

## CASE NOTES

### DOW JONES & COMPANY INC v GUTNICK\*

#### AN ADEQUATE RESPONSE TO TRANSNATIONAL INTERNET DEFAMATION?

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##### I INTRODUCTION

The recent decision of the High Court of Australia in *Dow Jones & Co Inc v Gutnick*<sup>1</sup> has inspired much controversy. The reaction from media and technology groups has been particularly critical as they see the decision representing a threat to freedom of expression on the Internet and a deterrent to online publication.<sup>2</sup> It has also been suggested that the High Court judgments reflect a peculiarly nationalistic approach to resolving problems with respect to a medium that is fundamentally borderless and aterritorial.<sup>3</sup> More generally, the decision is also highly significant because it represents the first major opportunity for an Australian court to examine the application of the rules of private international law to Internet conduct. While in the United States and Europe there now exists a large body of judicial decisions<sup>4</sup> and legislative

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\* (2002) 194 ALR 433.

<sup>1</sup> (2002) 194 ALR 433 ('*Gutnick*').

<sup>2</sup> Kevin Balshaw, *Gutnick and the Internet: Too Many Jurisdictions* (2002) <<http://www.crikey.com.au/media/2002/12/13/20021213gutnick.html>> at 1 May 2003; Peter Coroneos, *Think Global, Act Local: The Gutnick Decision and the Internet* (2002) <[http://www.iaa.net.au/gutnick\\_op\\_ed.html](http://www.iaa.net.au/gutnick_op_ed.html)> at 1 May 2003; Sally Jackson and Caitlin Fitzsimmons, 'Gutnick Decision Spooking Internet', *The Australian* (Sydney), 11 December 2002, 4.

<sup>3</sup> Coroneos, above n 2.

<sup>4</sup> In the US there have been over 300 decided cases dealing with jurisdictional issues in relation to the Internet. The most commonly cited is perhaps *Zippo Manufacturing Co v Zippo Dot Com Inc*, 952 F Supp 1119 (WD Pa, 1997), which introduced the 'sliding scale' test for jurisdiction based on the quantity and intensity of a defendant's contacts with the forum. In Europe there have been fewer cases, mainly concerning the territorial reach of local trademark law in respect of allegedly infringing activity taking place on a foreign based website: see, eg, *Euromarket Designs Inc v Peter and Crate & Barrel* [2000] EWHC Ch 179 (Unreported, Jacob J, 25 July 2000); *Carpaint SPA v Microsoft Corporation* [2000] European Trade Mark Reports 802.

activity<sup>5</sup> on the topic, in Australia, until *Gutnick*, the issues of jurisdiction and choice of law in relation to the Internet remained largely unexplored.<sup>6</sup>

The purpose of this article is to assess the adequacy of the approach taken by the High Court according to a number of criteria of adjudicative fairness. Firstly, does the decision treat plaintiffs and defendants with equality in transnational defamation litigation? Secondly, does it effectively advance the objectives of comity between nation states and the proper allocation of jurisdictional competence among national courts? In considering these issues, a number of alternative approaches to that adopted by the Court will also be discussed.

## II THE FACTS AND DECISION IN *GUTNICK*

*Gutnick* concerned an article written by journalists for the American publisher, Dow Jones, in the *Barron's* magazine. The article was researched and prepared in New York but uploaded (or posted) onto the Dow Jones website, which was hosted on a server in New Jersey. The article contained an allegation that Mr Gutnick, a high profile entrepreneur resident in Victoria, had engaged in the manipulation of share prices and had associated with a well-known American money launderer and tax evader. The Dow Jones website was not an ordinary site open to the public at large, but was a subscriber site that required the payment of subscription fees and password access. The worldwide subscription to the site was over 550 000, of whom 1700 were resident in Australia with a few hundred from Victoria. A small number of print copies of the offending article were also sold in Victoria.<sup>7</sup>

Gutnick sued Dow Jones in the Supreme Court of Victoria, expressly confining his claim to those damages flowing from publication of the article in Victoria. As Dow Jones had no place of business in Australia it was necessary for Gutnick to serve the defendant outside the jurisdiction under Order 7 of the Supreme Court Rules 1996 (Vic) to establish jurisdiction in that state. Two grounds were relied upon by the plaintiff: first, that the action was based upon a tort committed in Victoria (rule 7.01(1)(i)) and second, that damage was suffered in Victoria as a result of a tort wherever occurring (rule 7.01(1)(j)). Gutnick was successful on both bases before Hedigan J of the Supreme Court of Victoria and the Victorian Court of Appeal. Dow Jones then appealed to the High Court, which unanimously upheld the decision of the trial judge. The principal judgment was delivered by Gleeson CJ, McHugh, Hayne and Gummow JJ with

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<sup>5</sup> In Europe, most significantly there is the European Council, *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2001] OJ L 12, which contains specific provisions dealing with jurisdiction over Internet activity: see, eg, *ibid* art 15.

<sup>6</sup> In *Macquarie Bank Ltd v Berg* [1999] NSWSC 526 (Unreported, Simpson J, 2 June 1999), the Supreme Court of NSW refused to grant an injunction to restrain posting of material on a US-based website the contents of which were accessible in NSW and alleged to be defamatory of a NSW resident. The case did not however raise any issue of jurisdiction or applicable law as the defendant submitted to the jurisdiction and the parties accepted that NSW law applied. For an analysis of this decision and the problem of jurisdiction over Internet activity under Australian law, see Richard Garnett, 'Are Foreign Internet Infringers Beyond the Reach of the Law?' (2000) 23(1) *University of New South Wales Law Journal* 105.

<sup>7</sup> *Gutnick* (2002) 194 ALR 433, [169]–[171] (Callinan J).

whom Gaudron J expressly agreed. Callinan J delivered a separate judgment in which he agreed with the principal judgment on all but one issue,<sup>8</sup> while Kirby J also delivered a separate judgment in which he agreed generally with the other judges but expressed some concerns about the application of the rules to a global technological medium such as the Internet.<sup>9</sup>

In the appeal Dow Jones effectively conceded that rule 7.01(1)(j) was satisfied on the facts, which meant that the respondent had successfully established jurisdiction in Victoria. However, the question of whether the Court, in its discretion, should exercise jurisdiction remained alive, and it was for this purpose that the appellant chose to focus on the issue of the place of commission of the tort. This point was crucial for the reason that if the Court found that the tort had been committed in Victoria, then according to the Australian common law rules of choice of law, the law of that state would almost certainly govern the question of substantive liability in the case.<sup>10</sup> In addition, such a conclusion would make a powerful argument that the action should be allowed to proceed in Victoria on the ground that it was not a ‘clearly inappropriate’ forum.<sup>11</sup>

Consequently, the principal argument for Dow Jones was that the place where the tort was committed was New Jersey, not Victoria. In its view, in the case of material placed on the Internet, there should be deemed to be a single place of publication which would be the location where the publisher uploaded material on its web servers, unless such a place was merely ‘adventitious or opportunistic’.<sup>12</sup> The consequences of not adopting this view, the appellant argued, would be that an Internet publisher would be potentially subject to suit in every country where its content was accessible to users, on the basis that a publisher could not territorially restrict access to such information. The appellant acknowledged that in the case of media such as newspapers and television, the established place of the tort for the purposes of defamation was the place of ‘publication’, that is, the jurisdiction where the material was received or comprehended by a third party. However, it argued, the novel technological context of the Internet called for a new and distinct concept of ‘publication’.<sup>13</sup>

The appellant sought to support its argument by reference to a series of cases involving the place of the tort in negligence. In those decisions it was stated that the substance of the action arose in the place where the appellant’s conduct occurred, rather than the location of its effects or consequences.<sup>14</sup> Applying this

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<sup>8</sup> Callinan J considered that it would not be an abuse of process for a plaintiff to institute separate proceedings in each jurisdiction in which he or she claims to have been defamed: *Gutnick* (2002) 194 ALR 433, [202], and further discussion below part III(D).

