act 2002* (NSW), which came into operation on 17 February 2003. The subsection was intended to overcome [184] what were perceived to be restrictive judicial interpretations of s 22(1), and in particular a de facto requirement that, for the defence to succeed, publishers had to prove that they believed in the truth of what was published.¹⁰⁵

¹⁰⁵ Attorney General's Task Force on Defamation Law Reform, *Defamation Law — Proposals for Reform in NSW* (2002), 24, citing among others Sally Walker, 'Lange v ABC: The High Court rethinks the 'constitutionalisation' of defamation law' (1998) 6 *Torts Law Journal* 9.

Secondly, the reasonableness of a publisher’s conduct is relevant to the expanded qualified privilege defence which applies in cases involving the discussion of government and political matters. In *Lange v Australian Broadcasting Corporation*, the High Court held, having regard to the interest that the members of the Australian community have in receiving information on government and political matters that affect them, that there should be an expanded defence of qualified privilege in respect of the discussion of such matters, provided that the publisher has acted reasonably and without malice.¹⁰⁶ A publication will generally be reasonable where the publisher had reasonable grounds for believing any defamatory imputations to be true and took such steps as were appropriate to verify the accuracy of those imputations.¹⁰⁷ The publisher must usually have sought and published a response from the defamed person, unless to do so was impracticable or unnecessary.¹⁰⁸

The third circumstance in which the reasonableness of a defendant’s conduct is relevant in Australian defamation law is under s 23(1) of the *Defamation Act 2001* (ACT), which creates a defence where ‘the defendant establishes that the published matter (other than any published matter imputing criminal behaviour) was not published negligently. Section 23(2) provides that for the purposes of the defence, it is sufficient if:

- (a) the defendant establishes that the defendant took reasonable steps to ensure the accuracy of the published matter; and
- (b) the defendant gave the plaintiff a reasonable opportunity to comment on the published matter before it was published.

At the heart of each of these defences is an obligation on defendants to show that they took reasonable steps to ensure or had reasonable grounds to believe that the material they published was accurate. Also relevant is whether the defendant gave the plaintiff an opportunity to comment before publication.

¹⁰⁶ (1997) 189 CLR 520, 571–4.

¹⁰⁷ *Ibid* 574.

¹⁰⁸ *Ibid*; cf *Brander v Ryan* [2001] Aust Torts Reports ¶81-593, 66, 550–1, in which it was held that it was ‘not practicable to seek a response [and] not necessary to give the plaintiff an opportunity to respond’ prior to publication.

The expanded qualified privilege defence established in *Lange v Australian Broadcasting Corporation* was held not to apply in England in *Reynolds v Times Newspapers Ltd*.¹⁰⁹ In that case, the House of Lords considered the application of the common law defence of qualified privilege in a case concerning an allegedly defamatory publication in a mass circulation newspaper. Lord Nicholls, with whom Lords Cooke and Hobhouse expressed full agreement, held that the common law defence of qualified privilege should be available to the press in relation to a broad range of publications concerning subjects of public concern. His Lordship said

The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication.¹¹⁰

[185] In assessing whether the defence should protect the press in a particular case, Lord Nicholls held that the full range of circumstances should be taken into account, including:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.¹¹¹

¹⁰⁹ [2001] 2 AC 127. The Court of Appeal decision is reported at [1998] 3 WLR 862.

¹¹⁰ *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 205.

¹¹¹ *Ibid.*

In *Lukowiak v Unidad Editorial SA*,¹¹² Eady J of the English High Court considered the application of the principles in *Reynolds v Times Newspapers Ltd* in a defamation action brought against a Spanish defendant. The defendant’s newspaper, *El Mundo*, had reported that the plaintiff had admitted shooting an Argentine soldier who had surrendered during the Falklands war. *El Mundo* had only a small circulation in England. Spanish law recognises a doctrine of neutral reporting which protects defendants from liability for directly repeating untrue defamatory allegations taken from another media source. The defendant would not have been liable by reason of that doctrine had the action been heard and determined in Spain. Eady J held that the defendant had behaved responsibly in the circumstances. His Lordship said it would not be practical to require the defendant to take legal advice regarding defences available in foreign jurisdictions, because of the ‘chilling effect on ... freedom of expression.’ The report was thus published on an occasion of qualified privilege.

