



## CATCHWORDS

### **Dow Jones & Company Inc v Gutnick**

Torts – Defamation – Publication – Internet – Computer server – Material complained of housed on computer server in United States of America – Uploaded to World Wide Web – Viewable at subscription news site on World Wide Web – Downloaded to computer in Victoria – Whether material complained of was published in Victoria.

Torts – Defamation – Publication – Single publication rule.

Private international law – Choice of law – Law of the place of the tort (*lex loci delicti*) – Defamation – Damage to reputation – Where material complained of was published – Material complained of made comprehensible when downloaded in Victoria – Place of plaintiff's reputation – Victorian law governs substantive rights.

Private international law – Service out of jurisdiction – Rules of Court – Service permitted without leave of Court – Conditions of service – Action brought in respect of tort committed in Victoria – Action brought in respect of damage suffered in Victoria – Action limited to damage to reputation in Victoria – Service validly effected – Victoria a convenient forum.

Words and Phrases – "publication", "single publication rule".

Supreme Court (General Civil Procedure) Rules 1996 (Vic), rr 7.01(1)(i), 7.01(1)(j) and 7.05(2)(b).

1 GLEESON CJ, McHUGH, GUMMOW AND HAYNE JJ. The appellant, Dow Jones & Company Inc ("Dow Jones"), prints and publishes the *Wall Street Journal* newspaper and *Barron's* magazine. Since 1996, Dow Jones has operated WSJ.com, a subscription news site on the World Wide Web. Those who pay an annual fee (set, at the times relevant to these proceedings, at \$US59, or \$US29 if they are subscribers to the printed editions of either the *Wall Street Journal* or *Barron's*) may have access to the information to be found at WSJ.com. Those who have not paid a subscription may also have access if they register, giving a user name and a password. The information at WSJ.com includes *Barron's Online* in which the text and pictures published in the current printed edition of *Barron's* magazine are reproduced.

2 The edition of *Barron's Online* for 28 October 2000 (and the equivalent edition of the magazine which bore the date 30 October 2000) contained an article entitled "Unholy Gains" in which several references were made to the respondent, Mr Joseph Gutnick. Mr Gutnick contends that part of the article defamed him. He has brought an action in the Supreme Court of Victoria against Dow Jones claiming damages for defamation. Mr Gutnick lives in Victoria. He has his business headquarters there. Although he conducts business outside Australia, including in the United States of America, and has made significant contributions to charities in the United States and Israel, much of his social and business life could be said to be focused in Victoria.

3 The originating process in the action which Mr Gutnick brought against Dow Jones was served on it outside Australia. The writ recorded that service was effected in reliance upon two of the provisions of the Supreme Court (General Civil Procedure) Rules 1996 (Vic) ("the Victorian Rules") (rr 7.01(1)(i) and 7.01(1)(j)) providing for service of process outside Australia. Under those Rules, the scheme of which is broadly similar to that considered in *Agar v Hyde*<sup>1</sup>, a plaintiff may serve originating process without first obtaining the leave of the Court. If the defendant does not submit to the jurisdiction by filing an unconditional appearance, the plaintiff must obtain leave to proceed<sup>2</sup>, demonstrating that the originating process makes claims of a kind which one or more of the paragraphs of r 7.01(1) mention. If the defendant wishes to contend that the Court should decline to exercise its jurisdiction or should set aside service, the defendant may enter a conditional appearance and apply for either or both of two forms of order – an order staying further proceedings in the matter or an order setting aside service of the originating process.

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1 (2000) 201 CLR 552 at 574-575 [53]-[54].

2 r 7.04.

4 The principal issue debated in the appeal to this Court was where was the material of which Mr Gutnick complained published? Was it published in Victoria? The answer to these questions was said to affect, even determine, whether proceedings in the Supreme Court of Victoria should, as Dow Jones contended, be stayed on the ground that that Court was a clearly inappropriate forum for determination of the action<sup>3</sup>. The procedural steps which give rise to that issue can be described as follows.

#### The proceedings below

5 Dow Jones entered a conditional appearance to the process served upon it. It applied to a Judge of the Supreme Court of Victoria (Hedigan J) for an order that service of the writ and statement of claim be set aside or an order that further proceedings in the matter be permanently stayed.

6 In the course of the proceedings before the primary judge, Mr Gutnick proffered an undertaking to sue in no place other than Victoria in respect of the matters which founded his proceeding. The primary judge recorded in his reasons that Mr Gutnick "seeks to have his Victorian reputation vindicated by the courts of the State in which he lives [and that he] is indifferent to the other substantial parts of the article and desires only that the attack on his reputation in Victoria as a money-launderer should be repelled and his reputation re-established".

7 A deal of evidence was led before the primary judge seeking to establish the way in which, and the place at which, information found at a website like WSJ.com is published. It will be necessary to say something more about what that evidence revealed. His Honour concluded that the statements of which Mr Gutnick sought to complain were "published in the State of Victoria when downloaded by Dow Jones subscribers who had met Dow Jones's payment and performance conditions and by the use of their passwords". He rejected Dow Jones's contention that the publication of the article in *Barron's Online* occurred at the servers maintained by Dow Jones in New Jersey in the United States. Being therefore of the opinion that the defamation of which Mr Gutnick complained had occurred in Victoria, Hedigan J concluded that Victoria was not a clearly inappropriate forum for trial of the proceeding and dismissed Dow Jones's application.

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3 *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

8 Dow Jones sought leave to appeal to the Court of Appeal of Victoria but that Court (Buchanan JA and O'Bryan AJA) refused leave to appeal, holding that the decision at first instance was plainly correct. By special leave, Dow Jones now appeals to this Court. The appeal to this Court should be dismissed.

Undisputed principles

9 Argument of the appeal proceeded from an acceptance, by both parties, of certain principles. First, it is now established that an Australian court will decline, on the ground of forum non conveniens, to exercise jurisdiction which has been regularly invoked by a plaintiff, whether by personal service or under relevant long-arm jurisdiction provisions, only when it is shown that the forum whose jurisdiction is invoked by the plaintiff is clearly inappropriate<sup>4</sup>. Secondly, it is now established that in trying an action for tort in which the parties or the events have some connection with a jurisdiction outside Australia, the choice of law rule to be applied is that matters of substance are governed by the law of the place of commission of the tort<sup>5</sup>. Neither party sought to challenge either proposition. Rather, argument focused upon where was the place of publication of the statements of which Mr Gutnick complained. Dow Jones contended that the statements were published in New Jersey and that it was, therefore, the law of that jurisdiction which would govern all questions of substance in the proceeding. This was said to have two consequences: first, that the claims made in the originating process were not of a kind mentioned in any of the relevant paragraphs of r 7.01(1) of the Victorian Rules and, secondly, that because the law governing questions of substance was not Victorian law, Victoria was a clearly inappropriate forum for the trial of the proceeding.

"Jurisdiction" and "publishing"

10 Two of the terms that must be used in considering the questions that arise in this matter are terms that can give rise to difficulty. "Jurisdiction", as was pointed out in *Lipohar v The Queen*<sup>6</sup>, is a generic term<sup>7</sup> that is used in a variety of senses. In the present matter there are two distinct senses in which it is used – first, as referring to the amenability of a defendant to process in such a way as

<sup>4</sup> *Voth* (1990) 171 CLR 538.

<sup>5</sup> *Regie Nationale des Usines Renault SA v Zhang* (2002) 76 ALJR 551; 187 ALR 1.

<sup>6</sup> (1999) 200 CLR 485 at 516-517 [78] per Gaudron, Gummow and Hayne JJ.

<sup>7</sup> *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 at 1142 per Isaacs J.

will give a court authority to decide the controversy which that process seeks to agitate and, secondly, as referring to a particular territorial or law area or law district.