<sup>9</sup> *Ibid* [163], [166]. At various points in his judgment Kirby J noted that the approach taken and outcome reached were ‘contrary to intuition’, not ‘wholly satisfactory’, and warranting ‘national legislative attention’ and ‘international discussion in a forum as global as the Internet itself’. However, he did not propose any alternative view, in part because he saw such change as ‘exceed[ing] the judicial function’.

<sup>10</sup> See *Regie Nationale des Usines Renault SA v Zhang* (2002) 187 ALR 1 (‘Zhang’); *Szalatnay-Stacho v Fink* [1947] KB 1.

<sup>11</sup> *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (‘Voth’).

<sup>12</sup> *Gutnick* (2002) 194 ALR 433, [20].

<sup>13</sup> *Ibid*.

<sup>14</sup> *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458, 468 (Pearson LJ); *Agar v Hyde* (2000) 201 CLR 552, 591–2 (Callinan J).

view to defamation on the Internet, therefore, the substance of the tort arose at the place of posting or uploading the material on its server, according to the appellant.

The High Court agreed that the test to apply in determining the location of the tort was to find the jurisdiction where in substance the action arose. However, it disagreed that the primary focus of the inquiry should be on a defendant's conduct. While this view may be appropriate for the tort of negligence, it ignored a critical element in the tort of defamation — that is, injury to the plaintiff's reputation. In other words, the harm or effects of the defendant's conduct is the substance of the action. Accordingly, the notion of 'publication' in defamation cannot merely involve a defendant making material available or uttering a comment at a given point in time, but it is communicating such material to a reader or listener and as a result causing harm to another's reputation.<sup>15</sup>

Consequently, the Court found that the location of the tort in defamation is the place where damage to reputation occurs, this normally being the place where the material is made available in comprehensible form. In the case of material on the web, material is not available in such a form until it has been downloaded onto the computer of a user requesting such information. As a result, the same principles apply to the Internet as to other, older forms of media. Applying this view to the facts of *Gutnick*, therefore, the tort was found to have been committed in Victoria.<sup>16</sup>

Once this outcome was reached, the Court had little difficulty in finding that Victoria was not a 'clearly inappropriate forum' and so allowing the case to proceed there. What was of particular importance to the Court here was that Gutnick had confined his claim to damages arising out of publication in Victoria and so the only 'tort' the trial court would have to consider would be a Victorian one involving the application of local law.<sup>17</sup>

After concluding that Gutnick was entitled to sue Dow Jones in Victoria, the Court then proceeded to consider what approach should be taken in the situation where a plaintiff brings an action in respect of publication in several countries.

Earlier in its judgment the Court had rejected the argument by the appellant that it should adopt the American 'single publication rule'.<sup>18</sup> Pursuant to this rule, a plaintiff claiming to be defamed by publications in a number of states or countries simultaneously must only bring a single proceeding against the defendant in one jurisdiction. Within that proceeding the defendant is not entitled to plead separate claims in respect of each publication in each jurisdiction. Instead, the plaintiff has his or her claims 'aggregated' into a single action governed by a single law, although taking into account, as regards damages, the injury to reputation in several places.<sup>19</sup>

However, the High Court was not persuaded to adopt the American doctrine in Australia and reaffirmed the existing rule that each communication to a third party from a website creates a separate cause of action in each jurisdiction where

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<sup>15</sup> *Gutnick* (2002) 194 ALR 433, [44] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid* [48].

<sup>18</sup> *Ibid* [36].

<sup>19</sup> See *Restatement of the Law (Second) Torts* (1997) §577A quoted in *Gutnick* (2002) 194 ALR 433, [29] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

the communication was comprehended.<sup>20</sup> Consequently, the Court noted, it was at least presumably possible for a plaintiff to sue in respect of defamatory publications in a number of places.<sup>21</sup> While the Court agreed with Dow Jones that this spectre could cause injustice to defendants, it considered that there already exist adequate mechanisms in Australian law to prevent such an outcome.<sup>22</sup> First, the Court noted, it has long been held that a plaintiff who commences separate proceedings in multiple jurisdictions in respect of the same subject matter commits an abuse of process, and he or she will be required to bring all their claims in a single forum.<sup>23</sup> Second, a defendant may be able to challenge the plaintiff's choice of a local (Australian) forum by seeking a stay on the basis that the Court selected is 'clearly inappropriate'.<sup>24</sup> Third, a defendant may be able to challenge the plaintiff's institution of foreign proceedings by making an application for an anti-suit injunction.<sup>25</sup> Fourth, at the trial of the merits of the action, a defendant could possibly argue as a defence to substantive liability that its conduct was 'reasonable' and justifiable under the law and practice of the foreign country where it acted.<sup>26</sup> Fifth, as a practical matter, the Court noted a plaintiff would generally be unlikely to sue in jurisdictions where he or she has no reputation for the reason that little or no damages will be recoverable.<sup>27</sup>

### III ANALYSIS

#### A *Jurisdiction: Damage in the Forum*

A number of comments may be made about the High Court decision. An overall observation is that it seems clear that under existing Australian rules of personal jurisdiction, an Australian resident will almost always be able to sue in Australia in respect of defamatory material hosted on a foreign-based web server, at least where the plaintiff confines his or her claim to damage to reputation suffered within the forum of adjudication.

It is suggested that the current rules make it relatively easy to establish jurisdiction in a transnational defamation action in Australia, either on the basis that damage was suffered in the forum (rule 7.01(1)(j)),<sup>28</sup> or the tort was committed there (rule 7.01(1)(i)). In interpreting 'damage' suffered within the jurisdiction for the purposes of rule 7.01(1)(j), Australian courts have taken a

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<sup>20</sup> *Gutnick* (2002) 194 ALR 433, [36], [44] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>21</sup> *Ibid* [36].

<sup>22</sup> *Ibid* [36], [50]–[54].

<sup>23</sup> *Ibid* [36]; *Maple v David Syme & Co Ltd* [1975] 1 NSWLR 97 ('*Maple*').

<sup>24</sup> *Gutnick* (2002) 194 ALR 433, [50] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Voth* (1990) 171 CLR 538, 552–66.

<sup>25</sup> *Gutnick* (2002) 194 ALR 433, [50] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 389–90 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>26</sup> *Gutnick* (2002) 194 ALR 433, [51] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>27</sup> *Ibid* [53].

<sup>28</sup> Note however that this ground of jurisdiction is not available under the rules of the Supreme Courts of the Australian Capital Territory, Tasmania or Western Australia: Peter Nygh and Martin Davies, *Conflict of Laws in Australia* (7<sup>th</sup> ed, 2002) 63.

very liberal view, finding that ‘physical, financial or social consequences of an injury first received abroad’ would suffice.<sup>29</sup> In the context of transnational defamation, damage has been found to have occurred in the forum where the offending material was distributed or published.<sup>30</sup> Given that it was conceded on the facts of *Gutnick* that the article had been read in Victoria, it is not surprising that the appellant accepted that the respondent had suffered damage in Victoria. As a result this ground of jurisdiction was satisfied.<sup>31</sup>

While it is true that the damage in the forum head of jurisdiction does exist under the laws of a number of Commonwealth countries,<sup>32</sup> it is arguable that it provides an excessively liberal ground for the establishment of jurisdiction in Internet defamation actions, at least as it is currently interpreted in Australia. Thus, there is force in the remark of Kirby J in *Gutnick* that the damage ground of jurisdiction may conflict with the principle of public international law requiring a substantial connection between the subject matter of a dispute and the jurisdiction of a national court before a case can be adjudicated.<sup>33</sup> Such a view finds further support in the US constitutional rules of personal jurisdiction, where a foreign-based defendant must be shown to have certain ‘minimum contacts’ with the forum before it can be subjected to a suit in an American court.<sup>34</sup> Under the current interpretation of minimum contacts as applied to Internet defamation, some degree of targeting or directing of a website by the defendant at residents of the forum of adjudication is now required before jurisdiction may be found.<sup>35</sup> It is clear that mere suffering of damage by a plaintiff in the forum (even if it is his or her place of residence) would be inadequate to satisfy this test on the basis that it provides too inadequate a connection between the defendant and the forum.

