Before the High Court

The Message, Not the Medium: Defamation, Publication and the Internet in *Dow Jones & Co Inc v Gutnick*

DAVID ROLPH*

1. Introduction

A prominent Melbourne businessman commences proceedings in Victoria in relation to an article in the United States financial press which was placed on a subscription website.[1] A Russian businessman commences proceedings in England in relation to an article, again in the United States financial press and again placed on a website.[2] A merchant bank commences proceedings in New South Wales to restrain the publication of material on a website by a disgruntled ex-employee from an undisclosed location in the United States.[3] The case law on Internet defamation is burgeoning. The increased use of the Internet, the volume of information it contains and conveys and its pervasiveness in everyday life have necessarily created greater opportunities for defamation. Recent decisions have indicated the mounting challenges posed by the Internet to fundamental principles of both defamation law and private international law. The soundness of these principles has been tested by the development of mass media technologies, such as radio and television, in the twentieth century, but these principles have proven remarkably resilient. It remains to be seen how defamation law and private international law will find an adequate solution to the challenges posed by Internet technologies.

An opportunity to explore and clarify issues of principle raised by cases of Internet defamation presents itself in *Dow Jones & Co Inc v Gutnick*. On 14 December 2001, the High Court granted special leave to appeal in this case. The application at first instance and the limited grounds on which the High Court granted special leave are procedural. The substance of the proceedings, whether the article is in fact defamatory and whether there are available defences, has not yet been tested. Yet the preliminary issues of jurisdiction are vitally important to the conduct and resolution of defamation proceedings arising out of Internet publications. Given the increasing dominance of the Internet as a form of communication and the paucity of high appellate authority on the impact of this medium on defamation law and private international law, the guidance provided by the High Court's decision in *Dow Jones & Co Inc v Gutnick* will prove invaluable to practitioners and publishers alike.

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* Part-time lecturer and PhD candidate, University of Sydney. I wish to thank Barbara McDonald, Ross Anderson and Kimberlee Weatherall for their invaluable comments and advice. Any errors are mine.

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

2 *Berezovsky v Michaels* [2000] 2 All ER 986; [2000] 1 WLR 1004.

3 *Macquarie Bank Ltd v Berg* (1999) A Def R 53,035.

The dispute arose from an article written by journalist William Alpert, entitled 'Unholy Gains', published in the respected *Barrons Magazine* on 30 October 2000 and placed on the *Barrons Online* website.[4] The article in raised a number of distinct allegations about the plaintiff, the well-known Melbourne entrepreneur, Joseph Gutnick. It claimed that Gutnick was involved in the manipulation of stock prices, warning readers to avoid investment products with which the plaintiff was associated and calling for an investigation into the plaintiff's conduct by United States securities regulators.[5] It also questioned Gutnick's connection with the convicted money-launderer and tax evader, Nachum Goldberg, suggesting that Goldberg assisted Gutnick in a tax evasion scheme by laundering money through religious charities.[6]

The original statement of claim filed by the plaintiff confined itself to the Internet publication of the article in Victoria.[7] According to the evidence, there were 550,000 subscribers to the *Barrons Online* website worldwide at the relevant time.[8] The defendant conceded that 1,700 subscribers had paid by credit card from Australia, later admitting that in fact there were several hundred subscribers in Victoria.[9] The statement of claim was amended to include the paper copy of the magazine,[10] reflecting the fact that the article had also been circulated in Victoria in this form, albeit a significantly smaller number.[11]

The defendant then applied to have the proceedings stayed on the basis of the doctrine of *forum non conveniens* or alternatively to have the initiating process served on the defendant in the United States pursuant to the *Supreme Court (General Civil Procedure) Rules* 1996 (Vic) O 7.01(1)(i)[12] or (j)[13] set aside. The defendant claimed that the article was not published in Victoria and consequently that the plaintiff had no cause of action in defamation there. It argued that Victoria was a clearly inappropriate forum for the plaintiff's defamation suit. At first instance before Hedigan J, the defendant was unsuccessful. The defendant then sought leave to appeal to the Victorian Court of Appeal. On 21 September 2001, Buchanan JA and O'Bryan AJA refused the application. Almost three months later, Gleeson CJ and Hayne J granted special leave to appeal to the High Court.

The dispute in *Dow Jones & Co Inc v Gutnick* is jurisdictional. Whether the Supreme Court of Victoria is entitled to exercise jurisdiction and whether it is clearly inappropriate for it to do so are the crucial questions raised by this case. The case offers the High Court the opportunity to provide guidance on such important

4 Above n1 at para 1 (Hedigan J).
5 Id at paras 11–12.
6 Id at paras 3, 12.
7 Id para 5.
8 Id para 1.
9 Id para 2.
10 Above n7.
11 Above n4.
12 This allows for the service of originating process outside Victoria if the tort was committed in Victoria.
13 This allows for the service of originating process outside Victoria if damage was suffered wholly or partly in Victoria as a result of a tort, wherever occurring.

jurisdictional matters. This analysis will explore some of the key issues related to jurisdiction which will be considered on appeal. It will examine what is meant by publication in defamation law. It will then address how the requirement of publication is satisfied in matters disseminated via the Internet and how the place of the commission of the tort of defamation should be identified in such cases. It will argue that there is no principled basis for treating Internet defamation differently to defamation by other media for the purpose of jurisdiction. The impact of Internet technologies and the policy considerations associated with them will also be analysed in order to determine the appropriate approach to the exercise of jurisdiction in cases of multistate defamation committed via the Internet.