11 "Publishing" and its cognate words is also a term that gives rise to difficulty. As counsel for the interveners pointed out it may be useful, when considering *where* something is published to distinguish between the (publisher's) act of publication and the fact of publication (to a third party), but even that distinction may not suffice to reveal all the considerations relevant to locating the place of the tort of defamation.

WSJ.com

12 Since so much was made in argument, both in this Court and in the courts below, of what was said to be the unusual features of publication on the Internet and the World Wide Web, it is necessary to say something about what the evidence revealed about those matters.

13 For present purposes, it is convenient to adopt what was said in that evidence without diverting to consider what qualification to, or amplification of, that evidence might be necessary to give a complete and entirely accurate description of the Internet or the World Wide Web. (There was, for example, no evidence adduced that revealed what electronic impulses pass or what electronic events happen in the course of passing or storing information on the Internet.)

14 One witness called by Dow Jones, Dr Clarke, described the Internet as "a telecommunications network that links other telecommunication networks". In his opinion, it is unlike any technology that has preceded it. The key differences identified by Dr Clarke included that the Internet "enables inter-communication using multiple data-formats ... among an unprecedented number of people using an unprecedented number of devices [and] among people and devices without geographic limitation".

15 The World Wide Web is but one particular service available over the Internet. It enables a document to be stored in such a way on one computer connected to the Internet that a person using another computer connected to the Internet can request and receive a copy of the document. As Dr Clarke said, the terms conventionally used to refer to the materials that are transmitted in this way are a "document" or a "web page" and a collection of web pages is usually referred to as a "web site". A computer that makes documents available runs software that is referred to as a "web server"; a computer that requests and receives documents runs software that is referred to as a "web browser".

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16 The originator of a document wishing to make it available on the World Wide Web arranges for it to be placed in a storage area managed by a web server. This process is conventionally referred to as "uploading". A person wishing to have access to that document must issue a request to the relevant server nominating the location of the web page identified by its "uniform resource locator (URL)". When the server delivers the document in response to the request the process is conventionally referred to as "downloading".

17 Dow Jones has its editorial offices for *Barron's*, *Barron's Online* and *WSJ.com* in the city of New York. Material for publication in *Barron's* or *Barron's Online*, once prepared by its author, is transferred to a computer located in the editorial offices in New York city. From there it is transferred either directly to computers at Dow Jones's premises at South Brunswick, New Jersey, or via an intermediate site operated by Dow Jones at Harborside, New Jersey. It is then loaded onto six servers maintained by Dow Jones at its South Brunswick premises.

#### Dow Jones's contention

18 The principal burden of the argument advanced by Dow Jones on the hearing of the appeal in this Court was that articles published on *Barron's Online* were published in South Brunswick, New Jersey, when they became available on the servers which it maintained at that place.

19 In the courts below, much weight appears to have been placed by Dow Jones on the contention that a relevant distinction was to be drawn between the apparently passive role played by a person placing material on a web server from which the would-be reader had actively to seek the material by use of a web browser and the (comparatively) active role played by a publisher of a widely circulated newspaper or a widely disseminated radio or television broadcast. In this Court, these arguments, though not abandoned, were given less prominence than policy arguments based on what was said to be the desirability of there being but a single law governing the conduct of a person who chooses to make material available on the World Wide Web.

20 Dow Jones submitted that it was preferable that the publisher of material on the World Wide Web be able to govern its conduct according only to the law of the place where it maintained its web servers, unless that place was merely adventitious or opportunistic. Those who, by leave, intervened in support of

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Dow Jones<sup>8</sup> generally supported this contention. The alternative, so the argument went, was that a publisher would be bound to take account of the law of every country on earth, for there were no boundaries which a publisher could effectively draw to prevent anyone, anywhere, downloading the information it put on its web server<sup>9</sup>.

21 The rule propounded by Dow Jones may have a greater appearance of certainty than it would have in fact. "Adventitious" and "opportunistic" are words likely to produce considerable debate. Does a publisher's decision to have a server in a country where the costs of operation are low, or the benefits offered for setting up business are high, warrant either of these descriptions? Does a publisher's decision to have servers in two, widely separated, states or even countries warrant either description, or is it simply a prudent business decision to provide security and continuity of service? How is the user to know which server dealt with a particular request? Is the fact that one rather than the other server met the request "adventitious"?

22 To the extent that the suggested rule would require reference only to the law of the place in which the server is located, it is a rule that would evidently be convenient to the party putting material on a web server. But that does not conclude debate. The convenience of one party is important to it, but how would such a rule fit with other, no less relevant, considerations? In particular, how would it fit with the nature of the competing rights and interests which an action for defamation must accommodate?

23 It is necessary to begin by making the obvious point that the law of defamation seeks to strike a balance between, on the one hand, society's interest in freedom of speech and the free exchange of information and ideas (whether or not that information and those ideas find favour with any particular part of society) and, on the other hand, an individual's interest in maintaining his or her reputation in society free from unwarranted slur or damage. The way in which those interests are balanced differs from society to society. In some cases, for example as between the States in Australia, the differences in substantive law might be said to be differences of detail rather than substance, although even then it may be doubted that this is an accurate characterisation of the effect of the

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8 The interveners, some of whom were based in the United States, some in the United Kingdom and some in Australia, published material on the World Wide Web. Some operated subscription web sites; some operated open access, non-subscription web sites.

9 cf *Ashcroft v American Civil Liberties Union* 122 S Ct 1700 at 1708 (2002).

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differences in the defamation laws of the Australian States. Whether or not that is so, comparing the law of defamation in different countries can reveal differences going well beyond matters of detail lying at the edge of debate.

24 It follows that identifying the law which is to govern questions of substance, in an action for defamation where there is some foreign element, may have substantial consequences for the resolution of the proceeding. No less importantly, those who would seek to order their affairs in a way that will minimise the chance of being sued for defamation must be able to be confident in predicting what law will govern their conduct. But certainty does not necessarily mean singularity. What is important is that publishers can act with confidence, not that they be able to act according to a single legal system, even if that system might, in some sense, be described as their "home" legal system. Activities that have effects beyond the jurisdiction in which they are done may properly be the concern of the legal systems in each place. In considering where the tort of defamation occurs it is important to recognise the purposes served by the law regarding the conduct as tortious: purposes that are not confined to regulating publishers any more than they are confined to promoting free speech.

#### Defamation

25 The tort of defamation, at least as understood in Australia, focuses upon publications causing damage to reputation. It is a tort of strict liability, in the sense that a defendant may be liable even though no injury to reputation was intended and the defendant acted with reasonable care<sup>10</sup>. Yet a publication made in the ordinary course of a business such as that of bookseller or news vendor, which the defendant shows to have been made in circumstances where the defendant did not know or suspect and, using reasonable diligence, would not have known or suspected was defamatory, will be held not to amount to publication of a libel<sup>11</sup>. There is, nonetheless, obvious force in pointing to the need for the publisher to be able to identify, in advance, by what law of defamation the publication may be judged. But it is a tort concerned with damage to reputation and it is that damage which founds the cause of action. Perhaps, as Pollock said in 1887<sup>12</sup>, the law went "wrong from the beginning in making the damage and not the insult the cause of action" for slander but it is

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10 *Lee v Wilson & Mackinnon* (1934) 51 CLR 276.

11 *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 288 per Dixon J.

12 *The Law of Torts*, (1887) at 210.

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now too late to deny that damage by publication is the focus of the law. "It is the publication, not the composition of a libel, which is the actionable wrong."<sup>13</sup>

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

27 The bilateral nature of publication underpins the long-established common law rule that every communication of defamatory matter founds a separate cause of action<sup>14</sup>. That rule has found reflection from time to time in various ways in State legislation<sup>15</sup> and it would be a large step now to depart from it.

