

THE 'PLACE OF ACTION' DEFENCE  
A MODEL FOR CROSS-BORDER INTERNET DEFAMATION\*

Dan Svantesson\*\*

I. INTRODUCTION

In December 2002, the High Court of Australia delivered the appeal judgment in *Dow Jones & Company Inc v Gutnick*,<sup>1</sup> dismissing it with costs.<sup>2</sup> This case concerned allegedly defamatory material that was placed on an Internet server located in New Jersey in the United States but accessible in Australia and elsewhere. The parties were Joseph Gutnick (plaintiff/respondent), a businessman from Victoria (an Australian state), and Dow Jones (defendant/appellant), a United States publishing company. The judgment, which gained worldwide attention and is believed to be the first of its kind,<sup>3</sup> effectively allowed Gutnick to sue Dow Jones in Victoria where he was ordinarily resident, and stipulated that Victorian law should apply.

This article analyses the High Court judgment and arrives at several conclusions: (a) it does not seem unreasonable for a Victorian court to decide a dispute in which a Victorian resident is seeking to vindicate his reputation in Victoria only; (b) it does not seem unreasonable for a United States court to refuse to enforce a foreign judgment that infringes a United States company's constitutional rights regarding an act committed exclusively in the United States; and (c) the World Wide Web/WWW has created a *gap* between what may be reasonable grounds for jurisdiction on one hand and what may be reasonable

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\*\* Assistant Professor, Bond University, Australia; Research Associate, Baker & McKenzie Cyberspace Law and Policy Centre, University of New South Wales. The author thanks Lee Bygrave, Holly Raiche, Roy Baker, Maurice Bailey, Bianca Gilchrist, Sophie Dawson, Richard Potok and Steven Freeland for their comments on this article.

<sup>1</sup> [2002] High Court of Australia 56, 10 December 2002 (High Court judgment) at <[www.austlii.edu.au/au/cases/cth/high\\_ct/2002/56.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html)> (visited December 2003).

<sup>2</sup> *Ibid.*

<sup>3</sup> However, it is only a question of time before similar cases will appear elsewhere.

grounds for recognition and enforcement on the other. To overcome this conflict and bridge the gap a sensible harmonisation of private international law is required. As this is usually difficult, this article will argue an alternative by suggesting that publishers who act in a responsible manner should have a defence based on the *place of action*.

## II. BACKGROUND

In October 2000, Dow Jones published an article, *Unholy Gains*, in its business journal, *Barrons Magazine*. The article implied, among other things, that Gutnick had laundered money through the convicted Victorian money launderer, Nachum Goldberg. The relevant issue of *Barrons Magazine* sold 300,000 copies approximately. Of these, a small number came to Australia where some were sold in Victoria. The article was also available on Dow Jones' website at <[www.wsj.com](http://www.wsj.com)> that is essentially a fee-based subscription service. Dow Jones tried to downplay this fact stating that anybody could access the website by a trial subscription.<sup>4</sup> There were more than half a million subscribers to the magazine's Internet version and an estimated 1,700 had paid for the service using Australian-issued credit cards. Although no exact number of readers could be established for either the paper or online edition, it was suggested that prominent Victorian business people had read the article.

Gutnick had initiated proceedings against Dow Jones in the Supreme Court of Victoria (VSC) before Hedigan J seeking damages for defamation.<sup>5</sup> The case focused almost entirely on the online publication. A procedural detail of crucial importance was the fact that Gutnick had limited his claim to damages for the alleged defamation he suffered in Victoria after the publication had taken place in Victoria.<sup>6</sup> Further, he had undertaken not to sue in any other forum. As will be shown below, this delimitation was potentially determinative in relation to some aspects of the proceeding.

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<sup>4</sup> High Court judgment paras 293-299.

<sup>5</sup> *Gutnick v Dow Jones & Company Inc* [2001] VSC 305, 28 August 2001 (VSC judgment) at <[www.austlii.edu.au/au/cases/vic/VSC/2001/305.html](http://www.austlii.edu.au/au/cases/vic/VSC/2001/305.html)> (visited December 2003).

<sup>6</sup> *Ibid.*

The VSC had decided in favour of Gutnick after the plaintiff had shown that the action could be supported by Victorian legislation, in this case the 1996 Supreme Court (General Civil Proceeding) Rules (SC Rules), particularly one or more paragraphs of Rule 7.01(1). Generally, Rule 7.01 allows a defendant to ask the court to decline to exercise jurisdiction or to set aside service by entering a conditional appearance. In other words, Dow Jones was not required to submit to the jurisdiction of Victorian courts but it could appear before them to dispute that jurisdiction.<sup>7</sup>

After Dow Jones had failed in the VSC and later refused leave to appeal to the Court of Appeal,<sup>8</sup> it appealed to the High Court seeking leave to appeal to this court, where limited special leave was eventually granted. During the appeal proceedings before the Full Bench of the High Court, a group of 18 businesses supporting Dow Jones' position (including Amazon.com Inc, News Limited, and Yahoo! Inc) was also granted leave to intervene.<sup>9</sup> Since it is rare for the High Court to allow such interventions, the grant of leave to do so indicates that the Court had recognised the important implications of *Gutnick*.

All seven judges on the Full Bench dismissed the appeal. Four (Gleeson CJ; Gummow, McHugh and Hayne JJ) presented the majority judgment while the other three (Gaudron, Kirby and Callinan JJ) published their own reasons for dismissing the appeal.<sup>10</sup> However, it appears that all seven had agreed on the fundamental legal issues raised. Here, it is noteworthy that Callinan and Kirby JJ disagreed on the extent to which Internet communication is different from other forms of communication, a fundamental issue. On one hand, Kirby J stated:<sup>11</sup>

Intuition suggests that the remarkable features of the Internet (which is still changing and expanding) makes it more than simply

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<sup>7</sup> A defendant may also submit to jurisdiction by filing an unconditional appearance.

<sup>8</sup> *Dow Jones & Company Inc v Gutnick* [2001] VSC, Court of Appeal 249, 21 September 2001 at <[www.hcourt.gov.au/registry/matters/May02/M3-2002.rtf](http://www.hcourt.gov.au/registry/matters/May02/M3-2002.rtf)> (visited December 2003).

<sup>9</sup> *Ibid.*

<sup>10</sup> Essentially, Gaudron J agreed with the majority and her separate judgment merely expanded on some issues already raised by the majority.

<sup>11</sup> High Court judgment para 164.

another medium of human communication. It is indeed a revolutionary leap in the distribution of information, including about the reputation of individuals.

On the other hand, Callinan J stated:<sup>12</sup>

The Internet, which is no more than a means of communication by a set of interconnected computers, was described, not very convincingly, as a communications system entirely different from pre-existing technology.