2. *Publication*

The basic principles of defamation law relating to publication would seem to be clear and uncontroversial. Publication is an essential precondition for liability in defamation.[14] Communication is the essence of publication. In order for a defendant to be held liable for defamation, he or she must have published, that is communicated, a statement about the plaintiff to a third party.[15] Each communication to a third party constitutes a separate cause of action.[16] The place of publication is the place where the third party receives the defamatory statement.[17]

Yet the correctness of these statements has been put in issue in the forthcoming appeal in *Dow Jones & Co Inc v Gutnick*. In particular contention will be what constitutes 'communication' for the purposes of defamation; whether mere delivery of a defamatory matter to a third party is sufficient or whether communication in a form readily understandable and actually understood by that third party is required. The applicability and appropriateness of these basic principles to instances of Internet defamation are also likely to be considered. Whether there are compelling policy considerations justifying a departure from the existing treatment of multistate defamation is central to the appeal.

3. *Publication and Communication*

The precise meaning of the term, 'publication', was a crucial issue in *Gutnick v Dow Jones & Co Inc*. The plaintiff alleged that the defamatory matter was published in Victoria, thereby entitling him to invoke the jurisdiction of the

14 Peter Carter-Ruck & HNA Starte, *Carter-Ruck on Libel and Slander* (5th ed, 1997) (hereinafter Carter-Ruck) at 63; Patrick Milmo & WVH Rogers, *Gatley on Libel and Slander* (9th ed, 1998) (hereinafter Gatley) para 6.1; Michael Gillooly, *The Law of Defamation in Australia and New Zealand* (1998) at 73; Terence Tobin and Michael Sexton, *Australian Defamation Law and Practice* (Butterworths loose-leaf) para 5001.

15 Carter-Ruck, above n14 at 63; Gatley, above n14 para 6.1.; Gillooly, above n14 at 73–74; Tobin and Sexton, above n14 para 5001.

16 Carter-Ruck, above n14 at 68; Gatley, above n14 para 6.1; Gillooly, above n14 at 82; Tobin and Sexton, above n14 para 5280.

17 Carter-Ruck, above n14 at 69; Gatley, above n14 para 24.15; Gillooly, above n14 at 82; Tobin and Sexton, above n14 para 5270.

Supreme Court of Victoria. The defendant denied that the matter had been published in Victoria and resisted the court's purported exercise of jurisdiction. To justify their respective positions, the parties adopted significantly different views of the requirements for publication in defamation law. The defendant claimed that mere delivery of a defamatory matter to a person (other than the plaintiff) amounted to publication. The plaintiff, however, argued that a publication required a person not only to receive but also to comprehend the defamatory matter. Hedigan J emphatically rejected the defendant's interpretation of the term, 'publication', concluding:

> ... 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, (ie, made manifest to) and comprehended by the reader or hearer.[18]

Specifically, in relation to the defendant's submission that mere delivery satisfied the requirement of publication, Hedigan J stated that 'delivery without comprehension is insufficient and has not been the law'.[19] Hedigan J reaffirmed that there is a single concept of publication in defamation law, based upon the actual communication of a defamatory matter to a person other than the plaintiff.

In support of its proposition that publication required the actual communication of a defamatory matter to a third party, the plaintiff relied upon *dicta* from an impressive line of authorities, reproduced at length by Hedigan J.[20] The pithiest formulation of the plaintiff's argument is the statement of Isaacs J in *Webb v Bloch* that '[t]o publish a libel is to convey by some means to the mind of another the defamatory sense embodied in the vehicle'.[21] According to this line of authority, publication is equated with communication; communication is equated with comprehension on the part of the recipient of the defamatory matter, not its mere transmission.

By contrast, the defendant argued that mere delivery of a defamatory matter to a person other than the plaintiff was sufficient to constitute publication. To support its proposition that delivery could amount to publication, counsel for the defendant cited only two decided cases, *R v Burdett*[22] *and Duke of Brunswick v Harmer*.[23] Not only was the authority for the defendant's submission slender, it predated the Internet by over a century, prompting Hedigan J to observe:

> The irony can hardly have escaped the mind of senior counsel for the applicant/ defendant in that, with respect to the unique and revolutionary Internet, he sought support for his submissions in the legal sense on (sic) two cases decided in the first half of the 19th century.[24]

18 Above n1 para 60.
19 Ibid.
20 Id paras 34–36.
21 (1928) 41 CLR 331 at 363.
22 (1820) 4 B & Ald 95; (1820) 106 ER 873.
23 (1849) 14 QB 185; (1849) 117 ER 75.
24 Above n1 para 23.

It is difficult to discern the precise principle which these cases embody. The first case, *R v Burdett*, concerned a prosecution of Sir Francis Burdett for seditious libel. As Hedigan J acknowledged,[25] there were statements included in the judgments in this case which supported the concept of publication by mere delivery[26] which could not be readily reconciled with the overwhelming weight of authority. The fact that *R v Burdett* deals with criminal defamation provides the most ready basis for distinguishing it.[27]

The second case, *Duke of Brunswick v Harmer*, concerned a libel suit commenced in 1848 in respect of an article printed in 1830 in the *Weekly Dispatch*. The plaintiff's agent obtained a copy of the periodical from the British Museum and then from the defendant's office. The issue was whether the receipt of the magazine by the plaintiff's agent constituted publication for the purpose of defamation law, so as to give rise to a cause of action in 1848 and thereby avoid the operation of the limitation period. It was held that each separate publication gave rise to a separate cause of action, a proposition for which this case is frequently cited.[28]