28 If the place in which the publisher acts and the place in which the publication is presented in comprehensible form are in two different jurisdictions, where is the tort of defamation committed? That question is not to be answered by an uncritical application of some general rule that intentional torts are committed where the tortfeasor acts<sup>16</sup> or that they are committed in the place where the last event necessary to make the actor liable takes place<sup>17</sup>. Nor does it require an uncritical adoption of what has come to be known in the United States

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13 *Lee v Wilson & Mackinnon* (1934) 51 CLR 276 at 287 per Dixon J.

14 *Duke of Brunswick v Harmer* (1849) 14 QB 185 [117 ER 75]; *McLean v David Syme & Co Ltd* (1970) 72 SR (NSW) 513 at 519-520, 528.

15 For example, *Defamation (Amendment) Act* 1909 (NSW), s 7; *Defamation Act* 1974 (NSW), ss 9(2), 48; *Wrongs Act* 1958 (Vic), s 12; *Wrongs Act* 1936 (SA), s 11; *Defamation Act* 1889 (Q), s 24; *Defamation Act* 1957 (Tas), s 25; *Australian Broadcasting Corporation v Waterhouse* (1991) 25 NSWLR 519 at 537 per Samuels JA. See also *Louchansky v Times Newspaper Ltd (Nos 2-5)* [2002] QB 783.

16 A rule identified as the dominant civil law rule: Rabel, *The Conflict of Laws*, 2nd ed (1960), vol 2 at 303-304; cf *Jackson v Spittall* (1870) LR 5 CP 542 at 552; *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 466-467.

17 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 466-467; *Restatement of the Conflict of Laws*, (1934) at §377; cf *Eastern Air Lines Inc v Union Trust Co* 221 F 2d 62 at 80 (DCC 1955) and *Restatement of the Conflict of Laws*, 2d, (1971) at §145.

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as the "single publication" rule, a rule which has been rejected by the Court of Appeal of New South Wales in *McLean v David Syme & Co Ltd*<sup>18</sup>.

Single publication rule

29 Some 27 States of the United States, including California, Illinois, New York, Pennsylvania and Texas, by legislation<sup>19</sup> or by judicial decision have adopted what is identified as the single publication rule<sup>20</sup>. That rule is set out in §577A of the *Restatement of Torts*, 2d, (1977), which is headed "Single and Multiple Publications", and reads:

"(1) Except as stated in Subsections (2) and (3), each of several communications to a third person by the same defamer is a separate publication.

(2) A single communication heard at the same time by two or more third persons is a single publication.

(3) Any one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication.

(4) As to any single publication,

(a) only one action for damages can be maintained;

(b) all damages suffered in all jurisdictions can be recovered in the one action; and

(c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions."

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18 (1970) 72 SR (NSW) 513 at 520, 528.

19 Adopting the *Uniform Single Publication Act* promulgated in 1952.

20 Particulars are given in Wood, "Cyber-Defamation and the Single Publication Rule", (2001) 81 *Boston University Law Review* 895 at 899.

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30 In *Firth v State of New York*<sup>21</sup>, the New York Court of Appeals decided that the one-year statute of limitation in New York runs from the first posting of defamatory matter upon an Internet site and that the single publication rule applies to that first posting.

31 To trace, comprehensively, the origins of the so-called single publication rule, as it has come to be understood in the United States, may neither be possible nor productive. It is, however, useful to notice some of the more important steps that have been taken in its development. Treating each sale of a defamatory book or newspaper as a separate publication giving rise to a separate cause of action might be thought to present difficulties of pleading and proof. Following early English authority holding that separate counts alleging each sale need not be pleaded in the declaration<sup>22</sup>, American courts accepted that, where the defamatory matter was published in a book or newspaper, each publication need not be pleaded separately<sup>23</sup>. Similarly, proof of general distribution of a newspaper was accepted as sufficient proof of there having been a number of separate publications. It was against this background that there emerged, at least in some American States by the late nineteenth century, the rule that a plaintiff could bring only one action against a defendant to recover damages for all the publications that had by then been made of an offending publication<sup>24</sup>. The expression "one publication" or, later, "single publication" was first commonly used in this context<sup>25</sup>.

32 In the early decades of the twentieth century, the single publication rule came to be coupled with statements to the effect that the place of that single publication was the place where the newspaper or magazine was published<sup>26</sup>.

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21 775 NE 2d 463 (Ct App 2002).

22 *Baldwin v Elphinston* (1775) 2 Black W 1037 [96 ER 610]. See also, as to duplicity of pleading, in a single count, publication in more than one State, *McLean* (1970) 72 SR (NSW) 513 at 519-523.

23 See, for example, *Brian v Harper* 80 So 885 (La 1919); *Fried, Mendelson & Co v Edmund Halstead Ltd* 196 NYS 285 (App Div 1st Dept 1922).

24 See, for example, *Leonard v Pope* 27 Mich 145 at 150 (Mich 1873); *Galligan v Sun Printing & Publishing Assn* 54 NYS 471 (Sup Ct NY 1898).

25 See, for example, *Bigelow v Sprague* 5 NE 144 at 145 (Mass 1886); *Julian v Kansas City Star Co* 107 SW 496 at 500 (Mo 1907).

26 *Fried, Mendelson & Co v Edmund Halstead Ltd* 196 NYS 285 at 287 (App Div 1st Dept 1922).

The source of this added proposition was given as a case of prosecution for criminal libel<sup>27</sup> where the question was that raised by the Sixth Amendment to the United States Constitution and its reference to the "state or district wherein the crime shall have been committed". Despite this difference in the context in which the question of location arose, the statement that the place of publication was where the newspaper or magazine was published was sometimes taken as stating an element of (or at least a consequence of) the single publication rule applied to civil defamation suits<sup>28</sup>.

33 This single publication rule was understood as having consequences for the application of statutes of limitation which, in many States in the United States, provided only a short time before action for defamation was statute barred<sup>29</sup>. The time of the "single publication" was fixed as the time of the first publication<sup>30</sup>, it being thought that "[I]f the bar of the statute of limitations can be lifted by [later sales] we may no longer term it a 'statute of repose' which makes effective a purpose which the Legislature has conceived to be imperative"<sup>31</sup>.

34 It was not until the middle of the twentieth century and the advent of widely disseminated mass media of communication (radio and nationally distributed newspapers and magazines) that choice of law problems were identified. In some cases, the law of the forum was applied without any explicit recognition of the possible application of some other law<sup>32</sup>. But then, by a

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27 *United States v Smith* 173 Fed 227 (DC Ind 1909).

28 *Fried, Mendelson & Co v Edmund Halstead Ltd* 196 NYS 285 at 287 (App Div 1st Dept 1922); *Zuck v Interstate Publishing Corp* 317 F 2d 727 at 730 (2nd Cir 1963). But cf *Kelly v Loew's Inc* 76 F Supp 473 at 483 (D Mass 1948) per Judge Wyzanski and *Mattox v News Syndicate Co* 176 F 2d 897 at 900 (2nd Cir 1949) per Chief Judge Learned Hand.

29 A 1946 edition of Angoff, *Handbook of Libel*, said that the applicable period was one year in nearly two-thirds of American jurisdictions. See *Zuck v Interstate Publishing Corp* 317 F 2d 727 at 731 (2nd Cir 1963).

30 *Gregoire v G P Putnam's Sons* 81 NE 2d 45 (NY 1948).

31 *Wolfson v Syracuse Newspapers Inc* 4 NYS 2d 640 at 642 (App Div 4th Dept 1938); (aff'd) 18 NE 2d 676 (NY 1939).

32 See, for example, *Spanel v Pegler* 160 F 2d 619 (7th Cir 1947); *Holden v American News Co* 52 F Supp 24 (ED Wash 1943). Again, however, cf *Mattox v News Syndicate Co* 176 F 2d 897 at 900 (2nd Cir 1949) per Chief Judge Learned Hand.

process of what was understood as logical extension of the single publication rule, the choice of law to be applied came to be understood as largely affected by<sup>33</sup>, perhaps even to be determined by<sup>34</sup>, the proposition that only one action could be brought in respect of the alleged defamation, and that the place of publication was where the person publishing the words had acted.