American defamation law also takes into account in some circumstances matters such as the state of mind of the defendant at the time of publication, steps taken by the defendant to verify the accuracy of a publication, and any opportunity afforded to the plaintiff to comment on the publication. For example, the publication by a media defendant of false, defamatory material concerning a ‘public figure’ or concerning a matter of public concern will be actionable in the United States if the plaintiff proves by ‘clear and convincing evidence’ that the defendant acted with ‘actual malice’; that is, with knowledge of the falsity of the publication or reckless disregard for its truth or falsity.¹¹³ The test would be satisfied where the defendant had a ‘high degree of awareness of ... probable falsity’ having regard to matters such as any investigations actually undertaken, but elected to publish anyway’.¹¹⁴ Where the plaintiff is other than a ‘public figure’ and the publication does not involve a matter of public concern, false, defamatory material will be actionable under American law if the defendant was negligent as to the truth or falsity of the material.¹¹⁵ The inquiry into negligence

¹¹² (Unreported, English High Court, Eady J, 6 June 2001).

¹¹³ *New York Times Company v Sullivan*, 376 US 254, 279–80 (1964); *Curtis Publishing Company v Butts*, 388 US 130 (1967); *Gertz v Robert Welch Inc*, 418 US 323, 349–50 (1974); *Dun v Bradstreet Inc v Greenmoss Builders Inc*, 472 US 749, 751 (1985); *Philadelphia Newspapers Inc v Hepps*, 475 US 767, 775 (1986).

¹¹⁴ See eg *Masson v New Yorker Magazine*, 501 US 496, 510 (1991); *Fitzpatrick v Philadelphia Newspapers Inc*, 389 A 2d 684, 688 (1989).

¹¹⁵ *Gertz v Robert Welch Inc*, 418 US 323, 349–52 (1974); *Dun v Bradstreet Inc v Greenmoss Builders Inc*, 472 US 749, 763 (1985).

involves determining whether the defendant acted [186] reasonably under the circumstances, having regard to matters such as the sources relied upon, and any failure to verify the accuracy of material prior to publication.¹¹⁶ The concept of reasonableness as articulated in the defences to Australian and English defamation law identified above is therefore not entirely foreign to American law.

Having regard to all of these matters, in defamation cases in which it is alleged that a publisher's conduct has all occurred outside the jurisdiction of the forum, it might be that Gleeson CJ, McHugh, Gummow and Hayne JJ had in mind that Australian defamation law should develop a defence in respect of publication of the offending material in Australia which applies if the publisher proves that:

- the publication would not have been actionable by the law of the place of the publisher's conduct (ordinarily, the place where the material was written or edited) had the material been published there;¹¹⁷ and
- his or her conduct was reasonable in all the circumstances.

The first limb of a defence of this kind would recognise that in cases where a publisher's conduct has all occurred outside Australia, and the publisher does not otherwise have a defence under applicable Australian law, the publisher ought not to escape liability in respect of publication of the material in Australia if his or her conduct would have been actionable by the law of the place where it was done had the material been published there.

In assessing whether a publisher's conduct was reasonable for the purposes of the second limb of the postulated defence, the full range of circumstances would presumably need to be taken into account. As well as matters going to reasonableness generally, the following matters might also be taken into account:

¹¹⁶ See eg *McDowell v Paiewonsky*, 769 F 2d 942, 951 (3rd cir, 1985); *Schafer v Time Inc*, 142 F 3d 1361 (11th cir, 1998); *Medure v New York Times Company*, 60 F Supp 2d 477, 487 (WD Pa, 1999).

¹¹⁷ of the second limb of the double actionability test which formerly governed choice of law inquiries in Australian cases involving international torts: see *Phillips v Eyre* (1870) LR 6 QB 1, 28–9 (Willes LJ); *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, 198; *Breavington v Godleman* (1988) 169 CLR 41, 110–11 (Brennan J); *Dicey and Morris on Conflict of Laws* (13th ed, 2000), 1560, rule 205(2). The double actionability test was abolished as the choice of law test in Australia in cases involving international torts in *Regie National des Usines Renault SA v Zhang* [2002] HCA 10.

- whether the plaintiff has a substantial reputation to protect in the forum;
- the extent to which publication occurred in the forum;
- the extent to which the plaintiff is the subject of the publication; and
- the steps taken by the publisher to ensure that the publication was not actionable by the law of the forum or any other place where the plaintiff has a substantial reputation to protect.