The defendant could not provide an instance, in the decided cases or in the leading textbooks, where these cases had been cited as authority for the proposition advanced by it.[29] Hedigan J found that these authorities reflected a limited principle, namely that the communication of a defamatory matter may be inferred from the fact of delivery.[30] To the extent that they constituted an alternative definition of publication based on delivery only, Hedigan J dismissed them as 'errant authorities'.[31]

The preponderance of authority clearly supports the plaintiff's interpretation of the concept of 'publication', as Hedigan J found. It is also consistent with the purpose of defamation law, the protection of reputation. A plaintiff's reputation can only be lessened if a defamatory matter is actually communicated to a person other than the plaintiff.[32] The defendant offered no effective reply to this basic point. The argument advanced by the defendant, unsupported by precedent and principle, can be charitably described as tenuous. It is highly unlikely that the defendant's unorthodox interpretation of 'publication' will gain support before the High Court.

25 Id para 25.
26 Above n20 at 885 (Best J), at 891 (Holroyd J), at 897 (Abbott CJ).
27 Above n1 at paras 24–25.
28 Id para 31.
29 Id paras 30–31.
30 Id at paras 27, 29.
31 Id para 60.
32 Id para 61.

4. *The Place of Publication*

If a publication, for the purpose of defamation law, requires actual communication of a defamatory matter to a person, as Hedigan J held, the crucial issue in a case of multistate defamation becomes where publication occurs.

Hedigan J canvassed the possible places of publication for the impugned article.[33] There were five possibilities. The first one was the place of uploading of the information onto the server, New Jersey. This approach was strongly advocated by the defendant. Secondly, the place where the damage was suffered and thirdly, the place where the circumstances giving rise to the tort substantially occurred were also suggested. The fourth alternative, the place of downloading of the information, Victoria, was relied upon by the plaintiff. Finally, Hedigan J witheringly dismissed a fifth alternative, tentatively advanced by counsel for the defendant:

> I add that Mr Robertson briefly flirted with the proposition that cyberspace was a defamation-free zone, but did not develop it. Nor shall I.

Notwithstanding the inclusion of other alternatives posited by the defendant, the essential contest was between the plaintiff's approach, arguing in favour of Victoria, as the place where the matter complained of was downloaded, and the defendant's approach, arguing in favour of New Jersey, as the place where the matter complained of was uploaded. However, Hedigan J had already determined that publication required actual communication to a person other than the plaintiff. His Honour had further held that the act of downloading, providing the means by which a recipient could access the defamatory matter, was the operative act of publication which gave rise to a cause of action in defamation.[34] Having reached these conclusions, it was a small, logical step for Hedigan J to find that the place of publication was located where a person other than the plaintiff received and understood the defamatory matter, being in this case the place of downloading, Victoria. The preponderance of authority, derived from *dicta* in decided cases[35] and from the leading texts on defamation[36] and private international law,[37] supports the conclusion reached by Hedigan J.

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33 Id para 20.

34 Id para 67.

35 *Pullman v Hill* [1891] 1 QB 524 at 527 (Lord Esher MR); *Kroch v Rossell* [1937] 1 All ER 725 at 727 (Slesser LJ); *Bata v Bata* [1948] WN 366 at 366–67 (Scott LJ); *Gorton v Australian Broadcasting Commission* (1973) 22 FLR 181 at 183 (Fox J); *Allsopp v Incorporated Newsagencies Co Pty Ltd* (1975) 26 FLR 238 at 241 (Blackburn J); *Jones v Amalgamated Television Services* (1991) 23 NSWLR 364 at 367 (Hunt J); *Jenner v Sun Oil Co* [1952] 2 DLR 526 at 535–37.

36 Above n17.

37 Peter North & JJ Fawcett, *Cheshire and North's Private International Law* (13th ed, 1999) at 659; John Collier, *Conflict of Laws* (3rd ed, 2001) at 228; Lawrence Collins (ed), *Dicey and Morris on the Conflict of Laws* (13th ed, Vol 2, 2001) at paras 35–136; Peter Nygh & Martin Davies, *Conflict of Laws in Australia* (7th ed, 2002) at para 22.8.

The identification of the place of publication is vitally important because it locates the place of the commission of the tort of defamation. The fact that a defamatory matter was published within Victoria meant that a cause of action arose in Victoria. The plaintiff was therefore entitled to sue in respect of the defamatory matter in Victoria. A Victorian court was able to exercise jurisdiction in such a matter because the proceedings concerned a tort which occurred within Victoria. The service of originating process outside the jurisdiction was also effective.[38] The applicable law governing the cause of action, being a local not a foreign tort, was Victorian law, which happened to be the *lex fori* and the *lex loci delicti* as well.[39]

So much appears clear. The application of the established legal principles does not and should not yield the result contended for by the defendant. As Hedigan J noted,

> [b]old assertions that the Internet is unlike other systems do not lead to the abandonment of the analysis that the law has traditionally and reasonably followed to reach just conclusions.[40]

Having failed to persuade Hedigan J on principle, the defendant made an appeal to overriding policy considerations to justify special treatment of Internet publications.

5. *'The Unique and Revolutionary Internet'*[41]

The principal policy consideration relied upon by the defendant in *Gutnick v Dow Jones & Co Inc* was that the Internet is a medium radically different to all pre-existing forms of communication, sufficient to justify the fashioning of special rules or the creation of exemptions from prevailing principles of defamation law and private international law. It submitted that the traditional approach to multistate defamation, with its multiple causes of action in multiple jurisdictions, was an inappropriate means for dealing with Internet publications. The defendant argued instead that the place of the commission of the tort of Internet defamation should be the place where the defamatory matter was uploaded.