35 For present purposes, what it is important to notice is that what began as a term describing a rule that all causes of action for widely circulated defamation should be litigated in one trial, and that each publication need not be separately pleaded and proved, came to be understood as affecting, even determining, the choice of law to be applied in deciding the action. To reason in that way confuses two separate questions: one about how to prevent multiplicity of suits and vexation of parties, and the other about what law must be applied to determine substantive questions arising in an action in which there are foreign elements<sup>35</sup>.

36 Clearly, the common law favours the resolution of particular disputes between parties by the bringing of a single action rather than successive proceedings. The principles of *res judicata*<sup>36</sup>, *issue estoppel*<sup>37</sup>, and what has come to be known as *Anshun estoppel*<sup>38</sup>, all find their roots in that policy. The application of that policy to cases in which the plaintiff complains about the publication of defamatory material to many people in many places may well lead to the conclusion that a plaintiff may not bring more than one action in respect of any of those publications that have occurred before the proceeding is instituted or even, perhaps, before trial of the proceeding is complete. Effect can be given to that policy by the application of well-established principles preventing vexation

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33 *Hartmann v Time Inc* 166 F 2d 127 (3rd Cir 1948); *Dale System Inc v Time Inc* 116 F Supp 527 at 529-530 (DC Conn 1953).

34 *Restatement of the Conflict of Laws*, 2d, (1971) §150. See also *Zuck v Interstate Publishing Corp* 317 F 2d 727 at 734 (2nd Cir 1963).

35 Note, "The Single Publication Rule in Libel: A Fiction Misapplied", (1949) 62 *Harvard Law Review* 1041.

36 *Jackson v Goldsmith* (1950) 81 CLR 446.

37 *Blair v Curran; Curran and Perpetual Trustee Co Ltd v Blair* (1939) 62 CLR 464.

38 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.



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by separate suits<sup>39</sup> or, after judgment, by application of the equally well-established principles about preclusion, including principles of Anshun estoppel. Conversely, where a plaintiff brings one action, account can properly be taken of the fact that there have been publications outside the jurisdiction and it would be open to the defendant to raise, and rely on, any benefit it may seek to say flows from applicable foreign law<sup>40</sup>. If some of the publications of which complaint is or could be made are publications that have occurred outside Australia, or if action has been instituted outside Australia in respect of publications made in this country, or overseas, there is no evident reason why the questions thus presented are not to be answered according to the established principles just mentioned. The application of these principles, however, says nothing about questions of jurisdiction or choice of law. In particular, the application of these principles does not require that a single place of publication be identified in every defamation case no matter how widely the defamatory material is disseminated.

37 Publications within Australia, but in different States or Territories, may require consideration of additional principles. Although the choice of law to be made in such a case is again the law of the place of the tort<sup>41</sup>, questions of full faith and credit<sup>42</sup> or other constitutional questions<sup>43</sup> may well arise. It is unnecessary to pursue those matters further at the moment and we return to cases in which there are international rather than solely intranational aspects.

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39 *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 and, in relation to defamation, see also *Maple v David Syme & Co Ltd* [1975] 1 NSWLR 97 at 100-102; *Australian Broadcasting Corporation v Waterhouse* (1991) 25 NSWLR 519 at 537; *Meckiff v Simpson* [1968] VR 62 at 65 and [1968] VR 69; *Thomson v Lambert* [1938] 2 DLR 545.

40 *Meckiff v Simpson* [1968] VR 62 at 64-65.

41 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

42 Constitution, s 118.

43 For example, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

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#### Widely disseminated publications

38 In the course of argument much emphasis was given to the fact that the advent of the World Wide Web is a considerable technological advance. So it is. But the problem of widely disseminated communications is much older than the Internet and the World Wide Web. The law has had to grapple with such cases ever since newspapers and magazines came to be distributed to large numbers of people over wide geographic areas. Radio and television presented the same kind of problem as was presented by widespread dissemination of printed material, although international transmission of material was made easier by the advent of electronic means of communication.

39 It was suggested that the World Wide Web was different from radio and television because the radio or television broadcaster could decide how far the signal was to be broadcast. It must be recognised, however, that satellite broadcasting now permits very wide dissemination of radio and television and it may, therefore, be doubted that it is right to say that the World Wide Web has a uniquely broad reach. It is no more or less ubiquitous than some television services. In the end, pointing to the breadth or depth of reach of particular forms of communication may tend to obscure one basic fact. However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.

40 Because publication is an act or event to which there are at least two parties, the publisher and a person to whom material is published, publication to numerous persons may have as many territorial connections as there are those to whom particular words are published. It is only if one starts from a premise that the publication of particular words is necessarily a *singular* event which is to be located by reference *only* to the conduct of the publisher that it would be right to attach no significance to the territorial connections provided by the several places in which the publication is available for comprehension.

41 Other territorial connections may also be identified. In the present case, Dow Jones began the process of making material available at WSJ.com by transmitting it from a computer located in New York city. For all that is known, the author of the article may have composed it in another State. Dow Jones is a Delaware corporation. Consideration has been given to these and indeed other bases of territorial connection in identifying the law that might properly be held

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to govern an action for defamation where the applicable choice of law rule was what came to be known as the proper law of the tort<sup>44</sup>.

42 Many of these territorial connections are irrelevant to the inquiry which the Australian common law choice of law rule requires by its reference to the law of the place of the tort. In that context, it is defamation's concern with reputation, and the significance to be given to damage (as being of the gist of the action) that require rejection of Dow Jones's contention that publication is necessarily a singular event located by reference only to the publisher's conduct. Australian common law choice of law rules do not require locating the place of publication of defamatory material as being necessarily, and only, the place of the publisher's conduct (in this case, being Dow Jones uploading the allegedly defamatory material onto its servers in New Jersey).

43 Reference to decisions such as *Jackson v Spittal*<sup>45</sup>, *Distillers Co (Biochemicals) Ltd v Thompson*<sup>46</sup> and *Voth v Manildra Flour Mills Pty Ltd*<sup>47</sup> show that locating the place of commission of a tort is not always easy. Attempts to apply a single rule of location (such as a rule that intentional torts are committed where the tortfeasor acts, or that torts are committed in the place where the last event necessary to make the actor liable has taken place) have proved unsatisfactory if only because the rules pay insufficient regard to the different kinds of tortious claims that may be made. Especially is that so in cases of omission. In the end the question is "where in substance did this cause of action arise"<sup>48</sup>? In cases, like trespass or negligence, where some quality of the defendant's conduct is critical, it will usually be very important to look to where the defendant acted, not to where the consequences of the conduct were felt<sup>49</sup>.

44 In defamation, the same considerations that require rejection of locating the tort by reference only to the publisher's conduct, lead to the conclusion that,

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44 *Palmisano v News Syndicate Co* 130 F Supp 17 (SDNY 1955).

45 (1870) LR 5 CP 542.

46 [1971] AC 458.

47 (1990) 171 CLR 538.

48 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 468; *Voth* (1990) 171 CLR 538 at 567.

49 *Voth* (1990) 171 CLR 538 at 567.

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ordinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principal focus of defamation, not any quality of the defendant's conduct. In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.

Set aside service or stay proceedings?

45 It is convenient to deal at this point with Dow Jones's contentions that service of the originating process in the proceeding brought by Mr Gutnick should be set aside, and that further proceedings should be stayed on the ground that Victoria was a clearly inappropriate forum for trial of the action.

46 Rule 7.01(1) of the Victorian Rules provided that:

"(1) Originating process may be served out of Australia without order of the Court where –

...