### III. MAIN LEGAL ISSUES

The two main legal issues were: (a) whether a Victorian court had and should exercise jurisdiction in the dispute; and (b) if it had jurisdiction, which law should apply. Under common law, these questions had to be answered in the context of three interconnected yet separate steps. First, the court should examine whether it could claim jurisdiction. Secondly, it had to determine the law to be applied if it found it had jurisdiction. And thirdly, it should examine whether there were reasons for it not to exercise jurisdiction.

### IV. JURISDICTION

In Australia federally and in its constituent states, jurisdiction is regulated by legislation, which in this case were the SC Rules. More specifically, Rule 7.01(1) provided the two circumstances where a Victorian court could claim jurisdiction:

*Rule 7.01(1)*

Originating process may be served out of Australia without order of the Court where –

...

- (i) the proceeding is founded on a tort committed within Victoria;...
- (j) the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring.

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<sup>12</sup> Ibid para 180.

In the High Court, the plaintiff had relied on both grounds for jurisdiction. Kirby J noted that it was not in doubt that jurisdiction was appropriate under Rule 7.01(1)(j). He stated:<sup>13</sup>

Whatever else is in doubt, it is uncontested that the respondent's proceedings alleged that the respondent had suffered damage in Victoria. Once this is shown, the only question to be answered, to attract par (j), is whether such damage was "caused by a tortious act or omission wherever occurring".

In fact, the majority went further, concluding that since Gutnick had limited his claim to publications within Victoria, the case related to a tort committed within Victoria.<sup>14</sup> Consequently, the majority held that jurisdiction could be founded on either Rule 7.01(1)(i) or (j).

## V. CHOICE OF LAW

The current choice of law rule for torts in Australia is the so-called *lex loci delicti* rule – the law to be applied is the law of the place of wrong. This is a fairly new position since it was not established for international conflict cases until 2002.<sup>15</sup> Hence, the rule was still untested when *Gutnick* came before the courts, and it could not be readily used to identify the applicable law especially when it was not immediately obvious where the "place of wrong" was.

In defamation law, the "wrong" – the cause of action – is the "publication".<sup>16</sup> The VSC and High Court both noted that the term "publication" had a specific meaning in defamation law.<sup>17</sup> At common law, it had long been held that to "publish a libel is to convey by some means to the mind of another the defamatory sense embodied in the vehicle".<sup>18</sup> In a sense, this approach appeared to rest on a sound and logical foundation. Simply writing or sending defamatory material did

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<sup>13</sup> Ibid para 100.

<sup>14</sup> Ibid para 48.

<sup>15</sup> *Regie National des Usines Renault SA v Zhang* [2002] High Court of Australia 10, 14 March 2002 at <[www.austlii.edu.au/au/cases/cth/high\\_ct/2002/10.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2002/10.html)> (visited December 2003).

<sup>16</sup> See for example 1947 Defamation Act (NSW) section 9, and 1889 Defamation Act (Qld) section 7.

<sup>17</sup> VSC judgment para 22; High Court judgment para 11.

<sup>18</sup> *Webb v Bloch* (1928) 41 Commonwealth Law Reports 331, 363.

not lower the defamed in the estimate of a third person, but the comprehension of the defamatory material by a third person potentially did. On this point, the High Court's majority judgment was undesirably unclear on what constituted "publication". It had stated:<sup>19</sup>

Harm to reputation is done when a defamatory publication is *comprehended* by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the publisher makes it available and a third party has it *available for his or her comprehension*.<sup>20</sup>

In the first sentence, focus is placed on actual comprehension, while in the last it is on the third person receiving the material. Having something available for comprehension is not necessarily the same as actual comprehension. In this sense, it is not ideal that the High Court did not take greater care when choosing its terminology. Perhaps even more importantly, the statement that "publication" is not a unilateral act but bilateral in nature is irreconcilable with the common law position expressed in *Webb v Bloch*<sup>21</sup> and supported by Hedigan J.<sup>22</sup> In fact, "comprehension" is necessarily a unilateral act. It is only when "publication" is defined as a unilateral act that one may possibly rely on it to identify the (single) location. On the other hand, it may be argued that the court had referred to publication in the more generic sense in contrast to the strict legal sense.<sup>23</sup> If this were indeed the case, it would have been better if the court had made this clear.

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<sup>19</sup> High Court judgment para 26.

<sup>20</sup> Emphasis added.

<sup>21</sup> (1928) 41 Commonwealth Law Reports 331.

<sup>22</sup> Hedigan J stated that "the law in defamation cases has been for centuries that publication takes place where and when the contents of the publication, oral or spoken, are seen and heard, (i.e. made manifest to) and comprehended by the reader or hearer...I therefore conclude that delivery without comprehension is insufficient and has not been the law": VSC judgment para 60. Although "oral" and "spoken" mean the same thing literally, it may be assumed from the context of Hedigan J's statement that "spoken" means "written".

<sup>23</sup> This could have been in response to the appellant's assertion that the single publication rule was preferable.

Variations in terminology are found throughout the High Court judgment. It focuses on the material available for comprehension in many paragraphs,<sup>24</sup> while it focuses on actual comprehension in others.<sup>25</sup> In yet other paragraphs, various other interpretations seem possible.<sup>26</sup> A closer look at the terminology used in the majority judgment shows that it refers almost exclusively to the material being *available for comprehension*. On the other hand, Kirby and Callinan JJ refer to *actual comprehension*, just as Hedigan J had done before them in the VSC.<sup>27</sup> As a result, it may be surmised that the High Court had shifted the focus from the place of actual comprehension to where the material had become available for comprehension.

At the same time, it may be argued that if mere receipt of the defamatory material is viewed as *prima facie* evidence that the material was actually comprehended and thereby “published”, the judgments in the VSC and High Court may be reconciled. For example, *Sadgrove v*

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<sup>24</sup> See for example para 28 (“the place in which the publication *is presented in comprehensible form*”); para 40 (“the several places in which the publication *is available for comprehension*”); para 44 (“In the case of material on the World Wide Web, it is not *available in comprehensible form* until downloaded on to the computer of a person who has used a web browser to pull the material from the web server”); and para 48 (“That [Victoria] is where the damage to his reputation of which he complains in this action is alleged to have occurred, for it is there that the publications of which he complains *were comprehensible* by readers”) (*emphasis added*).

<sup>25</sup> See for example para 135 (“His Honour’s analysis shows how deeply embedded in the concept of the tort of defamation are the ideas of proof of damage to reputation; comprehension of the matter complained of; and acknowledgment that the sting is felt each time a publication is repeated”); para 184 (“The most important event so far as defamation is concerned is the infliction of the damage, and that occurs at the place (or the places) where the defamation is comprehended”); and para 199 (“Choice of law in defamation proceedings in this country raises a relatively simple question of identifying the place of publication as *the place of comprehension*: a readily ascertainable fact”) (*emphasis added*).