The defendant's argument required an acceptance of the premise as to the nature of the Internet. The defendant did not attempt to prove the difference, nor is it likely it could have. The emphasis, indeed the overstatement,[42] on the uniqueness of the Internet by the defendant perhaps led naturally to a resistance to this stance. Hedigan J was clearly unimpressed by the grand rhetorical claims made on behalf of what His Honour referred to, ironically, as 'the unique and

38 *Supreme Court (General Civil Procedure) Rules* (Vic) O 7.01(1)(i).

39 *Szalatnay-Stacho v Fink* [1947] KB 1 at 12: If a tort is a local tort, no issue of choice of law arises.

40 Above n1 para 70.

41 Id para 63.

42 Id para 75.

revolutionary Internet'.[43] This is amply demonstrated by His Honour's following observation:

> The trumpeting of cyber-space miracles does not add much to the sphere of debate here and occasionally degenerated into sloganeering, which decides nothing.[44]

This resistance to the overstatement of claims about the Internet's uniqueness arguably led to overcompensation, by recourse to understatement. Thus, Hedigan J opined that '[i]t can be said that this revolutionary technology at least notably modifies territorial boundaries'.[45] Given that the distinctiveness of the Internet is debatable, it is an unsound basis for the defendant's proposed change to the law. Moreover, the defendant's argument on this point was unhelpfully couched in generalities.

A more detailed awareness of the technical operation of Internet communications is undoubtedly useful. So too is the recognition that the Internet embraces distinct but related technologies, rather than being a monolithic, unified concept. However, a concentration on the technology itself can become an unhelpful distraction. For example, in *Godfrey v Demon Internet Ltd*,[46] Morland J broadly categorised Internet technologies as either e-mail, Usenet or the World Wide Web.[47] This was adopted by Hedigan J in *Gutnick v Dow Jones & Co Inc*[48] The inherent danger in imposing such a schema on emerging technologies is that such a categorisation is liable to become obsolete rapidly as new Internet applications are developed. Indeed, the schema as it is fails to take account of existing Internet applications which do not fit neatly within e-mail, Usenet or the World Wide Web. For instance, P2P (peer-to-peer) technology and VPN (virtual private networks) are not readily accommodated within any of the designated groupings given by Morland J. The neatness and simplicity of such a schema has an obvious attraction but risks foreclosing an acknowledgement of the development of new technologies. A concentration on the technology can equally become a source of error. For example, Hedigan J inexplicably characterises the defendant's article, published on a subscriber website, as 'an Internet publication, not a World Wide Web publication'.[49]

There is a temptation to concentrate on the distinctiveness of the Internet and the differentiation between its constituent technologies. Yet, this tends to detract from the real issue. These debates focus closely on the medium, not the message. However, the principle of publication in the law of defamation is not founded upon the nature and characteristics of the medium. The concept of publication has, as Hedigan J affirmed, a specialised meaning in the law of defamation which is not the same as that in common usage. Hedigan J correctly rejected the attempted

43 Id para 63.
44 Id para 70.
45 Id para 18.
46 [2001] QB 201.
47 Id at 204.
48 Above n1 para 49.
49 Id para 68.

superimposition of a technical discourse of Internet publication upon the legal issue of publication.[50] His Honour found 'the pop science language of "get" messages, "pulling off"... and "firewalls"' was obfuscatory rather than illuminating.[51] The detailed processes whereby a defamatory matter may be created, stored, accessed and conveyed by means of the Internet ultimately are not germane to the issue of when and where a publication has occurred for the purposes of defamation law. The common law's approach to publication is not dependent upon the technology involved but rather rests solely upon the existence of a person other than the plaintiff receiving and comprehending the defamatory matter.

6. *Other Policy Considerations*

There are three additional policy considerations broadly supporting the defendant's position: the impact of globalisation; the need for certainty; and freedom of speech and freedom of expression. There are also three additional policy considerations broadly supporting the plaintiff's position: the need to give due recognition to foreign legal systems; the legitimate interests of plaintiffs and defendants; and the existing practical solutions to multistate defamation. These factors will be examined in turn.

Globalisation. The impact of globalisation was one of the bases relied upon by the defendant in its argument against the application of existing principles of defamation law and private international law to Internet publications. According to the defendant, globalisation and particularly global technologies such as the Internet enable geographically isolated countries, like Australia, to overcome the 'tyranny of distance'.[52] The transcendence of territorial borders, the forging of new online communities founded upon common interest, the promotion of free speech and the free flow of information and ideas are the claims commonly made on behalf of the Internet.[53] According to the defendant, a resistance to globalisation leads to insularity.[54]

There are many difficulties associated with an argument based on 'globalisation'. The most obvious one is definitional. The articulation of the precise meaning and scope of the phenomenon of globalisation was not attempted in argument in this case. In different contexts, for example economics, culture or geo-politics, globalisation may assume a different meaning and a different emphasis. Indeed, as deployed by the defendant, globalisation has a stronger rhetorical, than substantive, appeal.