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

Because Mr Gutnick alleged that he suffered damage in Victoria as a result of the publication made in Victoria when the *Barron's Online* article was comprehensible to a reader, r 7.01(1)(j) was plainly engaged. Mr Gutnick's proceeding was brought in respect of damage alleged to have been suffered at least partly in Victoria and alleged to have been caused by a tortious act or omission. As r 7.01(1)(j) makes plain, that paragraph of the rule has operation wherever the tortious act or omission is alleged to have occurred.

47 It matters not, in this case, whether par (i) of the rule applied. It follows from the fact that par (j) was satisfied that the jurisdiction of the Supreme Court

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of Victoria was regularly invoked by service of the proceeding on Dow Jones. Was Victoria, nevertheless, a clearly inappropriate forum? Dow Jones contended that Victoria was a clearly inappropriate forum because the substantive issues to be tried would be governed by the laws of one of the States of the United States. Although reluctant, at first, to identify whether the state whose laws applied was New Jersey or New York, in the end Dow Jones submitted that the defamation had occurred in New Jersey and that the substantive issues in the proceeding were, therefore, to be governed by the law of that State.

48 As has been noted earlier, Mr Gutnick has sought to confine his claim in the Supreme Court of Victoria to the damage he alleges was caused to his reputation *in Victoria* as a consequence of the publication that occurred *in that State*. The place of commission of the tort for which Mr Gutnick sues is then readily located as Victoria. That is where the damage to his reputation of which he complains in this action is alleged to have occurred, for it is there that the publications of which he complains were comprehensible by readers. It is his reputation *in that State*, and only that State, which he seeks to vindicate. It follows, of course, that substantive issues arising in the action would fall to be determined according to the law of Victoria. But it also follows that Mr Gutnick's claim was thereafter a claim for damages for a tort committed in Victoria, not a claim for damages for a tort committed outside the jurisdiction. There is no reason to conclude that the primary judge erred in the exercise of his discretion to refuse to stay the proceeding.

Actions for publications in several places

49 More difficult questions may arise if complaint were to be made for an injury to reputation which is said to have occurred as a result of publications of defamatory material in a number of places. For the reasons given earlier, in resolving those difficulties, it may be necessary to distinguish between cases where the complaint is confined to publications made in Australia, but in different States and Territories, and cases where publication is alleged to have occurred outside Australia, either with or without publication within Australia. Several kinds of difficulty may arise and each requires separate identification and consideration, even if the treatment of one may have consequences for some other aspect of the matter.

50 First, there may be some question whether the forum chosen by the plaintiff is clearly inappropriate. If there is more than one action brought, questions of vexation may arise and be litigated either by application for stay of proceedings or application for anti-suit injunction.

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51 Secondly, a case in which it is alleged that the publisher's conduct has all occurred outside the jurisdiction of the forum may invite attention to whether the reasonableness of the publisher's conduct should be given any significance in deciding whether it has a defence to the claim made. In particular, it may invite attention to whether the reasonableness of the publisher's conduct should be judged according to all the circumstances relevant to its conduct, including where that conduct took place, and what rules about defamation applied in that place or those places. Consideration of those issues may suggest that some development of the common law defences in defamation is necessary or appropriate to recognise that the publisher may have acted reasonably before publishing the material of which complaint is made<sup>50</sup>. Some comparison might be made in this regard with the common law developing by recognising a defence of innocent dissemination to deal with the position of the vendor of a newspaper and to respond to the emergence of new arrangements for disseminating information like the circulating library<sup>51</sup>.

52 In considering any of these matters, it should go without saying that it is of the first importance to identify the precise difficulty that must be addressed. In particular, in cases where the publisher of material which is said to be defamatory has acted in one or more of the United States, any action that is brought in an Australian court in respect of publications that were made in America, would, in applying the law of the place of commission of the tort, have to give effect to the rather different balance that has been struck in the United States between freedom of speech and the individual's interest in reputation. Furthermore, it may well be that the resolution of a claim for publications made in one or more of the United States would be affected by the application by the law of the relevant state of a form of the single publication rule.

53 Three other matters should be mentioned. In considering what further development of the common law defences to defamation may be thought desirable, due weight must be given to the fact that a claim for damage to reputation will warrant an award of substantial damages only if the plaintiff has a reputation in the place where the publication is made. Further, plaintiffs are unlikely to sue for defamation published outside the forum unless a judgment obtained in the action would be of real value to the plaintiff. The value that a

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50 *cf Lange* (1997) 189 CLR 520.

51 *Emmens v Pottle* (1885) 16 QBD 354; *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170. See also *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 585-590, 591-596, 617-620.

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judgment would have may be much affected by whether it can be enforced in a place where the defendant has assets<sup>52</sup>.

54 Finally, if the two considerations just mentioned are not thought to limit the scale of the problem confronting those who would make information available on the World Wide Web, the spectre which Dow Jones sought to conjure up in the present appeal, of a publisher forced to consider every article it publishes on the World Wide Web against the defamation laws of every country from Afghanistan to Zimbabwe is seen to be unreal when it is recalled that in all except the most unusual of cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person may resort.

55 The appeal should be dismissed with costs.

56 GAUDRON J. I agree with Gleeson CJ, McHugh, Gummow and Hayne JJ, for the reasons their Honours give, that the appeal in this matter should be dismissed. I also agree with their Honours' observations under the heading "Actions for publications in several places". In respect of one aspect of those observations, I would wish to add some comments of my own.

57 Much of the argument in the present case was concerned with the possibility of several actions being brought in several different jurisdictions in respect of the same defamatory matter. Seemingly, it was to overcome that possibility that the "single publication" rule was adopted in several of the American States. That rule 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."<sup>53</sup>

58 It may be accurate to apply the description "legal fiction" to a rule that deems multiple publications to be a single publication. However, it is not apparent that the single publication rule set out in § 577A of the *Restatement of Torts*, 2d, (1977) deems that to be the case. Rather, as stated, the rule selects "single publication" as a device to define the circumstances in which a plaintiff can be prevented from bringing more than one action.

59 For many years it has been usual in this country for defamation plaintiffs to bring a single action in respect of nationwide or multi-state publications. *Gorton v Australian Broadcasting Commission*<sup>54</sup> is an example of that practice. In an action of that kind, the ordinary choice of law rules apply so that, in respect of each State or Territory in which the material was published, it is open to the parties to rely on the law of that State or Territory<sup>55</sup>.

60 It may be that the practice exemplified in *Gorton v Australian Broadcasting Commission* is not simply a practice but the necessary consequence of the principle that underlies the decision in *Port of Melbourne Authority v Anshun Pty Ltd*<sup>56</sup>. In that case it was held that the Port of Melbourne Authority was estopped from maintaining a separate action under a contract of indemnity by reason that the claim for indemnity could have been pursued in earlier

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52 cf *Yahoo! Inc v La Ligue Contre Le Racisme Et L'Antisemitisme* 145 F Supp 2d 1168 at 1178 (ND Cal 2001) and 169 F Supp 2d 1181 (ND Cal 2001); *Matusevitch v Telnikoff* 877 F Supp 1 (DDC 1995); *Bachchan v India Abroad Publications Inc* 585 NYS 2d 661 (Sup Ct NY 1992).

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53 Cohen, "The single publication rule: one action, not one law", (1966) 62 *Brooklyn Law Review* 921 at 924.

54 [1973] 1 ACTR 6.

55 See *McLean v David Syme & Co Ltd* (1970) 72 SR (NSW) 513; *Gorton v Australian Broadcasting Commission* [1973] 1 ACTR 6 at 7-8; *Jones v TCN Channel Nine Pty Ltd* (1992) 26 NSWLR 732.

56 (1981) 147 CLR 589.

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proceedings brought by an injured workman against the parties to the contract and, in which proceedings, the contracting parties claimed contribution against each other as tortfeasors.