Consequently, it may be argued that a jurisdiction test based on damage in the forum excessively favours plaintiffs in Internet defamation cases, given the relative ease of establishing local harm. However, the potentially expansive and oppressive scope of such a ground may be limited if other countervailing jurisdictional control measures exist under the law of the forum. Fortunately, all Commonwealth countries retain such a mechanism in the form of the doctrine of *forum non conveniens*. A local action will thus be stayed either where a foreign

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<sup>29</sup> *Flaherty v Girgis* [1985] 4 NSWLR 248, 266–7 (McHugh JA); see also *Darrell Lea Chocolate Shops Pty Ltd v Spanish-Polish Shipping Co Inc (The ‘Katowice II’)* [1990] 25 NSWLR 568, 577.

<sup>30</sup> See *Investasia Ltd v Kodansha Co Ltd* [1999] 3 Hong Kong Cases 515 (‘*Investasia*’).

<sup>31</sup> This point was noted by Kirby J in *Gutnick* (2002) 194 ALR 433, [100].

<sup>32</sup> See, eg, Civil Procedure Rules 2002 (UK) r 6.20(8); Rules of Civil Procedure 1990 (Canada) r 17.02(h).

<sup>33</sup> *Gutnick* (2002) 194 ALR 433, [101] (Kirby J).

<sup>34</sup> *International Shoe Co v Washington*, 326 US 310 (1945).

<sup>35</sup> *Young v New Haven Advocate*, 315 F 3d 256 (4<sup>th</sup> Cir, 2002) (‘*Young*’); *Revell v Lidov*, 317 F 3d 467 (5<sup>th</sup> Cir, 2002) (‘*Revell*’); *Northwest Healthcare Alliance Inc v Healthgrades.com, Inc*, 50 Federal Appendix 339 (9<sup>th</sup> Cir, 2002) (‘*Northwest*’).

court is considered more appropriate to hear the matter,<sup>36</sup> or the local court is found to be ‘clearly inappropriate’.<sup>37</sup> Significantly, in no transnational defamation case so far decided has a plaintiff been allowed to sue based on proof of damage in the forum alone, as courts have insisted on the existence of other local connecting factors before agreeing to hear the matter.<sup>38</sup> It is to be hoped that this trend continues and that courts do not allow the damage ground to become an expansive basis of jurisdiction in future cases.

It is possible that the ‘damage’ ground of jurisdiction may become more significant in the situation where a plaintiff brings multiple claims in an Australian court in relation to publications both in Australia and in a number of other countries. In such a case, the plaintiff may argue that the Court would have jurisdiction to hear the entire action (including the foreign defamation claims) on the basis that some damage was suffered in the forum, namely that the material was (in part) published there. The likely success of such an argument remains unclear, although it is notable that the High Court in *Gutnick*, in their discussion of multiple claims, seemed to assume that an Australian court would have jurisdiction over foreign acts of defamation, at least where such claims were brought in conjunction with a local plea. However, the Court did stress that care should be taken before agreeing to *exercise* jurisdiction over such an action on discretionary grounds.<sup>39</sup>

#### B *Jurisdiction: Tort Committed in the Forum*

Rather than the place of the damage, the key criterion in most transnational defamation actions has been the place of the tort. One reason why this factor has been significant is because under existing Anglo-Australian choice of law rules, the law of the place where the tort of defamation was committed governs the substantive liability of the defendant.<sup>40</sup> In addition and as a consequence, a finding that the tort has been committed in the forum will make it much more difficult to secure a stay of local proceedings based on the discretionary ground of *forum non conveniens*, since local law will govern the action. This conclusion is particularly strong in the case of Australian law which adopts the ‘clearly

<sup>36</sup> This is the English test from the decision *Spiliada Maritime Corp v Cansulex* [1987] 1 AC 460 (*‘Spiliada’*) which has been adopted in courts of other Commonwealth countries: see, eg, *Amchem Products Inc v British Columbia (Workers’ Compensation Board)* [1993] 1 SCR 897 (Supreme Court of Canada); *Club Mediterranee NZ v Wendell* [1989] 1 NZLR 216 (New Zealand Court of Appeal); *The Andhiguna Meranti* [1988] 1 Lloyd’s Rep 384 (Hong Kong Court of Appeal); *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 Singapore Law Reports 776 (Singapore Court of Appeal); *American Express Bank Ltd v Mohamed Toufic Al-Ozeir* [1995] 1 Current Law Journal 273 (Supreme Court of Malaysia). The principle has also been adopted in Ireland: see *Intermetal Group Ltd v Worlslade Trading Ltd* [1998] 2 IR 1 (Supreme Court of Ireland).

<sup>37</sup> This is the test in Australia based on the High Court decision in *Voth* (1990) 171 CLR 538, 552–66.

<sup>38</sup> See, eg, *Investasia* [1999] 3 Hong Kong Cases 515 and more recently, the English case *Reuben v Time Inc* [2003] All ER (D) 166, [14] (*‘Reuben’*). In the latter, the Court of Appeal stated that an action based on publication outside England would ‘almost certainly’ be stayed on the basis that the foreign court is the more appropriate forum to hear the matter.

<sup>39</sup> *Gutnick* (2002) 194 ALR 433, [49]–[54] (Gleeson CJ, McHugh, Gummow and Hayne JJ). See discussion below part III(D).

<sup>40</sup> See cases cited above n 10.

inappropriate forum' test,<sup>41</sup> an arguably more difficult test to satisfy for the defendants than the 'more appropriate forum' test established by the House of Lords in *Spiliada*.<sup>42</sup> As will be discussed below, in the majority of transnational defamation cases, whether involving Internet or print publications (or both), requests to decline jurisdiction have been refused, in large part because courts have been swayed by the existence of a local 'tort'.

It therefore becomes crucial to examine the requirements for establishing the place of the tort in defamation cases and the High Court's treatment of this issue in *Gutnick*. It will be recalled that the appellant there argued that the place of the wrong for the purposes of defamation by website should be the jurisdiction where the material was posted or uploaded to the server. Such an argument purported to create a new place of the tort for Internet defamation which departed from that applied to older forms of media, which was the place where the material was comprehended by the reader. Not surprisingly, the Court refused to adopt this view on the basis that it excluded the respondent altogether from the inquiry. Given that the gist of the defamation action is damage to the plaintiff's reputation, regard must also be had to that party's position, even at the jurisdictional stage. Accordingly the Court found that the place of the tort in Internet defamation was the place of comprehension of the material; that is, where it was downloaded and read by the end user.<sup>43</sup>

The effect of the Court's approach is that, provided a plaintiff can show that the material was read by at least one person in the forum, a finding that the tort has occurred in that jurisdiction will be virtually automatic.<sup>44</sup> Courts in other jurisdictions have reached a similar conclusion. In Malaysia it has been held that material placed on a newspaper website in Singapore could only be considered to have been 'published' in Malaysia where there was evidence that a third person within Malaysia had read and accessed it.<sup>45</sup> Canadian<sup>46</sup> and Italian<sup>47</sup> courts have also found that the place of tort in defamation arising from Internet websites is the jurisdiction in which the material is accessible and accessed by end users. Consequently, it seems that it will not be difficult for a plaintiff to find and plead a local tort in an Internet defamation case. This is an outcome which, as will be seen below, gives that party a significant advantage in resisting a defendant's application to stay the action on discretionary grounds.

Given this situation, it may be desirable to consider an alternative approach to the issue of the place of the tort which more equitably takes into account the

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<sup>41</sup> *Voth* (1990) 171 CLR 538, 552–66. For an analysis of the Australian cases on *forum non conveniens*, see Richard Garnett, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test?' (1999) 23 *Melbourne University Law Review* 30.

<sup>42</sup> Nygh and Davies, above n 28, 128.

<sup>43</sup> *Gutnick* (2002) 194 ALR 433, [157] (Kirby J).