Hedigan J did not accept the defendant's submission that he was under a 'national duty' to act in the 'national interest' and should therefore refuse to assume jurisdiction in this case as a consequence of the impact of globalisation.[55]

50 Id paras 14–16, 59, 64, 70.

51 Id para 70.

52 Id para 18.

53 Matthew Collins, *The Law of Defamation and the Internet* (2001) para 1.01.

54 Above n1 at 74.

55 Id para 18.

Equally, the pejorative characterisation of established common law principles as insular and therefore inappropriate does not really provide a sound, substantive justification for the proposed change in the law. Just as the rhetoric of globalisation is contestable, so too is the rhetoric of insularity. As Hedigan J observed, the defendant's argument in favour of New Jersey as the appropriate forum was conducive to 'the greatest insularity of all', the forced determination of Internet defamation suits by United States courts in accordance with United States defamation laws.[56] Ultimately, His Honour was resistant to the invocation of 'high-minded concepts', like the impact of globalisation, which did not assist in the resolution of crucial legal questions.[57]

If the phenomenon of globalisation is to serve as a basis for altering the existing approach to multistate defamation, it will need to be defined, its precise impact will have to be identified and the reasons in favour of change will have to be explicated. Otherwise, the impact of globalisation on multistate defamation will remain more rhetorical than real.

The Need for Certainty. In the resolution of legal disputes, and particularly in matters involving private international law issues, certainty is 'a prized quality'.[58] Yet, certainty is a problematic concept. Each party will define the need for certainty differently, reflecting their own interests in the conduct and outcome of the proceedings. As Hedigan J noted, the certainty contended for by the defendant benefited the defendant,[59] seeking as it did to have the proceedings heard in New Jersey and determined according to the law of New Jersey.

In their reformulation of the choice of law in tort rule for intranational torts, the majority judges in the High Court gave as one of their reasons the need to provide certainty.[60] Yet, there was an explicit acknowledgement that the tort of defamation may present difficulties and may not be readily accommodated within this rationale.[61]

There can be an overemphasis on the need and desirability for certainty and predictability. The perceived need for certainty and the desire for principles facilitating the neat resolution of transnational litigation may overlook or reduce the inherent complexities of multistate defamation. Reputations, like publications, can now cross borders. They may warrant protection across those borders as well, a fact which defendants like Dow Jones & Co Inc will have to accept.

Freedom of Speech and Freedom of Expression. The defendant contended that a failure to formulate a narrow rule for Internet publications would have a 'chilling effect' on freedom of speech and freedom of information over the Internet. Not only was it asserted that an outcome adverse to the defendant would have the effect

56 Id para 76.

57 Id para 74.

58 Id para 20.

59 Ibid.

60 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; (2000) 172 ALR 625 at 647 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

61 Ibid.

of 'reducing the uninhibited communication and circulation of information to an exceptionally low level',[62] it was also claimed that major international publishers would deny Australians subscriptions to their websites[63] or would erect firewalls to prevent Australians from accessing their websites.[64] Hedigan J was resistant to this submission, suggesting the 'chilling effect' was asserted, rather than proven.[65] A further objection can be made to this argument on the basis that the 'chilling effect' of defamation law does not target the Internet particularly. Rather, defamation law has a 'chilling effect' on all forms of media generally.

This is because there is a fundamental tension underlying the law of defamation between freedom of speech and the protection of reputation. Different legal systems address this tension in different ways. As Hedigan J noted, the approach to freedom of speech in United States defamation law is radically different to that adopted in Australian law. The impact of the First Amendment on American libel law is reflected in the balance it strikes between the right to freedom of speech and the right to reputation.[66] It may be broadly characterised as more favourable to defendants than plaintiffs. The approach taken by English and Australian law tends to prefer the protection of reputation to the right to freedom of speech and is thus more favourable to plaintiffs than defendants.[67] Hedigan J correctly diagnosed the practical effect of the defendant's argument. Many servers are already located in the United States. The defendant is effectively seeking to entrench American libel law as the applicable law for the determination of Internet defamation proceedings and implicitly to entrench the balance that law makes in relation to the tension between freedom of speech and the protection of reputation.

The Need to Give Due Recognition to Foreign Legal Systems. The defendant also resisted the application of established principles of defamation law and private international law on the basis that the outcome would require Internet publishers to have regard to different defamation laws in the various countries where the matter was to be published.[68] In the course of argument of the special leave application before the High Court, the counsel for the defendant, Geoffrey Robertson QC, noted that if the plaintiff's argument were to be accepted, liability for defamation would potentially arise in 191 jurisdictions throughout the world.[69] The defendant's emphasis on the need for certainty and the protection of free speech support its arguments limiting such legal diversity.

In *Macquarie Bank Ltd v Berg,*[70] Simpson J refused to grant an injunction restraining the publication of a defamatory matter on the Internet. Her Honour did not grant the relief sought for two reasons. Firstly, the defendant, Charles Berg,

62 Above n1 para 16.
63 Id para 17.
64 Id para 74.
65 Id para 16.
66 Most notably, *New York Times Co v Sullivan* 376 US 254 (1964); 84 S Ct 710 (1964).
67 Above n1 para 73.
68 Id para 17.
69 The origin of this figure is unclear.
70 See above n3.

was not within the jurisdiction and therefore, could not be restrained personally. Given the nature of the Internet, the injunction could not be issued subject to a territorial limitation. Simpson J was unable to issue an injunction against the whole world in respect of this publication, which would have had the effect of superimposing New South Wales defamation law on all other jurisdictions.[71] Secondly, Her Honour noted that New South Wales courts were traditionally reluctant to issue injunctions to restrain allegedly defamatory publications as a remedy, instead preferring freedom of speech, freedom of information and freedom of the press to prevail.[72]

Dow Jones & Co Inc supported the approach adopted by Simpson J in *Macquarie Bank Ltd v Berg*. Yet this is really inimical to the argument advanced by the defendant. Simpson J was clearly motivated by a consciousness of, and a sensitivity to, the essential difference of foreign legal systems in their respective approaches to defamation. The solution posited by the defendant in *Gutnick v Dow Jones & Co Ltd* eschews engagement with foreign legal systems and, in doing so, as Hedigan J recognises, places American defamation law in a privileged position and reinforces the international hegemony of American culture.[73]

Whilst the Internet facilitates the transcendence of territorial borders, the power of a court remains more localised. As this application demonstrates, a choice has to be made as to the appropriate forum in which to litigate disputes arising from the Internet. The approach advocated by the defendant seeks to overlook or eliminate the potential impact of foreign legal systems, including competing claims of foreign courts to exercise jurisdiction in respect of the same matter, in a manner inconsistent with that previously adopted by Australian courts in cases of multistate defamation.