61 In *Anshun*, the estoppel was said to arise, not because of res judicata or issue estoppel<sup>57</sup>, as those concepts are traditionally understood, but because the claim for indemnity was "a defence to [the] claim [for contribution] in the first action ... [and] so closely connected with the subject matter of that action that it was to be expected that it would be relied upon as a defence to that claim and as a basis for recovery"<sup>58</sup>. In this regard, the estoppel was seen to be an aspect of "the extended principle expressed by Sir James Wigram VC in *Henderson v Henderson*"<sup>59,60</sup>.

62 It was said in *Henderson v Henderson* that:

"where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case."<sup>61</sup>

63 For present purposes, it is unnecessary to explore the circumstances in which an estoppel will be held to arise in consequence of a failure to raise a matter in earlier proceedings. Rather, it is important to note that the principle as stated in *Henderson v Henderson* stems from the nature of judicial power. The purpose of judicial power is the final determination of justiciable controversies and such controversies are not finally determined unless all issues involved in a controversy are submitted for determination or, if they are not, are treated as no longer in issue.

64 If a plaintiff complains of multiple and simultaneous publications by a defendant of the same defamatory matter there is, in essence, a single controversy

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57 (1981) 147 CLR 589 at 597 per Gibbs CJ, Mason and Aickin JJ.

58 (1981) 147 CLR 589 at 604 per Gibbs CJ, Mason and Aickin JJ.

59 [1843] 3 Hare 100 at 115 [67 ER 313 at 319].

60 (1981) 147 CLR 589 at 598 per Gibbs CJ, Mason and Aickin JJ.

61 [1843] 3 Hare 100 at 115 [67 ER 313 at 319].

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between them, notwithstanding that the plaintiff may have several causes of action governed by the laws of different jurisdictions. Accordingly, if, in such a case, an issue arises as to whether an Australian court is a clearly inappropriate forum<sup>62</sup>, a very significant consideration will be whether that court can determine the whole controversy and, if it cannot, whether the whole controversy can be determined by a court of another jurisdiction.

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

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62 See *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

66 KIRBY J. Lord Bingham of Cornhill recently wrote that, in its impact on the law of defamation, the Internet will require "almost every concept and rule in the field ... to be reconsidered in the light of this unique medium of instant worldwide communication."<sup>63</sup> This appeal enlivens such a reconsideration.

67 The facts are set out in other reasons<sup>64</sup>. Essentially, Dow Jones & Company Inc, a corporation registered in the United States of America ("the appellant"), published material on the Internet that was allegedly defamatory of Mr Gutnick ("the respondent") who sued in the Supreme Court of Victoria to recover damages to vindicate his reputation.

The issues of jurisdiction, applicable law and forum

68 *History of the proceedings:* Hedigan J ("the primary judge") dismissed a summons by which the appellant had sought an order for the stay or dismissal of proceedings brought against it by the respondent<sup>65</sup>. This appeal comes from the refusal of the Court of Appeal of the Supreme Court of Victoria<sup>66</sup> to grant leave to the appellant to appeal from the judgment of the primary judge. The Court of Appeal concluded that the decision was not attended by sufficient doubt to warrant its intervention<sup>67</sup>. It confirmed the judgment of the primary judge. The attention of this Court has therefore been addressed to that judge's reasons.

69 *Three issues:* The appeal concerns issues that commonly arise where a non-resident foreign party seeks a stay, or the setting aside, of process that brings it involuntarily before an Australian court<sup>68</sup>:

- (1) The jurisdiction of the Australian court to decide the action;
- (2) If jurisdiction exists, the law that will apply, in accordance with the principles of private international law, in the exercise of such jurisdiction; and

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63 Collins, *The Law of Defamation and the Internet*, (2001) at v (Foreword); cf *American Civil Liberties Union v Reno* 929 F Supp 824 at 844 [81] (E D Pa 1996).

64 Reasons of Gleeson CJ, McHugh, Gummow and Hayne JJ at [1]-[3] ("the joint reasons"), reasons of Callinan J at [169]-[172].

65 *Gutnick v Dow Jones & Company Inc* [2001] VSC 305 ("*Gutnick*").

66 *Dow Jones & Company Inc v Gutnick* [2001] VSCA 249 per Buchanan JA and O'Bryan AJA.

67 *Dow Jones & Company Inc v Gutnick* [2001] VSCA 249 at [11].

68 cf *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 562 [154] ("*Pfeiffer*").

- (3) Having regard to the resolution of those questions, whether the proceedings should be stayed, or the process set aside, on the ground that the Australian jurisdiction selected by the plaintiff is an inconvenient forum when compared to another jurisdiction propounded by the resisting party.

70 *The arguments of the parties:* Although these three issues are separate and distinct, they are closely related. One vital question, relevant to the answer to each issue, is where the cause of action, identified by the respondent, arose. The respondent sues for defamation by the appellant. He submits that the essential elements of the tort of defamation are: (1) publication; (2) in a form comprehended by a third party; (3) causing damage to the plaintiff which, in the case of proof of publication of defamatory matter, is presumed<sup>69</sup>. Upon this basis the respondent asserts that his proceedings were "founded on a tort committed within Victoria"<sup>70</sup>.

71 If Victoria is identified as the place of the tort, that finding would provide a strong foundation to support the jurisdiction of the Supreme Court of Victoria<sup>71</sup>; and to sustain a conclusion that the law to be applied to the proceedings, as framed<sup>72</sup>, is the law of Victoria. These conclusions would, in turn, provide the respondent with powerful arguments to resist the contention that the proceedings should be stayed, or set aside, on inconvenient forum grounds<sup>73</sup>.

72 It is unsurprising that the thrust of the appellant's argument was that this Court should re-examine the common law of defamation in Australia so as to reformulate its elements, either generally or specifically, for the law as it applies to publication on the Internet. In particular, the appellant urged this Court to re-express the common law so as to abolish the "primitive" rule<sup>74</sup>, that every

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69 *Berezovsky v Michaels* [2000] 1 WLR 1004 at 1012; [2000] 2 All ER 986 at 993.

70 Supreme Court Rules (Vic) ("SCR"), r 7.01(1)(i). The relevant rule is set out in the joint reasons at [46].

71 Pursuant to SCR, rr 7.01(1)(i) or (j).

72 This refers to the concession that the respondent would not sue for damage out of Victoria: *Gutnick* [2001] VSC 305 at [127], [130].

73 SCR, r 7.05(2)(b) and *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 564-570 ("*Voth*"); *Henry v Henry* (1996) 185 CLR 571 at 586-587; *Regie National des Usines Renault SA v Zhang* (2002) 76 ALJR 551 at 556-557 [24]-[25]; cf 579-580 [144]-[149], 591-592 [192]-[193]; 187 ALR 1 at 8-9; cf 39-41, 55-57 ("*Zhang*").

74 *Robertson & Nicol on Media Law*, 4th ed (2002) at 103 ("*Robertson & Nicol*").

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publication of defamatory material constitutes a new and separate tort<sup>75</sup>. At least in respect of publications appearing on the Internet, the appellant submitted that the Court should express the common law to treat defamation as "one global tort (rather than a multiple wrong committed by every single publication and every internet hit)"<sup>76</sup>.

73 If the common law were re-expressed in this way, the appellant's argument proceeded, the "publication" in this case had occurred, and the tort had been completed, in the United States. Specifically, this had occurred in the State of New Jersey where the matter complained of was uploaded on the appellant's website or in the State of New York where it was composed and finally edited.

74 *Practical considerations:* Behind these arguments of legal authority, principle and policy lay the forensic advantages perceived by the respective parties. That is not unusual. Nor is it in any way reprehensible<sup>77</sup>. But it should be recognised at the outset. The respondent was entitled to regard the law of defamation in Victoria as more favourable to his interests than the law in the United States. The latter is greatly influenced by the jurisprudence of the First Amendment to the Constitution of that country<sup>78</sup>. That jurisprudence is more favourable to the appellant<sup>79</sup>. The jockeying over the issues in this appeal is thus not concerned only with large questions of law. For the parties, the stakes are more basic and more urgent.