<sup>26</sup> For example para 124 provides that “mere composition and writing of words is not enough to constitute the tort; those words must be *communicated to a third party who comprehends them*” (*emphasis added*). This passage may be interpreted to mean that actual comprehension is needed, but it may also mean that if the person coming into possession of the defamatory words is capable of understanding the words when he or she reads them, publication takes place when transfer of possession occurs.

<sup>27</sup> Clarke, “Defamation on the Web: Gutnick v Dow Jones” at <[www.anu.edu.au/people/Roger.Clarke/II/Gutnick.html](http://www.anu.edu.au/people/Roger.Clarke/II/Gutnick.html)> (visited December 2003). In the VSC, Hedigan J used a variety of different terms in his judgment but all of them could be argued to refer to actual comprehension (refer Step 4).

*Hole* held that “if a man writes a libel on the back of a post-cards and then sends it through the post there is evidence of publication, as in the case of a telegram”.<sup>28</sup> Further, “where the statement is in a newspaper, production of a copy of the paper will generally be accepted as *prima facie* evidence of publication”.<sup>29</sup> If this were the correct interpretation, there would be no change to the principle in Australia that publication occurs at the time and place where actual comprehension occurs.<sup>30</sup> If the majority in the High Court only intended the defamatory material becoming available for comprehension to be *prima facie* evidence of “publication”, they should have carefully framed this to avoid confusion. Instead, they were unclear on this point. Indeed, if a change were intended, it would be preferable if the court had explained the motive. Since this did not occur, it seems more likely that there was no such intention to change Australian defamation law.<sup>31</sup>

While the locations where the material becomes available for comprehension and the location of actual comprehension are ordinarily the same within the online context, the distinction is significant if material is downloaded and then read later as a computer printout at another time and place. This distinction is very important in relation to the more traditional forms of mass media, such as newspapers and books, which in our global society are frequently purchased in one jurisdiction but later comprehended in another.<sup>32</sup>

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<sup>28</sup> [1901] 2 King’s Bench 1, 4-5.

<sup>29</sup> Milmo P and ors (eds), *Gatley on Libel and Slander* (1998, 9<sup>th</sup> ed, Sweet & Maxwell, London) 804. Without citing support, Gatley states: “Proof that defamatory material has been placed on the Internet must surely be sufficient evidence of publication to unspecified numbers who can access the network”: *ibid.* First, it is necessary to point out that this statement is provided in the context of proof of publication, and it must be assumed that Gatley merely refers to *prima facie* evidence of publication. Secondly, Gatley suggests that in the online context, step two of the conceptual model establishes *prima facie* evidence of publication. However, this broad statement does not seem to be elaborated upon.

<sup>30</sup> *Prima facie* evidence of “publication” as such does not necessarily say anything on the location of the “publication”.

<sup>31</sup> To focus on step four instead of step three is not necessarily a big change in most cases. However, conceptually, the change is potentially dramatic as it may be a departure from the logical basis for placing the focus on publication, namely, that the damage results from a third party’s comprehension of the defamatory material.

<sup>32</sup> In *Gutnick*, the distinction would be irrelevant since both tests had nominated Victoria as the place.



VI. *FORUM NON CONVENIENS*

As noted earlier, the High Court may claim jurisdiction under Rule 7.01(1)(i) or (j), or decline jurisdiction based on *forum non conveniens* if it deems itself a clearly inappropriate forum.<sup>33</sup> Accordingly, a factor to consider is whether an Australian court is the *forum non conveniens*. However, case law shows that the mere fact that an Australian court has to apply foreign law does not make it an inappropriate forum.<sup>34</sup> A range of other factors, such as “[a]ny significant connection between the forum selected and the subject matter of the action and/or the parties”<sup>35</sup> and “[t]he availability of an alternative forum and whether it will give the plaintiff adequate relief”<sup>36</sup> should also be considered when determining the *forum non conveniens* as illustrated by Hedigan J. In fact, generally, the factors he took into account had included the following.<sup>37</sup>

1. Victoria was both the appropriate forum and convenient forum for the disposition of the litigation commenced by the plaintiff;
2. the part of the allegedly defamatory article sued upon by the plaintiff exclusively dealt with activities performed in Victoria;
3. all documentation and evidence relating to the part of the article sued upon would be found in Victoria;
4. contrary to the United States for example, Australia did not apply the single publication rule, but the long-established principle of libel law that each publication was a separate tort;
5. the defendant had the burden of proof regarding the *forum non conveniens* test;
6. Gutnick’s business headquarters was in Victoria;
7. Gutnick was an Australian citizen who resided in Victoria, his family resided in Victoria, and his social and business life was in Victoria;

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<sup>33</sup> In Victoria, this option is found in Rule 7.05(2)(b). See *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 Commonwealth Law Reports 197; *Voth v Manildra Flour Mills Pty Ltd* [1990] 171 Commonwealth Law Reports 538.

<sup>34</sup> *Regie National des Usines Renault SA v Zhang* [2002] High Court of Australia 10.

<sup>35</sup> Nygh P and anor, *Conflict of Laws in Australia* (2002, 7<sup>th</sup> ed, LexisNexis Butterworths, Australia) 129.

<sup>36</sup> *Ibid.*

<sup>37</sup> For more discussion see Svantesson, “The Gutnick v Dow Jones decision – Which questions were answered and which were not?” (2002) 4 *Internet Law Bulletin* 73.

8. the allegedly defamatory article was published in Victoria;
9. Gutnick had sued to vindicate his Victorian reputation and only in respect of publications within Victoria;
10. Gutnick had declined to sue anywhere else;<sup>38</sup>
11. the inconvenience of the defendant coming to Victoria to defend the action could not be as great as the inconvenience of the plaintiff being compelled to go to the United States to assert his rights;
12. it had not been shown sufficiently that the defendant would be “deprived of a defence [the so-called Polly Peck defence] which they would have in the United States” if the case was to be decided in Victoria;
13. it clear that the defendant “would be disadvantaged by trial in Victoria in respect of a defence of qualified privilege”;
14. it appeared just as likely that the plaintiff would lose juridical advantages if he sued in the United States as it was likely that the defendant would lose juridical advantages if the case was heard in Victoria; and
15. the objective of the *forum non conveniens* test was to ensure that the case was tried in a jurisdiction suitable to the interest of all parties and for the ends of justice.

Both the VSC and High Court did not find any, or at least sufficient, reasons to decline jurisdiction in the present case. The apparent reason used was that Gutnick had limited his claim to damages suffered in Victoria following publication in Victoria. He had also undertaken not to sue elsewhere and became “disconnected” in relation to other forums. Gaudron J had stated:<sup>39</sup>

As the respondent has limited his controversy with the appellant to the publication of defamatory matter in Victoria, the controversy is one that can be determined in its entirety by the VSC of that State and there can be no question of multiple suits in different jurisdictions.

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<sup>38</sup> Hedigan J had noted that this undertaking “destroys at a stroke the defendant’s claim that New Jersey is to be the preferred jurisdiction because of its capacity to award worldwide global damages”, a claim that was not “established as a matter of the law” in any case: VSC judgment para 127.