<sup>44</sup> See *Gutnick* (2002) 194 ALR 433, [26], [46] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>45</sup> *Lee Teck Chee v Merrill Lynch International Bank Ltd* [1998] 4 *Current Law Journal* 188, 194–5.

<sup>46</sup> *Investors Group Inc v Hudson* [1999] *Recueil en Responsabilite et Assurance* 185; *Kitakufe v Oloya* (Unreported, Ontario Court of Justice (General Division), Himel J, 2 June 1998) ('*Kitakufe*').

<sup>47</sup> *Re Moshe D* (Unreported, Italian Court of Cassation, Calabrese J, 27 December 2000) <<http://www.cdt.org/speech/international/001227italiandecision.pdf>> at 1 May 2003.

interests of the plaintiff and the defendant and does not cede as much jurisdiction to the adjudicating forum. Instead of focusing on the place where the material was uploaded and stored on the server — which seems a rather arbitrary and insubstantial connecting factor — Dow Jones could have argued that attention should be placed on the conduct of the defendant in relation to the plaintiff and the forum. In particular, did the appellant, by posting this information on its server, direct the material at subscribers in Victoria with an intention to harm the respondent there? If so, then it may be argued that Victoria is the place of the tort for the action. Alternatively, if it were considered that the article was directed at a predominantly New York audience and intended to affect his reputation among business persons there, then the tort would be deemed to be committed in that jurisdiction. Primary guidance on this question can be derived from the content and context of the allegedly defamatory material and the degree of publication in the forum.

Applying this view to the facts of *Gutnick*, for example, it could be argued that Dow Jones did not intend to harm the respondent in Victoria by describing his relationship with certain US figures. Rather this material was provided principally for the interest of US subscribers and to injure his reputation in that country. While the article made brief references to Gutnick's links with Victoria (for example, his former chairmanship of the Melbourne Football Club) its principal focus was his business activities in the US and Israel. The small number of Victorian subscribers to the electronic magazine as a proportion of the global whole (around 0.055 per cent) and the print version (around 0.0016 per cent) gives further support to this argument. By contrast, had there been more elements tying the article to Victoria, a stronger claim could have then be made that the tort occurred there. According to this view, therefore, it will be only where a defendant is found to have directed its material to persons in the forum, over and above those of another country, that the tort of defamation will be found to have been committed there.

While this suggestion broadly adopts the American 'targeting' model of jurisdiction in Internet defamation cases described above,<sup>48</sup> there is already some support for it in *Voth* — a High Court decision dealing with misrepresentation.<sup>49</sup> In that case the Court had to determine the place of the tort in an action for negligent misrepresentation. A majority took the view that a statement from abroad could only give rise to a tort committed in the forum where it was directed at a recipient and intended to be acted upon there. Mere receipt of the information was insufficient.<sup>50</sup> Hence, it may be argued that in the absence of evidence of direction or targeting of the forum by a defendant, no publication should be found to have occurred in that state.

The consequence of adopting such a view would, of course, be to limit the number of fora that could exercise jurisdiction in an Internet defamation action and compel many plaintiffs to sue publishers in their place of business. Certainly, in the US, plaintiffs have had difficulty in satisfying the 'targeting'

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<sup>48</sup> See cases cited above n 35.

<sup>49</sup> *Voth* (1990) 171 CLR 538.

<sup>50</sup> *Ibid* [63] (Mason CJ, Deane, Dawson and Gaudron JJ).

test of jurisdiction in Internet defamation cases.<sup>51</sup> Further, persons with a global reputation may argue that the rule inflicts a serious injustice upon them given that they may frequently be the subject of articles, the content of which is difficult to link to a specific location. Also, given that the bulk of Internet publishing emanates from the US, it is likely that most articles will concentrate on issues not directly pertaining to Australia. This means that it will be hard for a local plaintiff to show that he or she was targeted in this country even though their reputation was injured here. Nevertheless, it is argued that a jurisdictional test based on the intention and acts of a defendant is preferable as a matter of principle to one which focuses on the location of the defendant's server (as asserted by Dow Jones). It is also an approach which may have had a greater chance of success before the High Court in *Gutnick*. In addition, it is suggested, a targeting approach more fully takes into account the interests of both plaintiff and defendant in the jurisdictional inquiry and does not allow Australian courts to assume jurisdiction on too wide a basis.

The appellant in *Gutnick* also raised another argument on the issue of the place of the tort. It suggested that a version of the American 'single publication rule' should be adopted in Australia. Pursuant to this rule, a plaintiff who claims to be defamed by publications simultaneously in a number of countries or states must aggregate all its separate claims into one action against the defendant in one jurisdiction.<sup>52</sup>

The relevance of this argument to the facts of *Gutnick*, where the plaintiff brought only one claim against the defendant based on publication in Victoria, is not immediately apparent. It is possible that Dow Jones was seeking to argue that where an article is published in multiple jurisdictions, the jurisdiction of principal publication or distribution should be deemed the place of the tort. While some commentators and courts have supported such an approach,<sup>53</sup> it has

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<sup>51</sup> Of the 19 cases decided since 1998, plaintiffs have only been successful in seven, or a little over a third of decisions. Jurisdiction was declined in the following cases: *Revell*, 317 F 3d 467 (5<sup>th</sup> Cir, 2002); *Young*, 315 F 3d 256 (4<sup>th</sup> Cir, 2002); *Schnapp v McBride*, 64 F Supp 2d 608 (ED La, 1998); *Mitchell v McGowan*, US Dist LEXIS 18587 (ED Va, 1998); *Jewish Defense Organization, Inc v Superior Court of Los Angeles County*, 72 Cal App 1045 (4<sup>th</sup> Cir, 1999); *Barrett v Catacombs Press*, 44 F Supp 2d 717 (ED Pa, 1999); *Bailey v Turbine Design, Inc*, 86 F Supp 2d 790 (WD Tenn, 2000); *Lofton v Turbine Design, Inc*, 100 F Supp 2d 404 (ND Miss, 2000); *Oasis Corporation v Judd*, 132 F Supp 2d 612 (SD Ohio, 2001); *English Sports Betting, Inc v Tostigan*, US Dist LEXIS 4985 (ED Pa, 2002); *Machulsky v Hall*, 210 F Supp 2d 531 (D NJ, 2002); *Medinah Mining, Inc v Amunategui*, 237 F Supp 2d 1132 (D Nev, 2002). Jurisdiction was upheld in the following cases: *Northwest*, 50 Federal Appendix 339 (9<sup>th</sup> Cir, 2002); *Blumenthal v Drudge*, 992 F Supp 44 (D DC, 1998); *Bellino v Simon*, US Dist LEXIS 18081 (ED La, 1999); *Wells v Taylor*, US Dist LEXIS 17891 (ND Miss, 1999); *Bochan v La Fontaine*, 68 F Supp 2d 692 (ED Va, 1999); *Batzel v Smith*, US Dist LEXIS 8929 (CD Cal, 2001); *Planet Beach Franchising Corporation v C3ubit, Inc*, US Dist LEXIS 18349 (ED La, 2002).

<sup>52</sup> *Gutnick* (2002) 194 ALR 433, [29]–[30], [32]–[33] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>53</sup> Adrian Briggs, 'Private International Law' in 'Decisions of British Courts during 2000 Involving Questions of Public or Private International Law' (2000) 71 *British Yearbook of International Law* 435, 441–2; Jonathan Harris, 'Forum Shopping in International Libel' (2000) 116 *Law Quarterly Review* 562, 563. In *Olde v Capital Publishing Partnership* (1996) 5 Carswell's Practice Cases (4<sup>th</sup>) 95, [15] ('*Olde*'), it was said that

never been formally adopted as the law in any common law country. Even in the US the single publication rule does not perform such a role; it is used simply as a tool to prevent defendants being subjected to multiple claims under multiple laws. The rule has never been applied as a means of determining whether a court has jurisdiction over a defendant.