Legitimate Interests of Plaintiffs and Defendants. The defendant's approach refused to acknowledge that plaintiffs, as much as defendants, have a legitimate interest in the selection of the appropriate forum in which to litigate cases of multistate defamation. The defendant's approach clearly protected its own interests in certainty and commercial convenience.[74] To avoid exposure to limitless liability which could occur if the plaintiff had a cause of action in each jurisdiction where the defamatory matter was downloaded, the defendant argued in favour of the inflexible application of the law of the place of uploading information onto an Internet server and further in favour of the exclusive exercise of jurisdiction in such a matter by a court of that forum.

The defendant's approach, however, could perpetrate a massive injustice on plaintiffs. As Hedigan J noted, the plaintiff has an obvious interest in vindicating his or her reputation in those places where that reputation is acquired and possessed.[75] Yet the defendant's argument may prevent a plaintiff from litigating

71 Id at 44,792.
72 Id at 44,793.
73 Above n1 para 73.
74 Id at paras 20, 61, 73.
75 Id at paras 61, 78.

in those jurisdictions. A plaintiff has a further interest that it may legitimately seek to protect. The High Court has explicitly acknowledged the need to discourage forum shopping in transnational litigation.[76] Yet plaintiffs are entitled to select a forum in order to obtain a legitimate juridical advantage. The distinction between forum shopping and the pursuit of a legitimate juridical advantage is not always obvious. Much of the discussion of the plaintiff's claim and the potential defences in relation to the *forum non conveniens* doctrine concerned the relative juridical advantages of the parties.[77]

The defendant's argument gives the alleged tortfeasor the ultimate control over where the litigation should be conducted and which system of law should apply. The defendant controls the location of the server and therefore, in the terms of its own argument, the appropriate forum and the applicable law. Viewed in this light, the proposed change advocated by the defendant is not an insignificant one. The unnecessary disregard for the legitimate interests of plaintiffs is a compelling argument against its adoption.

Existing Practical Solutions to Problems of Multistate Defamation. The emphasis on the potential extent of a defendant's liability for the publication of a defamatory matter via the Internet overlooks the practical steps taken by the common law to curtail or minimise a defendant's actual liability. The practical difficulties presented by multistate defamation are not unknown. They have not been generated solely by the advent of the Internet. Mass media, such as the press, radio and television, have already presented opportunities for defamation across territorial borders. In conjunction, defamation law and private international law have been relied upon to supply principled and pragmatic responses alike in such cases.

Although a cause of action in defamation accrues wherever a defamatory matter is published, it has been held to be an abuse of process for a plaintiff to institute and maintain separate proceedings in multiple jurisdictions in respect of the same matter.[78] Whilst a plaintiff theoretically has a cause of action in each and every jurisdiction where a defamatory matter is published, any attempt by such a plaintiff to initiate proceedings in some or all of those jurisdictions may be met by an argument of abuse of process. This encourages the plaintiff to select an appropriate forum before commencing defamation proceedings.

A plaintiff may choose to institute proceedings in one jurisdiction but claim damages for publication, wherever occurring. This, however, will raise questions of liability, defences and damages under foreign legal systems for those publications occurring outside the law area.[79] The damages, as assessed, will need to be apportioned to reflect the extent of publication within each law area.[80] The potential complexity of such litigation may prove a disincentive for plaintiffs. It

76 Above n60 at 658–69 (Kirby J).

77 Id para 115.

78 *Maple v David Syme & Co Ltd* [1975] 1 NSWLR 97 at 100–102 (Begg J).

79 *Gorton*, above n35; *Allsopp*, above n35 at 241 (Blackburn J).

80 *Comalco Ltd v Australian Broadcasting Corporation* (1985) 64 ACTR 1 at 89 (Blackburn CJ); *Smith v John Fairfax & Sons Ltd* (1987) 81 ACTR 1 at 36–37 (Miles CJ).

may also encourage them to confine their claims to those law areas where their reputations have been most affected by the defamatory matter. Another approach was suggested by Hunt J in *Toomey v Mirror Newspapers Ltd*,[81] that of allowing a plaintiff to sue upon a primary publication in the forum and to claim consequential damages for the occurrence of the publication outside the law area, but this has since been rejected.[82] Finally, it is always possible for a plaintiff to limit his or her action to the publication within a law area and undertake not to sue upon publications outside it, as Gutnick did in this case.[83] These are some of the practical considerations which attenuate a plaintiff's right to sue in respect of a multi-jurisdictional defamatory matter wherever he or she chooses.