<sup>39</sup> High Court judgment paras 64–65.

However, Gutnick limited the potential damages he could be awarded by doing this.

## VII. IMPLICATIONS OF THE JUDGMENTS

The VSC and High Court judgments have mainly gained negative attention worldwide.<sup>40</sup> They are said to be “a threat to democracy [and] should scare everyone who values freedom of expression”.<sup>41</sup> The High Court judgment has also been described as follows:<sup>42</sup>

The Gutnick decision will be welcomed by dictators everywhere. Already in the last year, Zimbabwe set a nasty precedent by arresting a journalist whose crime was to write an article that was not published in Zimbabwe but could be downloaded in that sad land. Robert Mugabe can rightly regard the Gutnick decision as validating his state censorship.

Such statements are somewhat dramatic. The present case was decided under Australian law. Although most legal systems provide for jurisdictional claims for damage suffered within the jurisdiction, the outcome of *Gutnick* cannot reasonably be seen as a valid indication of how the courts in other states will decide similar disputes.<sup>43</sup> If this case concerns a person who values freedom of expression, a judgment for Dow Jones would correspondingly concern those who value the right of reputation – another basic human right widely considered to be just as important.<sup>44</sup> To suggest that “dictators everywhere” would be more

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<sup>40</sup> The VSC judgment was proclaimed as “a landmark court ruling that puts cyberspace publishers around the world on notice that they can be sued under Australia’s strict defamation laws – and effectively in any of the 190 nations where defamation proceedings can be brought”: Crawford and anor, “Court ruling threatens free Internet”, *Australian IT*, 29 August 2001. Further, this judgment drove home the conclusion that “[a]nyone who puts information on the internet is ...effectively publishing in every nation instantaneously”: Editorial, “Gutnick ruling threatens net and free speech”, *Australian IT*, 29 August 2001.

<sup>41</sup> *Ibid.*

<sup>42</sup> Dutton, “Internet publishers caught in legal web”, *The New Zealand Herald*, 7 January 2003.

<sup>43</sup> However, the High Court judgment has been referred to in at least one case in a foreign court: *Harrods Ltd v Dow Jones* [2003] England and Wales High Court Decisions 1162 (Queen’s Bench).

<sup>44</sup> See for example Article 19(3)(a) of the 1966 International Covenant on Civil and Political Rights that highlights the need to balance the right of freedom of expression

inclined to exercise jurisdiction over Internet activities after this High Court decision lacks empirical support. On the contrary, the rules on private international law in most states already allow for jurisdictional claims that are as wide or wider than those laid down by Australian courts.<sup>45</sup> Just as there has been no dramatic increase in jurisdictional claims after the French *Yahoo! case*,<sup>46</sup> there seems to be no visible increase following the present case either.

All this notwithstanding, the High Court judgment provides little room for deciding differently a case involving other sets of circumstances.<sup>47</sup> The court could have been more willing to depart from the established rules had the website in question not been a fee-based subscription service or the defendant had not been such a large resource-rich publishing company. From a public interest perspective, this presents the most interesting aspect of the case. In the VSC, Hedigan J found it significant that the website was not a “normal, open for all” type of website,<sup>48</sup> but the High Court gave this less attention, which is a more genuine cause for concern.

Since Dow Jones must have known that they provided material to persons in Victoria for a fee, it is easy to understand why the High Court had concluded (correctly) in favour of Gutnick. On the other hand, as discussed above, it is of concern that the High Court left so little room for exceptions. In this sense, the VSC judgment appears more promising.<sup>49</sup> According to the High Court, it seems that as long

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with that of reputation.

<sup>45</sup> For example, in the People’s Republic of China a defamation case falls under the jurisdiction of the relevant People’s Court where the defamatory act is committed, the plaintiff’s reputation is damaged, or a party is domiciled: for more information see Sack RD, Sack on Defamation: Libel, Slander and Related Problems (1999, 3<sup>rd</sup> ed, Practising Law Institute, New York).

<sup>46</sup> See International League Against Racism & Anti-Semitism (LICRA) and Union of French Jewish Students (UEJF) v Yahoo! Inc, High Court of Paris, 20 November 2000 at <[www.cdt.org/speech/international/001120yahoofrance.pdf](http://www.cdt.org/speech/international/001120yahoofrance.pdf)> (English translation) (visited December 2003).

<sup>47</sup> Parts of the judgment may be applicable to cases involving different circumstances: see for example High Court judgment paras 7, 44 and 165.

<sup>48</sup> See for example VSC judgment paras 19 and 41. In contrast, para 7 is the only part of the High Court judgment that may be interpreted as making a similar distinction.

<sup>49</sup> Hedigan J made statements that seemed to show he lacked understanding of the Internet’s technical nature: Svantesson, “The Gutnick v Dow Jones decision: – Which questions were answered and which were not?” (2002) 4 Internet Law Bulletin 73.

as the plaintiff limits his or her claim to damages suffered in a certain state following publication in that state, there is nothing in the Australian legal system to prevent the court from deciding the dispute and, in doing so, applying Australian law. Perhaps these problems are more theoretical than practical, and the reality is that most potential defendants do not have enough assets to motivate plaintiffs to sue them for defamation. A second limitation is the difficulty regarding the recognition of a judgment and its enforcement in a foreign jurisdiction where the defendant may, indeed, have assets.<sup>50</sup>

### VIII. RECOGNITION AND ENFORCEMENT

The High Court did not discuss at any great length the likelihood of the recognition and enforcement of any remedy that the VSC<sup>51</sup> could grant to Gutnick.<sup>52</sup> Further, it is doubtful that a United States court would enforce a judgment rendered against a United States company that took all its actions in United States territory and presumably according to United States law.<sup>53</sup>

As observed above, this issue goes to the core of the Internet's effect on private international law – the creation of a gap in the law. Or more accurately, the significant widening of the existing gap between what may be seen as reasonable grounds for jurisdiction and what may be seen as reasonable grounds for the recognition and enforcement of a foreign judgment. This is because on one hand, it does not seem unreasonable for a Victorian court to decide a dispute affecting an Australian citizen who habitually resides in Victoria, who spends most

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<sup>50</sup> In this context it may be said that small publishers are unlikely to be sued. While big publishing companies frequently have assets in more than one jurisdiction, small publishers often have assets in their home jurisdiction only thereby limiting the plaintiff's choice of forums where a judgment may be recognised and enforced.

<sup>51</sup> The defamation proceeding has been set for November 2003, and Dow Jones has announced that it would "continue its defense of the action brought by Gutnick in the Supreme Court of Victoria": see Dow Jones' website at <[www.dowjones.com/](http://www.dowjones.com/)> (visited December 2003).

<sup>52</sup> However, see High Court judgment paras 121-122.

