is that the publication of a defamatory statement in a single issue of a newspaper, or a single issue of a magazine, although such publication consists of thousands of copies widely distributed, is in legal efect, one publication which gives rise to one cause of action and that the applicable statute of limitations runs from the date of that publication. In contrast, common law views every publication as a separate tort.

After examining the single publication argument and the context of how the rule came to be law in 27 of the States of America, the Majority was of the view that applying the rule in Australian law is problematic because *"what began as a term describing a rule that all causes of action for widely circulated defamation should be litigated in one trial....came to be understood as affecting, even determining, the choice of law to be applied in deciding the action"*.[28] Australian law has separate principles, one dealing with prevention of multiple suits and choice of law principles to deal with which law should be applied. Notwithstanding that the single publication rule is influential in the US, it was rejected by the Hight Court as it does not fit with defamation law as developed in Australia.

WIDELY DISSEMINATED PUBLICATIONS – POTENTIAL FOR DEVELOPMENT OF THE LAW

The Majority does canvass the problems in applying their decision where damage to reputation is suffered in numerous jurisdictions. They consider that where there is an injury to reputation said to have occurred as a result of publication in a number of different places, then it may be necessary to distinguish between cases where the complaint is confined to Australian publication as opposed to cases where publication is alleged to have occurred both in and outside Australia.

The first issue they canvass is that the forum may well be considered as clearly inappropriate (as discussed above) and the litigation vexatious if more than one action is brought.

Secondly, they suggest that where the publisher's conduct has occurred outside the forum then there may be a need for development of common law defences to defamation to recognise where a publisher has acted reasonably before publishing the material that is subject to complaint. This development of the common law they suggest, has a precedent in the development of the defence of innocent dissemination.

However the view of the Majority is that three natural limitations to liability for internet publishers should be considered and balanced before embarking on further development of the common law defences to defamation. The Majority considers that these are natural limitations to what at first seems to be unrestricted liability for Internet publishers. They are:

- due weight should be given to the fact that substantial damages will only be available where the plaintiff has a reputation in the place of publication;
- judgments must be enforceable in a place where the defendant has assets; and
- if the two considerations above do not limit the concerns of those publishing on the internet, identifying the person about whom the material is to be published will readily identify the defamation law to which the person may resort.

FORUM SHOPPING AND A GRAB FOR EXTRATERRITORIAL JURISDICTION

The natural limitations suggested above do not, in our view, realistically prevent plaintiffs from embarking on forum shopping in defamation cases, particularly as communications continue to improve and reputations extend all over the world. Further there is nothing in the decision that would encourage courts around the world to exercise restraint and discretion before exercising long-arm jurisdiction in international matters.

A practical consequence of the Court's unanimous decision that the proper law(s) of a defamation is the place(s) of publication, is that public figures could theoretically sue in all jurisdictions where they believe there is damage to their reputation. Of course they should consider the extent of enforceability of the decision, but the problem nevertheless is that there is no effective restraint on forum shopping and even plaintiffs suing concurrently in more than one jurisdiction.

Theoretically, under Australian defamation law a number of different suits are possible. However, the Majority and Gaudron J say that practically this will not occur. The common law favours the policy of the resolution of particular disputes by the bringing of a single action. They say that the policy can be applied to cases where a plaintiff complains about the publication of defamatory material to many people in many places. The policy can be given effect by applying principles preventing vexation by separate suits[29] or after judgment by applying principles of preclusion such as Anshun estoppel[30]. We acknowledge that the High Court must view this issue from an Australian context however we question whether this is enough in an international context given that common law principles do not govern the entire world.

The decision highlights the reality for internet (and other international) publishers. International publication means making a risk assessment when deciding on which laws to comply with, regarding a particular publication. This is of particular concern with the internet publications that can be made almost anywhere. Without some international agreement there is, and continues to be, considerable uncertainty regarding the law(s) that will apply to such publications.