It is suggested that a test that seeks the jurisdiction of majority publication, by itself, may be an inadequate criterion for determining the place of the tort in transnational defamation cases. However, such a factor could be used as an additional element in the ‘targeting’ test proposed above. In other words, in resolving the question of whether a defendant intended to hurt the plaintiff in the forum, an important piece of evidence could be the proportion of the offending article published in that jurisdiction.

### C Jurisdiction: Appropriate Forum

It was mentioned above that the place of the tort has been a significant consideration in determining whether a common law court should exercise jurisdiction as a matter of discretion. In Commonwealth countries apart from Australia, a court may decline to exercise jurisdiction where a defendant can show that a foreign tribunal is a more appropriate forum for trial; that is, it is the jurisdiction ‘with which the action has the most real and substantial connection.’<sup>54</sup> In Australia, an arguably stricter test is imposed upon defendants seeking a stay: they must show that the local court is a ‘clearly inappropriate forum’ for the determination of the dispute between the parties.<sup>55</sup>

As discussed earlier, given the relative ease of proving that the tort of defamation has occurred in the forum in Internet website cases, it may be argued that some form of jurisdictional control mechanism is needed to prevent plaintiffs bringing suits in courts with little connection to the subject matter. While at least in theory the *Voth* and *Spiliada* tests appear sufficiently broad and flexible to perform this role, both have been severely qualified in the defamation context by the principle developed in *Cordoba Shipping Co Ltd v National State Bank (The ‘Albaforth’)*.<sup>56</sup> According to this case — which was recently approved in the defamation context by the House of Lords,<sup>57</sup> and seemingly not doubted by the High Court in *Gutnick* — the jurisdiction in which the tort was committed is ‘*prima facie* the natural forum for the determination of the dispute’.<sup>58</sup> Consequently, the plaintiff to a transnational defamation action who can show

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in cases involving magazines sold in a number of jurisdictions, it would make sense at least in cases such as this where a very small portion of the publications were sold in Canada, to name the place where the majority of the sales took place as the one where the action should be tried[.]

See also *Maple* [1975] 1 NSWLR 97, 102, where the Supreme Court of New South Wales ordered a stay of NSW proceedings in favour of trial in Victoria partly on the basis that the ‘vast bulk’ of circulation had occurred in that state.

<sup>54</sup> *The Abidin Daver* [1984] AC 398, 415 (Lord Keith) quoted in *Spiliada* [1987] 1 AC 460, 478.

<sup>55</sup> *Voth* (1990) 171 CLR 538, 552–66.

<sup>56</sup> [1984] 2 Lloyd’s Rep 91, 96 (‘*Cordoba Shipping*’).

<sup>57</sup> *Berezovsky v Michaels* [2000] 2 All ER 986 (‘*Berezovsky*’).

<sup>58</sup> *Cordoba Shipping* [1984] 2 Lloyd’s Rep 91, 96 (Goff LJ) (emphasis added).

publication in the forum enjoys a 'presumption' that the forum will agree to exercise its jurisdiction.

Undoubtedly an important factor underlying this presumption is that under Anglo-Australian choice of law rules, a court must apply the law of the forum to determine liabilities arising from a local tort,<sup>59</sup> and because such a court is best placed to apply its own law, it should retain jurisdiction. The extent to which the Court in *Gutnick* was influenced in its decision to refuse a stay by the fact that the law of Victoria would govern the action is not clear in the judgments, but it is likely to have been an important consideration. In *Voth*, the Court expressly referred to the governing law of the action as an important criterion in determining whether jurisdiction should be exercised<sup>60</sup> for the obvious reason that it is easier for an Australian court to apply its own law rather than that of another country.

At one point, counsel for Dow Jones in *Gutnick* seemed to argue that a stay should not be refused on the basis that Victorian law would apply if the case were heard in Victoria, because a New Jersey court would also apply such law to a tort that was committed in Victoria.<sup>61</sup> Authority was cited to show that US courts do not always apply the freedom of speech principles in the *US Constitution* (which impact upon the local state laws of defamation) to actions based upon material published abroad.<sup>62</sup> The High Court, during argument, responded rather sceptically to this view.<sup>63</sup> It is suggested that it did so with good reason, given that in the vast majority of US cases, foreign libel laws or judgments which have been deemed inconsistent with US principles of free speech have been denied recognition on the grounds of public policy.<sup>64</sup>

Consequently, an argument can certainly be made that in *Gutnick* the respondent would have been denied the protection of Victorian law had the action been stayed, and may even have had no case at all under the stricter US defamation laws.<sup>65</sup> Given this likely outcome, it seems difficult to argue that the issue of applicable law was not an appropriate matter for the Court to consider when deciding whether to exercise jurisdiction. The issue of choice of law in defamation actions is considered further below in part III(E).

Apart from the presumption in favour of exercising jurisdiction that arises from the existence of a local tort, courts have also been influenced to accept jurisdiction in defamation cases by plaintiffs pleading only the local tort and seeking damages solely for injury to reputation in that forum. While such an

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<sup>59</sup> See cases cited above n 10.

<sup>60</sup> *Voth* (1990) 171 CLR 538, 566.

<sup>61</sup> Transcript of Proceedings, *Dow Jones & Co Inc v Gutnick* (High Court of Australia, Geoffrey Robertson QC and Bret Walker SC, 28 May 2002) 59–60.

<sup>62</sup> See, eg, *Desai v Hersh*, 954 F 2d 1408 (7<sup>th</sup> Cir, 1992).

<sup>63</sup> Transcript of Proceedings, *Dow Jones & Co Inc v Gutnick*, above n 61, especially the comments of Gummow J.

<sup>64</sup> *Matusevitch v Telnikoff*, 877 F Supp 1 (D DC, 1995); *Bachchan v India Abroad Publications Incorporated*, 585 NYS 2d 661 (NY Sup, 1992); *Mohammed Radi Abdullah v Sheridan Square Press*, 154 FRD 591 (SD NY, 1994); *Ellis v Time Inc*, [1998] 26 Media Law Reporter 1225 (D DC, 1997).

<sup>65</sup> No detailed evidence was led by the parties as to what substantive law would be applied by the New Jersey court but it seemed to be assumed by the parties and the court that it would be more difficult for the respondent to succeed under such law.

action may seem like a generous gesture by plaintiffs, it is often the case that the jurisdiction in which they have chosen to sue has a highly ‘plaintiff-friendly’ law of defamation. Often the plaintiff has excluded claims under other countries’ laws to give the action the appearance of being an exclusively local one, and so strengthening the case against a stay.

Such a strategy was, of course, successful in *Gutnick*, with the High Court emphasising in its decision to refuse a stay that the respondent had sought damages for injury to reputation in Victoria and nowhere else.<sup>66</sup> Moreover, there were other factors which connected the case to Victoria, namely that it was the respondent’s place of residence and centre of his business operations and that local law would be applied at trial. Thus, the decision to refuse a stay was not surprising. However, the High Court did arguably place too much reliance on the fact that the respondent had confined his claim to damages in the forum in the jurisdictional analysis. This is an approach that may create problems in later cases that are less clearly connected to the forum.

The significance of a plaintiff only pleading damage to local reputation in order to manipulate the jurisdictional inquiry is more starkly illustrated in the House of Lords decision in *Berezovsky*.<sup>67</sup> That case involved the US-based publisher of a magazine which was sued in England in respect of an article allegedly defamatory of two Russian businessmen. Only 2000 copies of the magazine had circulated in England (as compared to 800 000 in the US and 13 in Russia) and the plaintiff again only sought damages in respect of publication in England.

Despite the plaintiff having only limited connections with England — gained largely through business visits — a majority of the House of Lords upheld the Court of Appeal decision to allow the matter to proceed on the basis that he had acquired a reputation in the forum. Connections with a country and reputation therein are not at all the same thing, as was noted by Lord Hoffmann in dissent. While Mr Berezovsky had a ‘truly international reputation’, his reputation in England was ‘merely an inseparable segment of his reputation worldwide’.<sup>68</sup>

In *Gutnick* the respondent had both connections to and reputation in the forum, which gave Victoria a strong claim to being the natural forum for the action. The effect of *Berezovsky* may be that an international celebrity with slim geographical connections to the forum who pleads only damage to local reputation will rarely, if ever, have his or her action stayed. Significantly, the emphasis placed by the High Court in *Gutnick* on the respondent’s pleading harm to local reputation suggests that it may have reached the same result on the facts of *Berezovsky*.