<sup>53</sup> Case law shows that United States courts are reluctant to enforce foreign defamation judgments that are inconsistent with the United States Constitution: *Telnikoff v Matusevich* (1997) 347 Maryland 561, 702 Atlantic 2d 230 (Court of Appeal, Maryland). In the present case, enforcement in Dow Jones' home forum (United States) would not be Gutnick's only option presumably since he could seek enforcement of the Australian judgment in a forum where Dow Jones has assets, if it can be found.

of his social and professional life in Victoria, who seeks to vindicate his reputation in Victoria, and who seeks damages only in relation to harm done in Victoria. At the same time, it does not seem unreasonable for a United States court to refuse to enforce a foreign judgment infringing on a United States company's freedom of speech as protected by the United States Constitution regarding an act done by that company exclusively in the United States.<sup>54</sup>

The characteristics of the Internet in general and the World Wide Web in particular have resulted in a development whereby existing and well-established jurisdictional rules can now found jurisdiction in previously unforeseen situations – the rules are the same but their application has been widened dramatically leading to a gap in the law. Although it may be true that a state sometimes makes wider jurisdictional claims than what it affords other states, the fact remains that this position is problematic as it leads to uncertainty for plaintiff and defendant, a situation that is unhealthy and should be addressed.

Arguably, the best way to bridge the gap is to sensibly harmonise private international law but this is hard.<sup>55</sup> When the proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters collapsed, the Convention on Exclusive Choice of Court Agreements replaced it. However, the replacement convention has a limited scope and does not deal with defamation.<sup>56</sup> The recent report of the Law Commission for England and Wales addressed jurisdiction and the law on Internet defamation<sup>57</sup> as follows:<sup>58</sup>

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<sup>54</sup> Several states in the United States, including New Jersey and New York, apply the so-called single publication rule: Wood, "Cyber-defamation and the single publication rule" (2001) 81 Boston University Law Review 895.

<sup>55</sup> Regional instruments, such as Brussels Regulation 44/2001, seem successful. In practice, however, their rules have yet to be applied or tested in a cross-border Internet defamation case.

<sup>56</sup> For the latest draft see <<ftp://ftp.hcch.net/doc/workdoc49e.pdf>> (visited December 2003). For more information on the proposed Convention see <[www.cptech.org/ecom/jurisdiction/hague.html](http://www.cptech.org/ecom/jurisdiction/hague.html)> (visited December 2003).

<sup>57</sup> The term "Internet defamation" refers to the spread of defamatory information through the Internet.

<sup>58</sup> Law Commission for England and Wales, Defamation and the Internet: A Preliminary Investigation, Scoping Study No 2, December 2002 p 3 at <[www.law.com.gov.uk/files/defamation2.pdf](http://www.law.com.gov.uk/files/defamation2.pdf)> (visited December 2003).

[A]ny solution would require an international treaty, accompanied by greater harmonisation of the substantive law of defamation. We do not think that the problem can be solved within the short to medium term. We do not therefore recommend reform in this area at the present time.

#### XI. A POSSIBLE ALTERNATIVE

In the absence of a realistic private international law solution in the near future, alternatives should be explored. An immediate possible response is to create a defamation defence that protects web publishers. Simultaneously, it is desirable to keep any solution technology-neutral. In *Gutnick*, the High Court had hinted that this new defence should be created but did not provide details on how this would work. It stated:<sup>59</sup>

[A] case in which it is alleged that the publisher's conduct has all occurred outside the jurisdiction of the forum may invite attention to whether the reasonableness of the publisher's conduct should be given any significance in deciding whether it has a defence to the claim made. In particular, it may invite attention to whether the reasonableness of the publisher's conduct should be judged according to all the circumstances relevant to its conduct, including where that conduct took place, and what rules about defamation applied in that place or those places.

This position considers the law of the place where the defendant acted, similar to the so-called *double actionability rule* that was the choice of law rule in Australia until recently.<sup>60</sup> In fact, this rule still applies in some common law jurisdictions including the United Kingdom.<sup>61</sup> This rule had originated in *Philips v Eyre* where it was held:<sup>62</sup>

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<sup>59</sup> High Court judgment para 51.

<sup>60</sup> This was until the *lex loci delicti* rule was also introduced for private international law cases in 2002; see discussion above.

<sup>61</sup> The 1995 Private International Law (Miscellaneous Provisions) Act (UK) still applies the double actionability test to defamation matters even though that test was abandoned in relation to others.

<sup>62</sup> (1870) 6 Law Reports, Queen's Bench 1, 28-29; Collins L and ors (eds), *Dicey and Morris on the Conflict of Laws* (2000, 13<sup>th</sup> ed, Sweet & Maxwell, London) 1562-1565.

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England...Secondly, the act must not have been justifiable by the law of the place where it was done.

This rule has been criticised<sup>63</sup> and, as referred to above, was recently abolished as the choice of law rule existing in Australia and some other common law jurisdictions. Nevertheless, this abolition should not prevent it from being a basis for discussion on the defamation defence.

#### **X. MODEL 'PLACE OF ACTION' DEFENCE**

The following proposal outlines how the double actionability rule may be adapted to the defamation defence. To provide a structured proposal, the defence is presented as a Model Code with four draft articles.

##### **(a) *Draft Article 1***

###### *Draft Article 1*

A defence against defamation is established if the defendant can show that it acted reasonably and lawfully at the place where the defendant acted.

The idea of focusing on the location where the defendant had acted appears to rest on a sound and logical basis. According to Professor Rheinstein, “[t]he law of torts is the law of loss shifting”.<sup>64</sup> The point of departure is the realisation that the one who suffers harm may only shift that loss to someone else if the latter had caused the harm by

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<sup>63</sup> See for example the critique raised in Reed, “To chill a mocking word: Applicable choice of law and jurisdiction principles over multistate defamation under English and Australian jurisprudence” [1997] *Tort Law Review* 33.

<sup>64</sup> Rheinstein, “The place of wrong: A study in the method of case law” (1944) 19 *Tulane Law Review* 4, 25. The law of torts is arguably aimed at making right what has been wronged or is deemed to deter wrongful behaviour. The better view is that both aims are merely consequences of loss shifting, namely, loss shifting makes right what is wronged and works as a deterrent. Further, the law of torts is simply one of the mechanisms regulating tortious behaviour. Other components include criminal law and self-imposed moral limitations.



acting in a manner contrary to relevant legal norms.<sup>65</sup> Consequently, it seems necessary to identify what are these “relevant legal norms”. It seems fundamentally fair and reasonable that a person should abide by the legal norms of the place where he or she acts. It also seems fundamentally fair and reasonable that a publisher should abide by the legal norms of foreign jurisdictions when it intends to publish to persons in those jurisdictions or where its action may have a probable consequence (see discussion on Draft Article 4(1) below).