The practical development the defendant was advocating to deal with Internet defamation was the adoption of the 'single publication' rule. The 'single publication' rule, used in the United States, has been described as 'a legal fiction which deems a widely disseminated communication ... to be a single communication regardless of the number of people to whom, or the number of states in which, it is circulated'.[84] It allows a plaintiff to bring an action for defamation in one jurisdiction and have relief granted in respect of the whole matter, wherever occurring. Although, in theory, United States law accepts the general propositions about the place of publication which have prevailed in Anglo-Australian law, the 'single publication' rule has been developed to overcome the need to consider the potential impact of foreign legal systems in the resolution of multistate defamation proceedings.[85]

The 'single publication' rule has not been adopted in Australia to deal with defamation by other media.[86] There are also *dicta* from high English appellate authority to the same effect.[87] As counsel for the defendant, Geoffrey Robertson QC, adverted to at the hearing for special leave to appeal to the High Court, the English Court of Appeal recently considered whether the 'single publication' rule ought to be applied to Internet publications. In *Loutchansky v Times Newspapers Ltd (No. 2)*, the Court held that it was arguable that the placing of a matter on a website was a single publication, irrespective of the length of time it remained there.[88] The issue in this case was whether the retention of an article defamatory of the plaintiff in a Web archive could give rise to a fresh cause of action if it were accessed some time after the original posting. Like *Duke of Brunswick v Harmer*, this case raised a question of the operation of limitation periods on new

81 (1985) 1 NSWLR 173 at 184.

82 *David Syme & Co v Grey* (1992) 38 FCR 303; (1992) 115 ALR 247 at 253 (Neaves J), at 270–71 (Gummow J).

83 Above n1 at paras 32, 78.

84 Debra Cohen, 'The Single Publication Rule: One Action, Not One Law' (1996) 62 *Brooklyn L R* 921 at 924.

85 Id at 940.

86 *McLean v David Syme & Co Ltd* (1970) 72 SR(NSW) 513; (1970) 92 WN(NSW) 611 at 625 (Mason and Manning JJA); *Jones v TCN Channel Nine Pty Ltd* (1992) 26 NSWLR 732 at 736 (Hunt CJ at CL).

87 Above n2 at 1012 (Lord Steyn).

88 [2002] 1 All ER 652 at 674.

publications of a defamatory matter. The Court noted that the appellants in that case were not arguing in favour of the adoption of the 'single publication' rule for multistate defamation, instead confining its argument to the limitation point.[89] The English Court of Appeal's willingness to countenance the introduction of a 'single publication' rule was not an emphatic endorsement, as they conceded the point might be 'arguable' in limited circumstances. The weight of Australian and English authority therefore opposes the introduction of a 'single publication' rule to deal with multistate defamation.

It is arguably undesirable to introduce a 'single publication' rule to deal with Internet publications. The confinement of such an approach to Internet publications would be difficult to justify. There would be no principled reason to prevent its application to defamation by other media, such as the press, radio and television. Effectively, the defendant argues in favour of distinguishing Internet defamation not only from all other types of defamation but also from all other torts. There is no principled basis for distinguishing Internet defamation from other multijurisdictional torts, such as product liability and negligent misrepresentation. A 'single publication' rule would also tend to interfere with a court's right to exercise jurisdiction in a case of multistate defamation committed via the Internet. Rather than limiting a court's right to exercise jurisdiction, it would seem preferable, in order to meet the needs of justice and the interests of the parties in a particular case, that a court continue to have a discretion to refuse the exercise of jurisdiction.

7. *Forum Non Conveniens*

Indeed, the discretionary non-exercise of jurisdiction, the doctrine of *forum non conveniens*, is arguably the most important control on a plaintiff's right to sue for multistate defamation. The occurrence of a tort within a law area is one basis upon which a court of that forum may exercise jurisdiction in respect of such a matter. The more important issue is whether it is appropriate for the court to exercise jurisdiction.[90]

If a plaintiff has no substantial connection with a law area apart from the fact of publication within it, he or she will be faced with an application to stay proceedings on the basis of *forum non conveniens*. Thus, the plaintiff's right to litigate in each and every jurisdiction is effectively limited to those law areas with which he or she has a connection. The more substantial the plaintiff's connecting factors to the selected forum, the more likely the court will be to exercise jurisdiction in such a matter. The plaintiff's right to litigate in respect of a multistate defamation is therefore not unlimited but nevertheless potentially involves more jurisdictions than other international torts. The plaintiff therefore retains a juridical advantage, enabling him or her to select a forum but restricted to those *fora* with which he or she has a substantial connection.

89 Id at 674–75.

90 Collins, above n53 para 24.19.

The applicable test in Australia for *forum non conveniens* is well-established. A party seeking the stay of proceedings or the setting aside of service of initiating process has to demonstrate that the plaintiff's selected court is a clearly inappropriate forum,[91] not that there is a more appropriate forum.[92] To demonstrate that a forum is clearly inappropriate, an applicant needs to prove that the proceedings are, in some way, oppressive, vexatious or an abuse of process.[93]

An issue will arise before the High Court in *Dow Jones & Co Inc v Gutnick* at the outset whether the requirement under the *Supreme Court (General Civil Procedure) Rules* O 7.05(2)(b) that an applicant demonstrate that 'Victoria is not an appropriate forum' is substantially different to the general test of a clearly inappropriate forum. Recently, the High Court has dealt with a perceived difference between the requirements of the common law doctrine of *forum non conveniens* and the wording of the *Supreme Court Rules* (NSW) Pt 10 r 2A.[94] The wording of the New South Wales and the Victorian rules are different and may therefore produce different outcomes. Nevertheless, in *Gutnick v Dow Jones & Co Inc*, Hedigan J held that the rule was not materially different from the common law doctrine of *forum non conveniens*. His Honour also acknowledged it was not necessary to decide this matter, as the defendant did not rely on any difference. Even if the application of the Victorian rule differs in approach to the doctrine of *forum non conveniens*, it may be that the outcome dictated by both approaches will be the same.