Kirby J's View

Kirby J was the only judge to reflect on features of the internet that may require a new approach:

> *"Its 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 of any jurisdiction"*.[31]

In his view the advent of the internet has brought about a need to:

> *"adopt new principles, or to strengthen old ones in responding to questions of forum or choice of law that identify, by reference to the conduct that is to be influenced, the place that has the strongest connection with or is the best position to control or regulate such conduct"*[32].

He explicitly admits that there could be undesirable consequences of rendering a website owner potentially liable to poceedings in courts of every legal jurisdiction where the subject enjoys a reputation. He says that the publisher

may freeze publication or restrict access to content for people in countries like Australia. Yet, he also accepts that the nature of the internet is such that it is impossible to be completely sure that a particular geographic area on the earth's surface is isolated for accessing a particular website. There are also other ways that Australians can access US content, e.g. by using an American credit card.

However, in applying the Victorian Supreme Court Rules to the facts, Kirby J agrees that the Victorian Court has jurisdiction to hear the matter. He says that although this may seem to be "long-arm" and conflict with principles of public international law, the validity of the law was not challenged in the proceedings. Further legislation giving courts long-arm jurisdiction is becoming increasingly common around the world, following recent controversial assertions of jurisdiction in US legislation.[33]

Kirby J says that the advent of the internet suggests a need to "*adopt new principles, or to strengthen old ones, in reponding to questions of forum or choice of law that identify, by reference to the conduct that is to be influenced, the place that has the strongest connection with, or is in the best position to control or regulate, such conduct*".[34] He says that the disparities between different countries regarding their approach to the defamation balance (the balance between freedom of information and the right to reputation and privacy) necessitate the need for a clear, single, readily ascertainable choice of law rule.[35] He makes a call to courts throughout the world to "*address the immediate need to piece together gradually a coherent transnational law appropriate to the 'digital millennium'.... Simply to apply old rules, created on assumptions of geographical boundaries, would encourage an inappropriate and unusually ineffective grab for extra territorial jurisdiction*". [36]

CURRENT INTERNATIONAL INITIATIVES - THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAWS

It is submitted that if there was international agreement to adopt a choice of law procedure similar to Article 10 of the preliminary draft *Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* (**"Hague Convention"**) adopted by the Special

Commission of the Hague Conference on Private International Laws in 30 October 1999, then there would be far more certainty for Internet publishers regarding the law to be applied in a particular circumstance. However, ironically enough, those who have stymied the progress of the convention would now benefit from the certainty of the application of agreed principles similar to Article 10. For now it is undeniable that, at least under Australian law, the defamation laws in all jurisdictions can theoretically apply. The view put forward by such interests is that if the Hague Convention is widely adopted then it will cripple the internet:

> *"In a nutshell, it will strangle the internet with a suffocating blanket of overlapping jurisdictional claims, expose every web-page publisher to liabilities for libel, defamation and other speech offences from virtually any country, effectively strip internet service providers of protections from litigation over the content they carry".*[37]

Consequently agreement to the Hague Convention has been postponed to allow for further discussion regarding developments in the field of electronic commerce. Perhaps it is now worthwhile for internet interests to revisit these concerns.

If Article 10 is applied to the case of alleged international defamatory conduct then it would mean that a plaintiff could only bring an action in the courts of a State in which the injury arose and only to the extent that the defendant cannot establish that the person claimed to be responsible could not have reasonably foreseen that the act or omission could result in an injury of the same nature in that State.[38] There is also further protection for a defendant in Article 10.4:

> *"If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State."*

So, applying these rules, if a plaintiff has a worldwide reputation then he/she is more likely to sue in the jurisdiction of his or her habitual residence.

Australia, the USA and the UK are all members of the Hague Conference.

CONCLUSION

Defamation laws around the world balance the competing rights of freedom of information and protection of reputation. Different cultures will continue to have different values and priorities regarding this balance. Consequently, it is to some extent futile to attempt to impose one culture's values on another. The decision in *Dow Jones v Gutnick* is an illustration of this. No one approach to law is ultimately correct. While this decision brings into sharp focus the questionable practice of courts exercising a long-arm jurisdiction, it also highlights that an international agreement regarding jurisdiction and applicable law will at least give publishers, content providers and Internet users some certainty regarding the various laws that they will be answerable to.