In Draft Article 1, the act must be both “reasonable” and “lawful” and the prime focus is whether the defendant has acted lawfully according to the law of the place where the act occurs. The reference to “reasonably” is merely a safety mechanism. For example, picture a jurisdiction where the defendant has acted and where no defamation law exists. However, the press has guidelines or a code of conduct. In such a situation, the guidelines or the code of conduct may be useful to help determine if the defendant has acted “reasonably”.

Draft Article 1 places the burden of proof on the defendant to show what the foreign law is.<sup>66</sup> This is desirable as it identifies once and for all who has the burden of proof. What this means depends on the circumstances of the case. Ordinarily, the defendant has to show that it has a defence under the law in question. In other circumstances, the defendant has to show that the plaintiff has no cause of action under the law in question. In unusual cases, the plaintiff may have to provide evidence on the foreign law in question to counter the defendant’s case.

**(b) Draft Article 2**

*Draft Article 2(1)*

Ordinarily “the place where the defendant acted”, under Article 1, is the place where the defendant is habitually resident.

*Draft Article 2(2)*

A natural person shall be considered to be resident –  
if that person is resident in only one State, in that State;

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<sup>65</sup> Unless the person suffering the harm is able to shift the loss to an insurance company based on contractual obligations, for example.

<sup>66</sup> Nygh P and anor, *Conflict of Laws in Australia* (2002, 7<sup>th</sup> ed, LexisNexis Butterworths, Australia) 325.

if that person is resident in more than one State,  
in the State in which that person has his or her principal  
residence; or  
if that person does not have a principal residence in any one  
State, in each State in which that person is resident.

*Draft Article 2(3)*

For the purposes of this Article, an entity or person other than a  
natural person shall be considered to be [habitually] resident in the  
State –

- (a) where it has its statutory seat;
- (b) under whose law it was incorporated or formed;
- (c) where it has its central administration; or
- (d) where it has its principal place of business.

This draft article identifies “the place where the defendant acted”. Draft  
Article 2(1) defines the place where the defendant has acted in most  
cases. This is deemed to be the place where the defendant is habitually  
resident. Draft Article 2(2)-(3) defining “habitually resident” replicates  
Article 3 of the 2001 draft of the proposed Hague Convention but there  
may be reasons to question the suitability of paragraphs (2)-(3). For  
example, the principal place of business may be more relevant than the  
place of incorporation. Nevertheless, the work on the proposed Hague  
Convention generally represents a good basis for discussion.

*(c) Draft Article 3*

*Draft Article 3(1)*

If there is no, or merely a coincidental, relevant nexus between the  
defendant’s acts and the place identified under Article 2, “the place  
where the defendant acted” shall be deemed to be the place that has  
the most substantial connection with the defendant’s act.

*Draft Article 3(2)*

Where a party attempts to break existing connecting factors with  
one State or attempts to create connecting factors with another  
State, in order to circumvent actual natural connections with “the  
place where the defendant acted’ as defined in Article 2 or Article  
3(1), such attempts shall be null and void.

This article has its origins in the applicable choice of law rules of the United Kingdom, for example. The judgments of Lords Hodson and Wilberforce in *Boys v Chaplin*<sup>67</sup> provide exceptions to the main rule on double actionability<sup>68</sup> and point to the so-called proper law of the tort. Therefore, it is necessary to provide for exceptions in certain cases. For example, if a publishing company is located in Norway but the alleged defamatory publication on events and persons in Nigeria is researched, written and uploaded in Nigeria onto a server located in Nigeria, the court may depart from the rules outlined in Draft Article 2.

Today's technology, with great portability and high level of anonymity, provides a perfect environment for so-called fraudulent evasions or *fraude à la loi*. For example, connecting factors may be created and/or broken by moving a website from one server to another, by changing the physical location of a server, or simply by downloading something onto a laptop computer after crossing the border to another state. At present, it seems that the prevention of such practices has gained little attention in discussions on Internet regulation. Article 3(2) therefore represents a safety mechanism that prevents perversion of the Model Code's application through fraudulent evasion.

**(d) Draft Article 4(1)**

*Draft Article 4(1)*

Article 1 is not applicable if:

- (a) the defamatory material has been made available with the intention of it being consumed at the place where the plaintiff has initiated the action; or
- (b) the defamatory material being consumed at the place where the plaintiff has initiated the action is a probable consequence of the material being made available.

As noted above, if a publisher publishes with the intention that the material is read or accessed at a certain place, namely, publishing for an intended audience at an intended place, the publisher should consider the laws of that place. Otherwise, publishers can easily

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<sup>67</sup> [1971] Appeal Cases 356.

<sup>68</sup> See further Collins L and ors (eds), Dicey and Morris on the Conflict of Laws (2000, 13<sup>th</sup> ed, Sweet & Maxwell, London) 1511-1514.

relocate to favourable jurisdictions, enjoy those laws and still target the old market. This would be clearly undesirable.

Similarly, publishers should consider the law of any foreign jurisdiction where publication is a probable consequence. In this sense, it is interesting that recent United States cases relating to Internet jurisdiction have followed a similar approach.<sup>69</sup> In *Young v New Haven Advocate*<sup>70</sup> two newspapers based outside Virginia published articles discussing in part the conduct of residents of Virginia in Virginia.<sup>71</sup> The articles were available both offline and online. The United States Court of Appeals for the Fourth Circuit concluded:<sup>72</sup>

The newspapers did not post materials on the Internet *with the manifest intent of targeting* Virginia readers. Accordingly, the newspapers could not have “reasonably anticipated being hauled into court [in Virginia] to answer for the truth of the statements made in their articles.” *Calder*, 465 U.S. at 790...In sum, the newspapers do not have sufficient Internet contacts with Virginia to permit the district court to exercise specific jurisdiction over them. *[emphasis added]*

If the “correct” interpretation of the United States approach is that it should focus on the defendant’s subjective state of mind when determining whether the defendant targeted the forum state, then it is too limited. Although the context of the proposed *place of action* defence is slightly different from the context as expressed in *Young* the problems are the same. In this sense, any model that focuses solely on

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<sup>69</sup> See for example *Young v New Haven Advocate* (2002) 315 F 3d 256 No 01-2340 (13 December 2002); *ALS Scan, Inc v Digital Service Consultants, Inc* (2002) 293 F 3d 707 (4<sup>th</sup> Circuit); *Revell v Lidov* [2002] United States Appeal LEXIS 27200 (5<sup>th</sup> Circuit); *Northwest Healthcare Alliance Inc v Healthgrades.Com Inc*, Court of Appeal 9 (Washington), 2002 WL 31246123 (unpublished).

<sup>70</sup> (2002) 315 F 3d 256 No 01-2340 (13 December 2002).

<sup>71</sup> Since maximum security prisons in Connecticut are overcrowded, it has contracted with Virginia to house a number of its prisoners. The articles in question discussed the state of a penal institution in Virginia as well as the conduct of its warden.