Of course, there is force in the point made by the Court in *Gutnick* that a plaintiff will hesitate to sue in a place where he or she has a limited reputation for fear of recovering only minimal damages. It is also true that enforcement of any award obtained against a foreign defendant may be difficult where the defendant has few assets in the forum, and the law of the defendant’s country of

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<sup>66</sup> *Gutnick* (2002) 194 ALR 433, [48] (Gleeson CJ, McHugh, Gummow and Hayne JJ), [155] (Kirby J).

<sup>67</sup> *Berezovsky* [2000] 2 All ER 986.

<sup>68</sup> *Ibid* 1003. Commentators have agreed with this point: see, eg, Briggs, above n 53, 442.

residence may not recognise such an award.<sup>69</sup> However, it still may be argued that courts should strive to develop jurisdictional rules which have regard for the interests of both plaintiff and defendant equally, and which also do not unduly enlarge the jurisdiction of Australian courts at the expense of foreign tribunals. It is suggested that a rule which allows a plaintiff with little connection to the forum to sue in that forum for only harm to local reputation has the potential to inflict injustice and oppression on foreign defendants and to make Australia a libel destination.

The position taken in other transnational defamation cases involving discretionary stay applications largely confirms the views expressed above. Firstly, where the plaintiff is a resident of the forum seeking damages for harm to local reputation alone, jurisdiction has almost always been exercised. So, for example in *Kitakufe*,<sup>70</sup> an Ontario resident was held to be entitled to sue in Ontario in respect of a website publication that was hosted on a server in Uganda, on the basis that his claim was for 'injury to his reputation in his community' (which was Ontario) and it would be inconvenient to compel a local resident to sue elsewhere.<sup>71</sup> Consequently, the decision on the facts of *Gutnick* seems consistent with existing law.

Second, where a plaintiff is not a resident of the forum, then jurisdiction may still be exercised where the Court considers the plaintiff to have an identifiable reputation in the forum. On this point, the influence of *Berezovsky* seems to be strong. Thus, in *Investasia*,<sup>72</sup> a recent Hong Kong decision, a Japanese national was permitted to sue two Japanese-based defendants in relation to material published in Japanese both on the Internet and in a magazine with very limited distribution in Hong Kong (around 0.03 per cent of the total). On the question of reputation in the forum, the Court took an extremely liberal view. While the plaintiff in that case had close business connections with Hong Kong (including spending four to six months of the year there), the Court stated that 'far less' a link would have been adequate. In fact, 'a plaintiff [who] had a presence in Hong Kong only once a year for the purpose of doing business here'<sup>73</sup> would be entitled to sue a foreign-based publisher of a magazine with only limited circulation in Hong Kong.

Consequently, the issue of which jurisdiction forms the natural forum in an Internet defamation suit seems to be governed less by the geographical connections of the parties and the cause of action to the forum, but rather the existence of a local tort, plaintiff reputation in the forum and plaintiff pleading strategy to limit actions to local damage.

However, in another respect, the judgment in *Investasia* does suggest a possible alternative path to stay applications in multi-state defamation cases. At

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<sup>69</sup> *Gutnick* (2002) 194 ALR 433, [53] (Gleeson CJ, McHugh, Gummow and Hayne JJ), [165] (Kirby J).

<sup>70</sup> (Unreported, Ontario Court of Justice (General Division), Himel J, 2 June 1998).

<sup>71</sup> See also, *Direct Energy Marketing Ltd v Hillson* (1999) 89 All Canada Law Reports (3d) 49 (Albertan resident able to sue in Alberta in respect of print and web publication in that province); *Schapiro v Ahronson* [1999] 7 EMLR 735 (English resident able to sue Israeli newspaper in England in respect of small print publication that circulated in England).

<sup>72</sup> [1999] 3 Hong Kong Cases 515.

<sup>73</sup> *Ibid* [16] (Findlay J).

one point, the Court noted that it was misleading in a jurisdictional inquiry to focus exclusively upon the proportion of circulation in the forum as compared to the overall distribution of the article. Instead, attention should also be drawn to the *content* of the article. If the article was ‘sensational and juicy’ in nature and had the potential to spread quickly among business associates of the plaintiff in the forum and cause damage to his or her reputation there, then a court may be more willing to exercise jurisdiction than if the article is ‘low-key and boring’.<sup>74</sup>

It was argued above in the discussion on place of the tort that courts have given excessive weight to the fact of publication in the forum and too little attention to the nature and content of the material published. In particular it was suggested that Australian courts may consider adopting the American approach, which focuses on whether the defendant sought to harm the plaintiff in the forum by directing or targeting its material at persons there. It may be argued, in the alternative, that such an analysis could also be incorporated into the inquiry regarding appropriate forum.

Instead of simply considering whether the plaintiff has a reputation in the local forum which, as *Berezovsky* and *Investasia* show, may be easy to establish even for non-residents, a more desirable approach may be to inquire whether the defendant intended to injure the plaintiff there. As discussed above, such an approach would involve an examination of the content and context of the article to determine whether the forum was targeted by the defendant. In addition, factors such as the proportion of the overall publication that took place in the forum (eg the number of subscriptions there) would be relevant. Such a principle arguably balances the rights of plaintiffs and defendants more equally in the jurisdictional analysis than the existing test. It also better accommodates the nature of Internet publication. While in the case of print publications publishers have greater power to control territorial dissemination of their material, in the case of the Internet this is much more difficult to accomplish, absent a subscription-type service such as that employed by Dow Jones.<sup>75</sup>

Shades of such an approach can be seen in two recent Commonwealth cases, one involving (in part) an Internet website publication. In *Olde*<sup>76</sup> and *Tracy v O’Dowd*,<sup>77</sup> actions by foreign plaintiffs were both stayed where each party had an insufficient connection with the forum. This was determined on the basis that publication in the forum was minimal and, significantly, the comments in question had little relevance or link to the local jurisdiction.

*O’Dowd* concerned an action in Northern Ireland by an American businessman and philanthropist, who claimed to be defamed by a New York newspaper. The paper containing the offending article was posted on the defendant’s website for one week after publication. During this period, 93 per cent of the visits to the site or ‘hits’ were from users in the US, while only 0.7 per cent were from Northern Ireland. While the High Court noted that that the plaintiff had a ‘significant reputation with certain people in Northern Ireland’

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<sup>74</sup> Ibid [11].

<sup>75</sup> See, eg, Matthew Collins, *The Law of Defamation and the Internet* (2001) 307–8. A similar point was made by Kirby J in *Gutnick* (2002) 194 ALR 433, [86].

<sup>76</sup> (1996) 5 Carswell’s Practice Cases (4<sup>th</sup>) 95.

<sup>77</sup> *Tracy v O’Dowd* (Unreported, High Court of Justice in Northern Ireland (Queen’s Bench Division), Higgins J, 28 January 2002) (*O’Dowd*).

and that the plaintiff's claim was limited to damage to his reputation in that jurisdiction, a stay of local proceedings was nevertheless granted.<sup>78</sup> Apart from the fact that the plaintiff had little connection with Northern Ireland and the degree of publication in that country was small, the content of the article concerned American matters and was clearly directed at persons in that country. The subject of the article was the suitability of the plaintiff, a US citizen and resident, to be US Ambassador to the Republic of Ireland. It was clear from the tone of the article that its object was to try to influence the process of selection. In the Court's view, therefore, the thrust of the article reflected a real and substantial connection with the US, not Northern Ireland.