#### Reformulation of the common law of Australia

75 *Reasons for restraint:* The responsibilities of this Court extend to the re-expression of the common law of Australia. However, the Court is bound by the Constitution. No principle of the common law may be inconsistent with its language or implications<sup>80</sup>. Nor may the common law be inconsistent with valid

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75 *Duke of Brunswick v Harmer* (1849) 14 QB 185 [117 ER 75].

76 *Robertson & Nicol* at 102.

77 cf *Jenner v Sun Oil Co Ltd* [1952] 2 DLR 526 at 540.

78 *New York Times Co v Sullivan* 376 US 254 (1964).

79 cf *Yahoo!, Inc v La Ligue Contre Le Racisme Et L'Antisemitisme* 145 F Supp 2d 1168 at 1178 (N D Cal 2001); 169 F Supp 2d 1181 at 1194 (N D Cal 2001).

80 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-567.

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applicable legislation, whether federal, State or of a Territory<sup>81</sup>. In re-expressing the common law from time to time, regard may be had to the general developments of statute law<sup>82</sup>.

76 Sometimes, asked to reformulate an established principle of the common law, this Court will decline the invitation, considering that any alteration of the law should be left to the legislature. Factors relevant to such decisions have included the effect on competing interests that should be consulted before any alteration of the law<sup>83</sup>; the existence of significant economic implications of any change<sup>84</sup>; the enactment of legislation evidencing parliamentary attention to the subject<sup>85</sup>; the perceived undesirability of imposing retrospective liability, especially criminal liability, on persons<sup>86</sup>; and the desirability, in particular cases, of not making any change until after intensive analysis of social data and public consultation, facilities typically unavailable to a court<sup>87</sup>. The fundamental restraint upon substantial judicial innovation in the expression of the law is imposed by the character of a court's functions as such and an acceptance that, under the Constitution, major legal changes in the Australian Commonwealth are the responsibility of the other branches of government, not of the courts<sup>88</sup>.

77 *Reasons for action:* Despite these expressions of restraint, important reformulations of the common law have been made by this Court, including in

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81 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 602 [231]-[232]; *Conway v The Queen* (2002) 76 ALJR 358 at 371 [65]-[66]; 186 ALR 328 at 345-346; *Zhang* (2002) 76 ALJR 551 at 579 [143]-[145]; 187 ALR 1 at 39-40.

82 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 25-27 [80]-[83]; cf *Lamb v Cotogno* (1987) 164 CLR 1 at 9.

83 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633.

84 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 402; *Jones v Bartlett* (2000) 205 CLR 166 at 237-238 [244], 240-241 [252]; cf *Dietrich v The Queen* (1992) 177 CLR 292 at 312, 323.

85 eg *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 at 667-668.

86 cf *Lipohar v The Queen* (1999) 200 CLR 485 at 561-564 [194]-[199].

87 eg *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 633; cf *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 549 [79]-[80], 570-572 [130]-[133], 591-600 [203]-[225]; cf Kirby, "Judging: Reflections on the Moment of Decision", (1999) 4 *The Judicial Review* 189 at 200-207.

88 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 29.

recent times<sup>89</sup>. Some of these have had very great significance. They have reversed long held notions of common law principle. Sometimes they have been stimulated by contemporary perceptions of the requirements of fundamental human rights<sup>90</sup>. In the present case, in support of its arguments, the appellant invoked the "revolutionary" features of the technology that supplies the Internet. It submitted that those features permitted, and required, a reconsideration of the law governing the elements of the tort of defamation.

#### The features of the Internet and the World Wide Web

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*The Internet*: The history of the Internet, its ubiquity, universality and utility have been described in the reasons of many courts in the United Kingdom<sup>91</sup>, the United States<sup>92</sup>, Canada<sup>93</sup>, Australia<sup>94</sup> and elsewhere<sup>95</sup>. In the expert evidence before the primary judge in this case, there was no relevant dispute about the main features of the Internet and of the World Wide Web specifically. Some additional evidence relevant to those features was placed before this Court, without objection, in support of the application of a number of organisations which were granted leave to intervene<sup>96</sup>. Although the supporting affidavits were not part of the record in the appeal, and cannot be so treated<sup>97</sup>,

<sup>89</sup> eg *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

<sup>90</sup> eg *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

<sup>91</sup> *Godfrey v Demon Internet Ltd* [2001] QB 201 at 204-205; *Bonnier Media Ltd v Smith* unreported, Court of Session (Scotland), 1 July 2002 per Lord Drummond Young.

<sup>92</sup> *Zippo Manufacturing Co v Zippo Dot Com, Inc* 952 F Supp 1119 at 1123-1124 (W D Pa 1997); *American Civil Liberties Union v Reno* 929 F Supp 824 at 830-844 [1]-[81] (E D Pa 1996).

<sup>93</sup> *Braintech Inc v Kostiuik* (1999) 171 DLR (4th) 46.

<sup>94</sup> *Macquarie Bank Ltd v Berg* (1999) A Def R ¶53, 035.

<sup>95</sup> *League Against Racism and Antisemitism v Yahoo! Inc* unreported, County Court of Paris, 20 November 2000 per Gomez DJ; Judgment No 4741, Italian Court of Cassation, 27 December 2000 per Calabrese J.

<sup>96</sup> The interveners included a number of large, mostly overseas, corporations operating open access, non-subscription websites but some provided services to registered users or individuals given access for a fee. The interveners included Amazon.com, Inc; Associate Press; Cable News Network LP, LLLP; Guardian Newspapers Ltd; The New York Times Company; News Limited; Time, Inc; Tribune Company; The Washington Post Company; Yahoo! Inc and John Fairfax Holdings Ltd.

most of the features of the Internet there described confirm the evidence given at trial. They are, in any case, readily ascertainable from standard works that describe the Internet's basic elements.

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It is important to consider these features because they afford the foothold for the appellant's argument that the Internet is such a new and different medium of human communication that it demands a radical reconceptualisation of the applicable common law, specifically with respect to the tort of defamation.

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It has been estimated that, by the end of 2002, the number of Internet users will reach 655 million<sup>98</sup>. The number continues to grow exponentially. It is estimated that in some countries, the number of users doubles every six months<sup>99</sup>. The Internet is essentially a decentralised, self-maintained telecommunications network. It is made up of inter-linking small networks from all parts of the world. It is ubiquitous, borderless, global and ambient in its nature. Hence the term "cyberspace"<sup>100</sup>. This is a word that recognises that the interrelationships created by the Internet exist outside conventional geographic boundaries and comprise a single interconnected body of data, potentially amounting to a single body of knowledge. The Internet is accessible in virtually all places on Earth where access can be obtained either by wire connection or by wireless (including satellite) links. Effectively, the only constraint on access to the Internet is possession of the means of securing connection to a telecommunications system and possession of the basic hardware.

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*The World Wide Web*: The Web is a forum consisting of millions of individual "sites". Each site contains information provided by, or to, the creator of that site. When a publisher of information and opinion wishes to make its content available on the Web, it commonly does so by creating a "website" and "posting" information to that site. Such a website is a collection of electronic messages maintained on a type of computer known as a "web server". Typically,

<sup>97</sup> *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 107-110, 112-113; *Mickelberg v The Queen* (1989) 167 CLR 259 at 265-271, 274-275, 298-299; *Eastman v The Queen* (2000) 203 CLR 1 at 12-13 [16]-[18], 24 [68], 51 [158], 63 [190], 96-97 [290].

<sup>98</sup> United Nations Conference on Trade and Development, *E-Commerce and Development Report, 2002: Executive Summary* (2002) at 1.

<sup>99</sup> United Nations Conference on Trade and Development, *E-Commerce and Development Report 2001: Trends and Executive Summary*, (2001) at 56.