<sup>72</sup> *Young v New Haven Advocate* (2002) 315 F 3d 256 No 01-2340 (13 December 2002) at 7. The targeting approach has been strongly advocated in recent literature including Wrenn, “Cyberspace is real, national borders are fiction: The protection of expressive rights online through recognition of national borders in cyberspace” (2002) 38 *Stanford Journal of International Law* 97.

the defendant's intention is inherently inadequate. If courts are too willing to decline jurisdiction because the publisher did not intend publication in a particular place, but at the same time strictly allow suits in jurisdictions where the plaintiff has a prior reputation, the end result may prevent a plaintiff from suing anywhere. This arguably breaches the 1966 International Covenant on Civil and Political Rights.

To strike an appropriate balance between "determining that there is no jurisdiction over activities in cyberspace, which would seem like lawlessness, and determining that there is unlimited jurisdiction over all activities in cyberspace, a type of hyper-regulation",<sup>73</sup> it is necessary that jurisdiction is found in a state where the publication is a probable consequence. For example, the facts in *Young* may lead to the conclusion that publication in the plaintiff's forum (Virginia) was a probable consequence of the material being made available even though the material was mainly read in, and perhaps exclusively intended for, the defendants' forum (Connecticut). It is against this type of background that a *place of action* defence as proposed here becomes necessary.

To understand the meaning of "probable", the ordinary meaning of the term should be used. The Macquarie Encyclopedic Dictionary defines it as "likely to occur or prove true", "having more evidence for than against, or evidence which inclines the mind to belief but leaves some room for doubt" and "affording ground for belief".<sup>74</sup> The meaning has also been discussed in a criminal law context in *R v Crabbe*.<sup>75</sup>

If an accused knows when he does an act that death or grievous bodily harm is a probable consequence, he does the act expecting that death or grievous bodily harm will be the likely result, for the word "probable" means likely to happen. That state of mind is comparable with an intention to kill or to do grievous bodily harm. There is a difference between the case in which a person acts knowing that death or serious injury is only a possible consequence, and where he knows that it is a likely result. The former is not a case of

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<sup>73</sup> Wrenn, "Cyberspace is real, national borders are fiction: The protection of expressive rights online through recognition of national borders in cyberspace" (2002) 38 *Stanford International Law Journal* 97, 103.

<sup>74</sup> Delbridge A and ors (eds), *The Macquarie Encyclopedia Dictionary* (1995, Macquarie Library Pty Ltd, Castle Hill).

<sup>75</sup> (1985) 156 *Commonwealth Law Reports* 464, 469.

murder even if death ensues, unless death or grievous bodily harm is intended (or, perhaps – and it is unnecessary to consider this proposition – unless the act is done with the intention and for the sole purpose of creating a risk of death or grievous bodily harm.)

In determining whether publication in a particular jurisdiction is an intended or a probable consequence, attention should be placed mainly on considerations other than the medium used. While the fact that the material is placed on a website may be deemed to indicate the publisher intended widespread dissemination, this alone is insufficient to meet the criterion of “intention” found in Draft Article 4(1)(a) or the criterion of “probability” found in Draft Article 4(1)(b). In fact, it is too simplistic to conclude that everybody knows that material on the Internet may be accessed from anywhere in the world as was assumed by the High Court in the present case. The court had stated:<sup>76</sup>

However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.

Although the above is true, it overlooks the widespread use of the Internet for domestic or even local spread of information. Even if users know that what they put on the “net” is accessible worldwide, this does not necessarily mean that they intend to publish it in *every* jurisdiction or the publication is a probable consequence.<sup>77</sup> The focus has to be on factors such as whether the article is of interest in the jurisdiction in question, whether it relates to persons or events in that jurisdiction, and whether it uses language that is normally used in that jurisdiction.

However, none of the factors is determinative alone. For example, an article being written in English or Japanese does not necessarily mean that consumption in every English or Japanese-speaking jurisdiction is

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<sup>76</sup> High Court judgment para 39.

<sup>77</sup> A similar but more limited reasoning is found in *Young v New Haven Advocate* (2002) 315 F 3d 256 No 01-2340 (13 December 2002) at 6. In that case, the plaintiff’s claims were not as wide as that referred to in the High Court’s majority judgment: High Court judgment para 5.

“a probable consequence of the material being made available”. The focus should not always be on what is deemed the official language of a state. Also, foresight is traditionally viewed as a necessary element in tort law.<sup>78</sup> However, with the World Wide Web, this is a foregone conclusion since a web-publisher can certainly foresee publication in any jurisdiction, which therefore is a probable consequence. This goes to the very core of the Internet’s uniqueness.

**(e) Draft Article 4(2)**

*Draft Article 4(2)*

Nothing stated in paragraph (1) shall limit the application of Article 1 if the defendant has taken reasonable steps to avoid publication at the place where the plaintiff has initiated the action.

It is necessary to provide the publishers with some protective means. For example, if a person wishes to write about events and persons in India but does not wish to be exposed to the risk of suit for defamation there, that person should be able to take reasonable steps to avoid exposing the material to readers in India. What is deemed “reasonable step” will have to be viewed in the context of technological and other developments and surrounding circumstances.<sup>79</sup> For example it is arguable that a prominent notice denying access to a website in a certain state may be deemed a reasonable step. It is better still if a menu is included requiring the “web-surfer” or reader to indicate the state where access is sought before access to the site is permitted.

By using this type of filter, a publisher may accurately and cost-effectively control which jurisdictions it wishes to entertain, so to speak. Although this system may be abused, in the absence of some-

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<sup>78</sup> *Wyong Shire Council v Shirt* (1980) 146 Commonwealth Law Reports 40; Rheinstein, “The place of wrong: A study in the method of case law” (1944) 19 *Tulane Law Review* 4, 26.

<sup>79</sup> See Goldsmith and anor, “The Internet and the dormant commerce clause” (2001) 110 *Yale Law Journal* 785 where it is argued that it is wrong to assume that web content providers cannot control content flows on the web. Providers often condition access to content by a fee payment or presentation of geographical or age identification. However, this process can be costly and slows the process of content distribution greatly. Therefore, the pertinent point is “not the impossibility of geographical and age identification and filtering but rather the cost and effectiveness of these services”: *ibid* 809.

thing more foolproof, this initiative would show that the publisher had taken a reasonable step to protect itself. In this sense, the defendant's "good faith" would be central to determining whether the steps it takes may be deemed reasonable for the purposes of Draft Article 4(2). Presently, this seems to be a temporary problem in light of advances in technology. Increasingly, accurate "geo-location" technologies<sup>80</sup> will enable a website operator to determine the location of the access-seeker with some precision, and using such technology would then be seen as "reasonable steps" especially when it happens to be inexpensive or easy to operate. This has important implications for Internet defamation in light of developments in geo-location technologies and how they impact on and drive the development of private international law.