While the Court cited decisions such as *Berezovsky* in its judgment, it is clear that a markedly different approach was taken to the application of the discretionary test of *forum non conveniens* in the transnational defamation context. Instead of focusing almost exclusively on the factors of local publication and local reputation of the plaintiff, the Court in *O'Dowd* undertook, in addition, an examination of the content and intended target audience of the article.<sup>79</sup> It also was not overly swayed by the plaintiff's decision to plead only in relation to the publication in the forum (no doubt suspecting that the plaintiff's chances of suing in the only other likely forum — the US — were remote).<sup>80</sup> Such an approach is arguably more consistent with the original purpose of the *Spiliada* test: to provide a broad platform for courts to locate the forum with the most real and substantial connection to the parties and the action on the facts of a given case.<sup>81</sup> A plaintiff's reputation in the forum and the fact of publication there will now be merely certain factors among many to be considered, with more scope for the defendant to argue that it did not intend to harm the plaintiff in the forum. Such an approach arguably treats plaintiffs and defendants more equally in transnational defamation jurisdiction disputes.

Again it is suggested that such an approach would have been worthy of adoption by the High Court in *Gutnick*. Similar to the approach of the English and Hong Kong courts mentioned above, the Court also seemed to assume that a plaintiff, who establishes publication and reputation in the forum and then confines his or her claim to local harm, will have little difficulty suing in the forum. Instead the High Court seemed to be much more concerned with the possibility of a plaintiff bringing multiple claims in relation to publications in several countries and how such a practice could be controlled.<sup>82</sup> What is interesting to note, however, is that in the cases on Internet defamation so far decided, there has as yet been no attempt by a plaintiff to bring multiple claims in relation to the one article or message. While this outcome may simply reflect that the advent of this technology is comparatively recent, it may also be that plaintiffs are choosing quite deliberately not to pursue such a course. If, instead, a plaintiff can choose a country with sympathetic defamation laws and be almost assured of securing jurisdiction by pleading only local injury, it is hard to see

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<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> *Spiliada* [1987] 1 AC 460.

<sup>82</sup> See discussion in *Gutnick* (2002) 194 ALR 433, [49]–[54] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

why they would want to sue in relation to publications elsewhere. In fact, the very consequence of pleading additional claims under other countries' laws may be to persuade the Court to renounce jurisdiction altogether on the basis that the forum is no longer an appropriate one to resolve the dispute.

Consequently it may be argued that the High Court in *Gutnick* was missing the real source of the problem: it is not so much plaintiffs harassing defendants by bringing multiple claims in relation to multiple publications, but plaintiffs being allowed to institute single claims against defendants which have little real connection with the forum of adjudication.<sup>83</sup> While the Court noted that a plaintiff would be unlikely to sue in a jurisdiction in which he or she had no reputation for fear of recovering little or no damages,<sup>84</sup> this point does not meet the fundamental objection that courts should not exercise jurisdiction over matters with insufficient connections to them. Otherwise, plaintiffs and defendants are not treated equally and Australian courts encroach upon the proper jurisdictional competence of other countries.

#### D *The Problem of Multiple Suits*

Nevertheless, since the High Court spent considerable time on the issue of multiple suits, some discussion of the matter is appropriate. The appellant in *Gutnick* seemed to argue that one strategy for dealing with this problem would be for the Court to recognise the American 'single publication rule'. As mentioned above, the effect of this doctrine is to require a plaintiff to bring only one action in one jurisdiction in respect of multiple publications of the same subject matter. A single law is applied to resolve the matter but, in assessing damages, regard is had to the fact that injury occurred in several places. The High Court in *Gutnick* rejected this argument largely for the reason that the separate publication rule was too deeply entrenched in Australian law. Under this principle, each communication to a third party creates a separate cause of action in each jurisdiction where the communication is comprehended.<sup>85</sup> Further, the Court argued, there was no need to adopt a single publication rule in Australia because there were other doctrines which could adequately deal with the problem of multiple suits in multiple jurisdictions, such as orders to restrain local suits for abuse of process or *forum non conveniens* and anti-suit injunctions.<sup>86</sup>

The High Court's decision not to adopt the single publication rule in Australia is surely correct. There seems no reason in principle why a plaintiff should 'lose' claims under the laws of other places of distribution, simply because the defamatory material was in the form of an instantaneous, simultaneous

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<sup>83</sup> A recent libel suit filed in England by Richard Perle, a US Government adviser against Seymour Hersh, a US journalist with the *New Yorker* magazine arising from an article describing Perle's alleged dealings with Saudi businessmen, is another clear example of an action that should be stayed on the ground of inadequate connection between forum and subject matter. Perle himself admitted that the only reason he had chosen to sue in England was because 'it is easier to win such cases there': Adam Daifallah, 'Richard Perle Suing Over New Yorker Article', *The New York Sun* (New York, US), 12 March 2003, 2.

<sup>84</sup> *Gutnick* (2002) 194 ALR 433, [53] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

<sup>85</sup> *Ibid* [44].

<sup>86</sup> *Ibid* [49]–[54].

publication. More significantly, it seems unfair to defendants for them to lose the protection of defences under the laws of the various places of publication which would be available if the claims had to be pleaded separately. In this respect, the application of the single publication rule in the US has had the effect of 'extending the ... rule to choice of law' by fictitiously imposing a single law on a set of multiple claims.<sup>87</sup>

In addition, it is likely that the existing mechanisms under Australian law will be able to control abuses in cases involving multiple claims in respect of multiple publications. In a sense the abuse of process doctrine already embodies half of the content of the single publication rule in its preclusion of suits being brought by plaintiffs in different places in respect of multiple publications. Accordingly, a plaintiff must, subject to compliance with local jurisdictional rules, bring all his or her claims, whether in relation to local or foreign publications in the one action in the one forum.<sup>88</sup> In the context of Internet defamation, the doctrine would presumably apply to prevent a plaintiff commencing proceedings in Australia in relation to a publication in this country after first having instituted proceedings abroad in respect of the same material simultaneously published. Of course, such a conclusion would depend upon the foreign court having jurisdiction to hear the claim in relation to the Australian-based publication. If no jurisdiction existed in the foreign court to hear such a claim, then no abuse of process would be committed by the plaintiff bringing the claim before an Australian court.

In relation to multi-state publications within Australia, a much stronger argument would exist for finding an abuse of process where a plaintiff brought suit in more than one Australian forum against an Australian defendant. In such a situation, all states and territories would have jurisdiction to hear claims for multi-state defamation.<sup>89</sup> The same position may apply where a resident of an Australian state or territory (eg Gutnick) sued a foreign defendant (eg Dow Jones) in more than one state or territory in respect of material published separately in each jurisdiction. As discussed above,<sup>90</sup> it is arguable that an Australian court would have jurisdiction over claims involving publications in other Australian jurisdictions where damage was shown to be suffered in the forum. Accordingly, it would be an abuse of process to proceed in separate courts.

The anti-suit injunction doctrine serves a similar purpose to the abuse of process principle by precluding a plaintiff from bringing suit overseas in relation to material that has been simultaneously published and litigated in Australia. Frankly, however, it is hard to see when such an injunction would ever be

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<sup>87</sup> Debra Cohen, 'The Single Publication Rule: One Action, Not One Law' (1996) 62 *Brooklyn Law Review* 921, 929. It is notable that English courts have recently rejected the single publication rule: *Loutchansky v Times Newspapers Ltd* [2002] QB 321.

<sup>88</sup> See, eg, *Gorton v Australian Broadcasting Commission* [1973] 1 ACTR 6 ('Gorton'). The *Anshun* estoppel doctrine referred to by the Court in *Gutnick* has a similar effect in that it requires a plaintiff to bring his or her entire case in the one proceedings and not be allowed to plead claims in subsequent proceedings which could have been brought in the earlier action: *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

<sup>89</sup> *Service and Execution of Process Act 1992* (Cth) s 15. This was the outcome in *Maple* [1975] 1 NSWLR 97.