1. Ibid. at paragraph 71. the US-based publisher of *Barron's Online* and *Barron's* magazine
2. Ibid. at paragraphs 45-48.
3. Ibid. at paragraphs 100-103.
4. Ibid. per Kirby J at paragraph 101.
5. Ibid. per Kirby J. at paragraph 145.
6. [2000] HCA 36.
7. Ibid. per Gleeson CJ. Gaudron, McHugh, Gummow and Hayne JJ at paragraph 35.
8. [1971] AC 458.
9. Ibid. per Lord Pearson at 468.
10. *Dow Jones & Company Inc. v Gutnick* [2002] HCA 56 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at paragraph 44.
11. Ibid.
12. Cheshire and North, *Private International Law*, 11th cd. (1987) at 450, cited by Kirby J. at paragraph 145.
13. *Distillers Co. (Biochemicals) Ltd v Thompson* [1971] AC 458.
14. Ibid para 43.
15. (1870) LR 5 CP 542.
16. *The Albaforth* [1984] 2 Lloyd's Rep. 91.
17. (1990) 171 CLR 538.
18. Ibid. per Mason CJ, Deane, Dawson and Gaudron JJ at 569.
19. [2002] HCA 10.
20. [1987] AC 460.
21. [2002] HCA 10
22. Ibid at para 64.
23. Ibid at para 39.
24. Ibid at para 39.
25. Ibid at para 198-199.
26. Ibid at par 35.
27. Ibid at para 36.
28. Part of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589
29. Ibid at para 113.
30. Ibid at para 114.
31. Ibid at para 101.
32. Ibid at para 114.
33. Ibid at para 117.
34. Ibid at para 119.
35. Quotation from James Love, director of Ralph Nader's Consumer Project on Technology in Washington DC in Australian Financial Review 5 July 2001 p53.
36. Article 10.1(b).

The views expressed in this article are those of the authors and not necessarily those of the firm or its clients.

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The Andrew Olle Lecture 2002 Delivered by Mr Lachlan Murdoch Sydney, October 18, 2002

Good Business: Great Journalism

Lachlan Murdoch, in this much discussed lecture, examines a range of issues confronting modern journalism.

Thank you for inviting me to address Australia's pre-eminent media event generously hosted by the ABC. It is a night that honours our industry at the same time honouring Andrew Olle, a great Australian journalist. I very much thank you for this opportunity.

Although I give the odd speech now and then, I've never actually given a lecture before, so I hope you'll bear with me.

In preparing for speeches I generally try to read over previous speakers' comments, to gain a sense of the type of speech you may be expecting. Reading Kerry Stokes' comments from last year was extremely poignant, as this lecture is once again held under a pall of terrible tragedy. Sadly, Kerry's speech could just as well be given again tonight, as we again find ourselves in all too familiar territory.

JOURNALISM IN TIMES OF CRISIS

Tonight, as we honour the memory of a great Australian journalist, it is also a timely occasion to mark the work of all our colleagues and friends who have strived under heart-breaking circumstances to inform their fellow Australians and in many instances, the rest of the world. After last week's bombing in Bali, so many of our journalists, photographers and camera crews are again working in extreme conditions and under incredible duress to piece together the harrowing story that unfolded on October 12. We sometimes forget that those we send to report for us from places like Bali feel the trauma and grief like everyone else. We forget that those working behind a camera, a recorder or notebook feel the pulse of humanity as we do.

The best of them feel that pulse more strongly.

It struck me when I heard *The Sydney Morning Herald's* Matthew Moore and *The Daily Telegraph's* Peter Lalor speaking to Sally on ABC radio earlier this week, their voices trembling.

Reporting in *The Tele* on Tuesday Peter went on to write:

> *"There are times when a pen and a notebook are inadequate shields against the world....Tomorrow I promise I will be hard-nosed, today I have to grieve with all these people. My people... "*

Later that day, Peter rang his editor, Campbell Reid, and said he may not be able to report for Wednesday's newspaper. He had joined a search for the missing. Later, he did file his story.