Broadly, each of these matters would be relevant to assessing whether, in the circumstances, the publisher should have been cognisant of the defamation laws of the forum before taking the decision to publish.¹¹⁸

Generally, a defendant’s conduct would not be reasonable where it is shown to have been actuated by malice. Nonetheless, as the purpose of the postulated defence is to protect publishers from liability under Australian law in cases where the publisher took appropriate care having regard to all the circumstances, it would be appropriate for the defence to be defeated where the plaintiff proves that the defendant was actuated by malice.¹¹⁹

[187] The potential operation of the postulated defence can be illustrated by considering two hypothetical examples. Suppose, for example, that defamatory material was written and edited outside Australia, but was focused on the activities of an Australian in Australia, and was read, heard or seen principally by persons in Australia. Suppose further than the material would not have been actionable by the law of the place where the material was written and edited had it been published there. In such a case, the publisher would only have a defence by establishing that his or her conduct was reasonable in all the circumstances. The publisher’s conduct would not ordinarily be reasonable in such a case unless efforts had been made by the publisher to ensure that he or she had a defence under Australian law. The nexus in such a case between the publication and Australia means that a publisher could reasonably be expected to pay regard to the risk of liability under Australian defamation law before deciding to publish.

¹¹⁸ cf *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [151] (Kirby J).

¹¹⁹ That is, to the extent that the elements of malice are not covered under the rubric of reasonableness: cf *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574.

At the other end of the spectrum, suppose defamatory material was written and edited outside Australia, made allegations against a non-Australian plaintiff only tangentially, and was principally read, heard or seen by persons outside Australia. Again, suppose that the material would not have been actionable by the law of the place where it was written and edited had it been published there. In such a case, it might not be reasonable in all the circumstances to expect the publisher to pay regard to the risk of liability under Australian defamation law. The publisher might establish the postulated defence in such a case by showing that he or she knew the plaintiff to have a substantial reputation in some other place, and took appropriate steps to ensure that the material would not be actionable by the law of that place or the place where the material was written, edited and uploaded.

Many cases will fall somewhere in the middle of these extremes. If a defence of the kind postulated were to be formulated, such cases could be resolved on a case-by-case basis, having regard to all of the circumstances. Over time, a valuable corpus of case law would be built up.¹²⁰

As the postulated defence would involve an evolution of the principles of Australian defamation law, it could logically only apply to claims in respect of material published in Australia. In accordance with the choice of law test established in *Regie National des Usines Renault SA v Zhang (Zhang)*,¹²¹ liability in respect of material published in some other place would fall to be determined according to the law of that place. Cases before Australian courts in which damages are sought in respect of material published outside Australia are likely to be rare or confined to a small number of jurisdictions, having regard to the substantive and practical impediments identified earlier.¹²²

¹²⁰ cf *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010, 1027 (Lord Nicholls).

¹²¹ [2002] HCA 10.

¹²² It may be that Gleeson CJ, McHugh, Gummow and Hayne JJ had a broader defence in mind; namely a complete defence that would apply in respect of the worldwide publication of the same material: *Dow Jones & Company Inc v Gutnick* (2002) 194 ALR 433, [52]. A broader defence of that kind would involve courts applying a substantive law of the forum (*lex fori*) to causes of action accruing outside the forum. Such an approach would run directly counter to the principle in *Regie National des Usines Renault SA v Zhang* [2002] HCA 10, which is that the law of the place of the tort (*lex loci delicti*) is the governing law in cases involving torts committed outside Australia.

At first glance, it might be thought incongruous that the postulated defence would require a court applying substantive principles of Australian law to have regard to the substantive law of a foreign jurisdiction, in light of the High Court’s abolition of the double actionability rule as the test for choice of law in cases involving foreign torts.¹²³ Briefly stated, the effect of the double actionability rule was that an act done outside Australia was normally actionable in Australia only if it was both actionable according to Australian law and actionable according to the law of the foreign country where it was done.¹²⁴ The abolition of the double actionability rule was driven by a recognition that the first limb of [188] the rule — actionability according to Australian law — was little more than a technique of forum control,¹²⁵ or a means of enforcing ‘xenophobic opinions about the worth and applicability of the law of other jurisdictions.’¹²⁶ The effect of the abolition of the double actionability rule is that, in cases involving foreign torts, the substantive law for the determination of rights and liabilities is now the *lex loci delicti* (the law of the place of the tort).