Accepting the common law doctrine of *forum non conveniens* as the applicable test, in order to demonstrate that Hedigan J erred in the exercise of his discretion, Dow Jones & Co Inc will need to show that Victoria is a clearly inappropriate forum for the litigation of this dispute. It will need to identify how the plaintiff's proceedings are oppressive, vexatious or otherwise an abuse of process. The serious difficulty the defendant confronts in the present case is the preponderance of factors favouring Gutnick's invocation of the jurisdiction of the Supreme Court of Victoria. The defendant contended that the matter was 'an article written in America for Americans "the events constituting a tort having an indelibly American complexion"'.[95] However, Hedigan J noted that favouring the plaintiff's case were the facts that:

> Mr Gutnick's business headquarters is (sic) in Victoria; he is a Victorian citizen; he is a Victorian resident with his family here; the article was published in

91 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247–48 (Deane J); *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564–65 (Mason CJ, Deane, Dawson and Gaudron JJ); *Henry v Henry* (1996) 185 CLR 571; (1996) 135 ALR 564 at 576 (Dawson, Gaudron, McHugh and Gummow JJ); *Regie National des Usines Renault SA v Zhang* [2002] HCA 10 at paras 24–25 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

92 This is the prevailing test for *forum non conveniens* in Great Britain: *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 at 477–78 (Lord Goff of Chieveley); *Airbus Industrie GIE v Patel* [1999] 1 AC 119; [1998] 2 All ER 257 at 263 (Lord Goff of Chieveley).

93 *Voth*, above n91 at 554 (Mason CJ, Deane, Dawson and Gaudron JJ).

94 *Zhang*, above n91 at paras 22–23.

95 Above n1 para 20.

> Victoria: he sues only in respect of publication in Victoria and declines suit anywhere else.[96]

The defendant's arguments on publication were designed to reinforce its argument that the Supreme Court of Victoria ought not to exercise jurisdiction in these proceedings. Even if the defendant's argument that the article was published in New Jersey, not in Victoria, with its corollary that the tort was a foreign tort, were accepted, the fact that the place of the commission of the tort was in New Jersey is only one factor connecting the matter to New Jersey. Whilst the law to be applied to the resolution of the proceedings is a material consideration,[97] the majority in the recent High Court decision in *Regie National des Usines Renault SA v Zhang* reaffirmed:

> An Australian court cannot be a clearly inappropriate forum merely by virtue of the circumstance that the choice of law rules which apply in the forum require its courts to apply foreign law as the *lex causae*.[98]

It still remains for the defendant to demonstrate that, in the balancing of the respective factors favouring the plaintiff and the defendant, Hedigan J made an appealable error. Hedigan J undertook an extensive analysis of the competing factors, including not only the place of publication and the applicable law but also the extent of publication in Victoria, the cost and inconvenience to the parties of litigating in a foreign jurisdiction, the availability of witnesses, the likely defences and the realistic possibility of enforcing judgment.[99] His Honour indicated that not all factors favoured the plaintiff. For instance, the limited publication of the article within Victoria, in the context of the worldwide extent of *Barrons Online*, was a factor which did not support the plaintiff's claim. Hedigan J also refused to take into account the plaintiff's assertion that a more expeditious hearing would be obtained in Victoria than in New Jersey. Nevertheless, the lack of compelling reasons favouring the defendant and indeed the preponderance of factors favouring the plaintiff were not sufficient to support the view that Victoria was a clearly inappropriate forum in which to litigate this dispute. Therefore, it would seem unlikely that the defendant will be able to demonstrate that Hedigan J's exercise of his discretion miscarried.

8. *Conclusion*

The judgment of Hedigan J at first instance in *Gutnick v Dow Jones & Co Inc* evinces an orthodox approach to a range of issues: publication; the place of the commission of the tort of defamation; jurisdiction; and *forum non conveniens*. Instinctively, orthodoxy may seem inappropriate for dealing with a medium as revolutionary as the Internet. Ultimately, the argument that certain fundamental principles of defamation law and certain basic rules of private international law

96 Id para 124.

97 *Voth*, above n91 at 566 (Mason CJ, Deane, Dawson and Gaudron JJ).

98 Above n86 para 81 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

99 Above n1 para 115.

need to be reformulated to recognise the exceptional character of the Internet is flawed in an essential respect. What amounts to publication and where that publication occurs are medium-neutral. Publication is concerned with the fact of communication to a person other than the plaintiff, not the means by which that communication is effected. In order to determine where a defamatory matter is published, the issue is not the means by which the matter is disseminated but rather the fact and extent of its dissemination. Accepting that Internet technologies are inherently and radically different to all pre-existing media does not automatically and ineluctably lead to the conclusion that new rules are needed to deal with them. The deficiencies of the current treatment of multistate defamation need to be demonstrated. This is particularly so given that the approach advocated by the defendant effectively seeks to deprive a court of the right to exercise jurisdiction in cases of defamation via the Internet, thereby depriving it of the discretion to decline to exercise jurisdiction. This is a substantial change requiring clear justification. Hedigan J refused, correctly, to fashion special rules for Internet defamation. The common law has previously dealt with cases of multistate defamation through a mixture of principle and pragmatism. A more compelling case will need to be made to depart from this steady, evolutionary development.