<sup>90</sup> See discussion above at part III(A).

awarded in the context of multiple, international defamation suits. First of all, it is highly unlikely that a plaintiff would sue in a foreign country to vindicate his or her reputation in Australia either because of problems of satisfying the jurisdiction of the foreign court, or the difficulty for the foreign court in applying Australian defamation law and quantifying loss of reputation in Australia. Consequently, an injunction from an Australian court would rarely be needed to restrain such action. Secondly, it is also unclear whether an Australian court would restrain a plaintiff from suing in a foreign country in relation to damage to his reputation in that jurisdiction. Given the strong emphasis placed on the factors of the place of publication and local reputation in the majority of transnational defamation cases to date, it is doubtful that an Australian court would grant an order which would have the effect of forcing a plaintiff to sue *in Australia* in respect of defamation committed outside the country. However, if the plaintiff first commenced proceedings in Australia in relation to a local publication and then sued abroad in relation to foreign material, then a court may be more likely to grant an injunction to prevent a multiplicity of proceedings. Of course, this conclusion again assumes that an Australian court would have jurisdiction to entertain the foreign claim.

It seems, though, that the most likely result of an injunction being granted in such circumstances would be that the plaintiff would, in the Australian proceedings, cease to plead the foreign claim altogether with the result that there would no longer be any multiple claims on foot. Such an approach would therefore control multiple claims by eliminating them; a position similar in effect to that achieved by application of the single publication rule. It remains to be seen, however, whether Australian courts will adopt such an approach or whether, like Callinan J in *Gutnick*, they would allow plaintiffs to bring multiple suits in multiple jurisdictions in respect of damage to reputation in each.<sup>91</sup> Interestingly, an anti-suit injunction may not be awarded by an Australian state or territory court to restrain a plaintiff from prosecuting proceedings in another state or territory court.<sup>92</sup>

Finally, in relation to the ‘clearly inappropriate’ forum test, although this has historically proven difficult for defendants to satisfy, it may be that in the context of multiple defamation suits, its operation will be more extensive. Where, for example, a plaintiff brought six claims in an Australian court in relation to defamatory material on the Internet, of which only one involved a publication in Australia, it is possible that an Australian court would regard such an action as better heard elsewhere, at least where the plaintiff or content of the publication had few links to the forum.<sup>93</sup> In the Australian interstate context, there have been many instances of plaintiffs bringing multiple claims in a single action arising from television broadcasts occurring in all states and territories,<sup>94</sup> but in very few such cases has application been made to transfer such actions from one court to another. Under each of the *Jurisdiction of Courts (Cross-Vesting) Acts* of the states and territories a defendant may apply to have proceedings transferred from

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<sup>91</sup> *Gutnick* (2002) 194 ALR 433, [202].

<sup>92</sup> *Service and Execution of Process Act 1992* (Cth) s 21.

<sup>93</sup> *Reuben* [2003] All ER (D) 166.

<sup>94</sup> *Gorton* [1973] 1 ACTR 6.

one Australian court to another where, inter alia, it is considered 'in the interests of justice'.<sup>95</sup> The vast majority of such cases, however, in the defamation context have involved only single, not multiple claims.<sup>96</sup> Little guidance can therefore be derived from the Australian interstate context in determining how an Australian court may apply the *Voth* test in the context of multiple claims.

### E Choice of Law

Finally, a comment should be made about the implications of the *Gutnick* decision for choice of law in Internet defamation. It was mentioned above that the issue of what law would be applied by the adjudicating court at trial is of particular relevance in determining which court should hear the matter. However this point does also implicitly raise the issue of the adequacy and appropriateness of the existing choice of law rules in defamation actions. While the High Court in *Gutnick* only briefly referred to this issue in its judgments,<sup>97</sup> it is likely to be of great importance in the future. As noted above, under Anglo-Australian law, the law of the forum will be applied without exception to determine the liability of the defendant in a defamation action where the publication has occurred in the forum.<sup>98</sup> In relation to publications outside Australia, the law of the place where the publication occurs will apply, provided that such law is pleaded by the parties and does not offend Australian public policy.<sup>99</sup> As mentioned above, however, an Australian court may be unwilling to exercise jurisdiction over acts of defamation committed outside the country.<sup>100</sup> Consequently, the principal focus of this discussion will be on the rule that the law of the forum applies to local publications.

While such a rule is well established, there are occasions when its operation can result in an injustice. For example, it seems hard to see why a plaintiff resident in New York should be allowed to have the benefit of Victorian law in a defamation action against another New York resident simply because Victoria was the place of publication. It is arguable in this case that New York law has a closer connection to the parties and the action than Victoria, which may have been an unintended and fortuitous place of publication, as may often be the case with the Internet. An approach which selects the law of the parties' residence is applied in those states of the US that have adopted the *Restatement of the Law (Second) Conflict of Laws*.<sup>101</sup> A similar rule, based on the place of the plaintiff's residence, was recommended as the choice of law rule for defamation actions by the Australian Law Reform Commission in its report on choice of law.<sup>102</sup>

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<sup>95</sup> See, eg, *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) ss 5(2)(b)(ii)(C), 5(2)(b)(iii). The phrase 'the interests of justice' has been given an interpretation by the majority of Australian courts that roughly equates to the 'more appropriate forum' test developed in *Spiliada*: see, eg, *Bankinvest AG v Seabrook* [1988] 14 NSWLR 711, 730.

<sup>96</sup> See, eg, *Hayward v Barratt* [2000] NSWSC 708; *Aopi v Rapke* [2000] NSWSC 1195 (Unreported, Levine J, 11 December 2000).

<sup>97</sup> See especially *Gutnick* (2002) 194 ALR 433, [105]–[107] (Kirby J).

<sup>98</sup> See cases cited above n 10.

<sup>99</sup> *Zhang* (2002) 187 ALR 1.

<sup>100</sup> *Reuben* [2003] All ER (D) 166.

<sup>101</sup> (1969) §149 (Comment D).

<sup>102</sup> Australian Law Reform Commission, *Choice of Law Rules*, Report No 58 (1992) 58.

Of course, in *Gutnick*, the result of applying a choice of law rule based on the place of the plaintiff's residence would be the same as the current rule if the case came before a Victorian court, since Victoria is both the place of publication and place of the respondent's residence. However, adoption of such a rule in Australian law would have the benefit of depriving the Berezovskys and other 'libel tourists' of the opportunity to take advantage of local law in an Internet defamation action, simply on the basis that the material was accessed here. The proposal of the Australian Law Reform Commission therefore merits serious consideration, although it would mean creating a separate rule for defamation distinct from that applicable to other torts, which Australian Parliaments or courts may be unwilling to do.

It may also be noted that, in cases involving foreign publications which an Australian court does agree to adjudicate, adoption of a choice of law rule based on the law of the plaintiff's residence would also be desirable. Such an approach would be particularly advantageous in a case where the plaintiff sued in relation to publications both within Australia and overseas as the same law would be applied to all claims. Finally, it is interesting to note that the European Commission, in its recent draft regulation on the law applicable to non-contractual obligations, has proposed that the law of the plaintiff's country of residence be applied to defamation actions.<sup>103</sup>

#### IV CONCLUSION

The significance of *Gutnick* goes well beyond the area of defamation law. It is the first occasion in which Australia's highest court has had the opportunity to address the issue of jurisdiction over Internet activity. While the result on the facts of the case that a Victorian resident is entitled to sue in Victoria in respect of damage exclusively suffered there seems hard to attack, the approach taken by the Court may lead to more dubious results in cases where plaintiffs are less closely connected to Australia. An alternative approach based on whether the defendant publisher sought to harm the plaintiff in the forum arguably establishes a more equitable balance in Internet defamation cases between the rights of plaintiffs and defendants. Such a rule would also ensure that Australian courts do not claim jurisdiction over Internet activity on too wide a basis, a result which would be injurious to comity between states and also possibly lead Australia to become a magnet for international libel litigation.

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<sup>103</sup> See European Commission, *Consultation for a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations* (2002) art 7 <[http://europa.eu.int/comm/justice\\_home/unit/civil/consultation/index\\_en.htm](http://europa.eu.int/comm/justice_home/unit/civil/consultation/index_en.htm)> at 1 May 2003.

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