On a proper analysis, however, the postulated defence does not involve any inconsistency with the reasoning of the High Court in *Zhang*. Relevantly, the issue in *Zhang* was whether Australian courts should apply substantive rules of Australian law in cases involving foreign torts. The postulated defence, however, would apply only to Australian torts; that is, in actions concerning publications of defamatory material occurring in Australia. The postulated defence would not apply at all in cases involving foreign torts; that is, in defamation actions concerning publications of defamatory material occurring outside Australia. Viewed in that way, the postulated defence is not parochial or xenophobic. To the contrary, it is a defence which accords relevance to foreign law for the purpose of assessing a foreign defendant’s potential liability for a tort committed in Australia.

Conclusion

The internet is the first medium to make mass, global communication widely and cheaply available. It is a medium which does not respect geographical boundaries. It

¹²³ *Regie National des Usines Renault SA v Zhang* [2002] HCA 10.

¹²⁴ See eg Lawrence Collins (ed), *Dicey and Morris on Conflict of Laws* (13th ed, 2000) 1560, rule 205. The history of the double actionability rule as it was applied in defamation actions is traced in Collins, above n 98, chapter 25.

¹²⁵ [2002] HCA 10, [43]-[60] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹²⁶ *Ibid* [132] (Kirby J).

is not possible to know where material posted on the Internet will be downloaded, or to prevent material from being downloaded in any particular place. While some of the characteristics of the Internet are shared by other media, their confluence in the Internet is unique.¹²⁷ In each of these respects, the Internet represents a communications revolution.

To argue that worldwide publication via the Internet is analogous to the circulation of copies of *The Times* of London to countries shaded red on a nineteenth century map of the world¹²⁸ is like arguing that you can understand the genetic make-up of human beings by studying only the DNA of mice. At best, the printing press is a distant ancestor of the web server. A global and instantaneous medium of communication exposes challenges for defamation law which are yet to be fully explored. In adapting principles of defamation law so that they can justly apply to online publications, some modification of existing rules and the development of new ones is inevitable.¹²⁹

The days when it was thought that the Internet might prove to be incapable of being regulated are long gone. So too are the days when it was thought that the ubiquity of the Internet would result in the First Amendment to the United States Constitution becoming a universal standard. International human rights instruments, and the laws of most countries, place a value on the protection of reputation. It is unrealistic to expect that value to be discounted simply because an attack on reputation has occurred online.

Dow Jones & Company Inc v Gutnick was not the ideal test case for a consideration of the jurisdictional rules which should apply to material published online by foreign publishers. Gutnick's preparedness to limit his claim to damage arising out of publication occurring in Victoria, and the strength of the links between Gutnick and Victoria, insulated from view the parochial approach Australian courts take towards the retention of proceedings with a weak or tenuous nexus with the forum. More difficult cases can readily be imagined, such as cases where damages are sought in

¹²⁷ Collins, above n 98, [1.01], [3.01]–[3.14], [24.02].

¹²⁸ An analogy used by Callinan J in the course of oral argument in the High Court on 28 May 2002.

¹²⁹ Lord Bingham in Collins, above n 98, v: 'almost every concept and rule in the field, familiar to students, scholars, practitioners and judges around the world, has to be reconsidered in the light of this unique medium of instant worldwide communication.'

respect of the worldwide publication [189] of online material or cases where the plaintiff is not a resident of the forum. Such cases, when they arise, might result in a reconsideration of the ‘clearly inappropriate forum’ test which governs forum non conveniens inquiries in Australia.

Kirby J saw the result in *Dow Jones & Company Inc v Gutnick* as ‘less than wholly satisfactory’, but argued that a remedy had to be left to parliaments or international agreement. No such remedies can be expected any time soon. Gleeson CJ, McHugh, Gummow and Hayne JJ, on the other hand, expressed no reservations about the outcome of their decision, but flagged the development of a new defence to defamation law to deal with more difficult cases that might arise in the future. It is to be hoped that momentum for the development of such a defence is maintained.

Formulation of a new defence should be guided by the potential unfairness of holding a publisher liable according to Australian defamation standards in a case where the publisher complied with the standards prevailing in the place where the material was written and edited, and took reasonable care to pay regard to relevant foreign law, having regard to all the circumstances. The formulation proposed in this article attempts to strike the appropriate balance.