The discussion on "reasonable steps" is not only relevant to the *place of action* defence but to the assessment of damages as well. If a publisher takes steps to prevent or limit publication in a certain jurisdiction, the number of actual publications in that jurisdiction may be potentially very small thereby limiting the effect of the publication on the plaintiff's reputation and containing the amount of damages to be awarded if defamation exists. Further, if steps are taken to prevent or limit publication in a certain jurisdiction, this is arguably good ground for the mitigation of damages.

An advantage of Draft Article 4(2) is that it allows publishers to decide the jurisdictions where they wish to be exposed. On the other hand, this provision has a serious consequence as it encourages geographical restrictions on the provision of information through the Internet. In other words, providers of material on the web will become less willing to make their material available worldwide. This development is not ideal and may transform the Internet from a global to a regionalised medium as long as different states have different laws.

The alternative is even less appealing because it is not desirable for the Internet to be a lawless dimension.<sup>81</sup> In the case of defamation it is

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<sup>80</sup> Cha, "Rise of internet 'borders' prompts fears for web's future", Washington Post, 4 January 2002.

<sup>81</sup> The reality is that national laws are being applied to the Internet and activities on the Internet. In the absence of applicable private international law rules the result is that activities on the Internet are subject to overlapping jurisdictional claims from forums worldwide. This is because the Internet is deemed "everyone's land" instead



simply unreasonable to suggest that national laws protecting the right of reputation do not extend to the Internet. This would also be contrary to established international law as seen in the 1966 International Covenant of Civil and Political Rights for example. In relation to all forms of communication, a balance needs to be struck between the protection of freedom of speech and protection of reputation. In the absence of an international convention dealing with this issue, national laws will have to provide the regulatory regime. Since different states have different defamation laws in practice, the regulation of activities on the Internet should take into account this reality one way or another. Thus, unless something drastic intervenes in the meantime the Internet will inevitably transform from a relatively borderless dimension into a medium that takes account of geographical and legal borders.

#### XI. IMPLEMENTATION OF THE 'PLACE OF ACTION' DEFENCE

The model outlined above should not be seen as representing the only way in which a *place of action* defence may be established. Although the draft model contains the essential elements necessary for such a defence to operate satisfactorily, there is still room for improvement.

The *place of action* defence may be implemented in domestic law in many ways. In common law states, the courts should establish the defence in the same way the "innocent dissemination" defence was introduced.<sup>82</sup> In civil law states, legislative changes would be required unless an expanded interpretation of existing legislation is sufficient.<sup>83</sup> Compared to the introduction of an international convention, these two approaches are advantageous because they allow states to introduce the defence domestically and in a manner of their own choosing.

#### XII. PROPOSED MODEL AND GUTNICK

What would be the result if the above proposed defamation defence were to be applied to the circumstances in the present case? Unhappily

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of "no-man's land".

<sup>82</sup> *Emmens v Pottle* (1885) 16 Queen's Bench Division 354; *Vizetelly v Mudie's Select Library Ltd* [1900] 2 Queen's Bench 170.

<sup>83</sup> Regardless of how the place of action defence is best implemented in domestic law, it would be desirable that an international institution supports the introduction of this defence.

for Dow Jones, the *place of action* defence would not protect them. Further, although Dow Jones could possibly show that it had acted reasonably and lawfully under the laws of New Jersey under Draft Articles 1-2, it cannot be said that the nexus between the acts of Dow Jones and the place where the alleged defamation occurred was coincidental under Draft Article 3(1).

Since Dow Jones had knowingly accepted subscribers from Victoria it may be assumed that they intended for the material to be consumed in Victoria and the other places where subscribers existed (Article 4(1a)). The website being a subscription service, a consideration of Article 4(1b) would also be unnecessary. Conversely, it may be argued that since the published article was concerned with the actions of an Australian citizen/resident in Australia, and the language used (English) was also the main language used in Australia, the defamatory material being consumed in Australia would be a probable result of the material being made available there.

Moreover, this is supported by the fact that Dow Jones tried to rely on the so-called Lange Qualified Privilege,<sup>84</sup> namely, the published article containing the words the plaintiff had complained about was related to subjects of public interest that were also “political and government matters affecting the people of Australia”.<sup>85</sup> Certainly, if Dow Jones asserts that the article relates to matters of such relevance for Australians, it is unsurprising that persons in Australia would actually read it when they get the chance.

Finally, Dow Jones did not take reasonable steps to avoid publication in Australia as mentioned in Article 4(2). Consequently, the *place of action* defence would not provide any relief for Dow Jones in *Gutnick*.

### XIII. CONCLUSIONS

The fact that the High Court had unanimously dismissed the appeal of Dow Jones probably has little importance from a public interest perspective and probably is of limited concern to Dow Jones.<sup>86</sup> The

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<sup>84</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 Commonwealth Law Reports 520.

<sup>85</sup> VSC judgment para 39.

<sup>86</sup> For discussion on the possible motives of Dow Jones see Young, “Dow Jones v

important part of the judgment concerns the grounds for the decision and the indications for the future resolution of similar disputes. From a general public interest perspective, one has to ask whether the VSC and High Court would have come to the same conclusion if Dow Jones had been a small non-profit publisher, or even an individual, and the allegedly defamatory material in question was freely available from the website (no fee required). Nevertheless, while the High Court decision does not necessarily mean the death of freedom of speech online, it could lead to future problems. In contrast to the VSC decision, it was general in character and left little or no room for future cases involving similar, but not identical, circumstances to be decided differently.

The High Court judgment has illustrated clearly that defamation has entered a new era. The Internet's nature and the technology involved have highlighted the inadequacy of existing jurisdictional rules. This in turn has widened the gap between what can be seen as reasonable grounds for jurisdiction on one hand, and reasonable grounds for the recognition and enforcement of foreign judgments on the other. The most natural and suitable manner for bridging the gap is a sensible harmonisation of private international law. The proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters could have played an important role in this respect but it did not.<sup>87</sup> At present, it seems unlikely that such harmonisation would occur in the foreseeable future. This calls for alternatives to be examined. One suggestion is to introduce a new defamation defence as proposed above. This *place of action* defence is advantageous because it considers the law of the place where the defendant has acted and it may be introduced into the domestic sphere relatively quickly by way of a Model Code or otherwise.

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Gutnick: the Internet honeymoon is over. What's next?" On Line Opinion, 17 January 2003 at <[www.onlineopinion.com.au/2003/Jan03/Young.htm](http://www.onlineopinion.com.au/2003/Jan03/Young.htm)> (visited December 2003).

<sup>87</sup> It must be noted that, while torts in general and defamation in particular are likely to fall outside the scope of the proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, the Hague Conference on Private International Law may seek to address these issues in its future work. For the draft convention see "Future Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters" at <[www.hcch.net/e/workprog/jdgm.html](http://www.hcch.net/e/workprog/jdgm.html)> (visited March 2004).