<sup>100</sup> The term was coined by Gibson, *Neuromancer*, (1984) at 51: see Harasim (ed), *Global Networks*, (1993) at 9; and Kirby, "The Globalization of the Media and Judicial Independence", in Martin (ed), *Speaking Freely: Expression and the Law in the Commonwealth*, (1999) 19 at 20-22.



this is controlled either by the publisher concerned or by a third party contracted by the publisher to provide "web hosting" services.

82 An Internet user may access the information maintained on a website provided the user knows, or can ascertain, the Internet address of the relevant website. By entering that address into the user's web browser, the user will be directed to that website. Once the user locates the website in this way, the user may be required to take additional steps to access information stored on the web server associated with the website. Thus, to post an article to a website, a publisher must prepare a version in digital (computer readable) format. Such an article becomes part of the digital collection of data known as a web page. Such a web page is transmitted to a web server. It, along with the other web pages, comprises the website.

83 By posting information on a website, the publisher makes the content available to anyone, anywhere, having access to the Web. However, accessibility will depend on whether there is open access (under which any web user can access the site); subscription access (under which only web users who register, and commonly pay, for the service can secure access); combination access (where only a portion of a site may be accessed after registration and/or payment of a fee) and restricted access (access limited to specified users authorised by the website operator to view the website, eg employees of a particular company).

84 *Difficulty of controlling access:* The nature of the Web makes it impossible to ensure with complete effectiveness the isolation of any geographic area on the Earth's surface from access to a particular website. Visitors to a website automatically reveal their Internet Provider ("IP") address. This is a numerical code that identifies every computer that logs onto the Internet. The visitor may also disclose certain information about the type of browser and computer that the visitor uses. The IP addresses of users are generally assigned to them by an Internet Service Provider ("ISP"). The user's IP address will remain the same whenever and wherever the user "surfs" the Web. But some ISPs do not assign a permanent IP address. Instead, they assign a new IP address every time a user logs onto the Web. Because of these features, there is presently no effective way for a website operator to determine, in every case, the geographic origin of the Internet user seeking access to the website.

85 For similar reasons, with respect to subscription accounts, checking the issuing location of a credit card provided by a user would not afford a universally reliable means of ascertaining the geographic location of a user seeking access to a website. Thus, even assuming that a geographic restriction could be introduced isolating Australia (and hence Victoria) by reference to the origin of the visitor's credit card, a resident of Australia with a credit card issued by a United States bank, would be able to access sites that might be denied to an Australian resident with an Australian credit card, although both users were physically located in Australia.

86 In addition to these difficulties of controlling access to a website by reference to geographic, national and subnational boundaries, the Internet has recently witnessed a rapid growth of technologies ("anonymising technologies") that enable Internet users to mask their identities (and locations). By reason of these developments, the provision of cost effective, practical and reliable identity verification systems, that could afford a universally reliable recognition of the point of origin of an Internet user, has not emerged. This is why the nature of Internet technology itself makes it virtually impossible, or prohibitively difficult, cumbersome and costly, to prevent the content of a given website from being accessed in specific legal jurisdictions when an Internet user in such jurisdictions seeks to do so. In effect, once information is posted on the Internet, it is usually accessible to all Internet users everywhere in the world. Even if the correct jurisdiction of an Internet user could be ascertained accurately, there is presently no adequate technology that would enable non-subscription content providers to isolate and exclude all access to all users in specified jurisdictions.

87 These special features of the Internet present peculiar difficulties for the legal regulation of its content and, specifically, for the exclusion of access in defined jurisdictions. Such difficulties may have a bearing on the question of whether a particular jurisdiction has an advantage in regulating content published and accessed on the Internet<sup>101</sup>. This does not mean (and no party before the Court suggested) that the Internet is, or should be, a law-free zone. However, in considering what the law, and specifically the common law of Australia, should say in relation to the contents of the Internet, particularly with respect to allegedly defamatory material on a website, the appellant argued that regard had to be taken of these elementary practical features of the technology.

88 *Novel features of the Web:* The crucial attributes, so it was said, include the explosion in the availability of readily accessible information to hundreds of millions of people everywhere, with the consequent enhancement of human knowledge, and the beneficial contribution to human freedom and access to information about the world's peoples and their diverse lives and viewpoints that the Internet makes available, thereby contributing to human understanding. It was argued that the law should generally facilitate and encourage such advances, not attempt to restrict or impede them by inconsistent and ineffective, or only partly effective, interventions, for fear of interrupting the benefit that the Internet has already brought and the greater benefits that its continued expansion promises.

89 This Court has made reference to the fact that modern development in mass communications and particularly the electronic media may influence the

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<sup>101</sup> cf *Spinozzi v ITT Sheraton Corp* 174 F 3d 842 at 844-845 per Chief Judge Posner (7th Cir 1999).

continued relevance or reformulation of established legal principles<sup>102</sup>. The appellant contested the respondent's suggestion that the Internet was merely the latest of many technologies that have enhanced the spread of information. It submitted that the Internet involved a quantum leap of technological capacity and the ubiquitous availability of information that demanded a root and branch revision of some of the earlier legal rules in order to take into account the Internet's special features.

90 The appellant accepted that it was requesting this Court to take a large step in re-expressing the principles of the common law. However, it argued that the Court should seek a bold solution because of the revolutionary character of the technology that had produced the need to do so. Because the common law adapts even to radically different environments, this Court was asked to be no less bold than the technologists who had invented and developed the Internet. We were reminded of Judge Learned Hand's observation<sup>103</sup>:

"The respect all men feel in some measure for customary law lies deep in their nature; we accept the verdict of the past until the need for change cries out loudly enough to force upon us a choice between the comforts of further inertia and the irksomeness of action."

91 In *Theophanous v Herald and Weekly Times Limited*<sup>104</sup>, Brennan J, citing these remarks, noticed that some judges "find the call to reform more urgent". In the context of the development of the Internet, the unique features that I have described and the many beneficial advantages which I acknowledge, I am one of those to whom Brennan J referred.

92 The idea that this Court should solve the present problem by reference to judicial remarks in England in a case, decided more than a hundred and fifty years ago, involving the conduct of the manservant of a Duke, despatched to procure a back issue of a newspaper of minuscule circulation<sup>105</sup>, is not immediately appealing to me. The genius of the common law derives from its capacity to adapt the principles of past decisions, by analogical reasoning, to the resolution of entirely new and unforeseen problems. When the new problem is as novel, complex and global as that presented by the Internet in this appeal, a greater sense of legal imagination may be required than is ordinarily called for.

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**102** *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 565.

**103** Hand, "The Contribution of an Independent Judiciary to Civilisation", in Winters (ed), *Handbook for Judges*, (1975) 43 at 44.

**104** *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 142-143.

**105** *Duke of Brunswick v Harmer* (1849) 14 QB 185 [117 ER 75]; cf Robertson & Nicol at 101.

Yet the question remains whether it can be provided, conformably with established law and with the limited functions of a court under the Australian constitution to develop and re-express the law.

Jurisdiction: the Victorian Supreme Court Rules

93 *The applicable Rule of Court:* It is convenient now to deal with an issue of construction that lies at the threshold and concerns the applicability of the Supreme Court Rules of Victoria ("SCR") invoked by the respondent to establish jurisdiction, given that his process was served on a foreign corporation out of Australia which had no apparent presence or assets in this country. The relevant rule, r 7.01, is set out in other reasons<sup>106</sup>.

94 Upon one available interpretation, r 7.01 applies in the present case wherever it might be held that the tort of defamation has occurred. If this is a good argument it is unnecessary, in resolving the first issue (jurisdiction), to address any of the foregoing large questions about the Internet. If the respondent's point on the construction of the nominated rule is valid, he has demonstrated jurisdiction in any case. This conclusion would get the respondent over the first hurdle.

95 The primary judge held that the respondent had established jurisdiction of the Supreme Court of Victoria on each of the two provisions of r 7.01(1) upon which he relied, namely pars (i) and (j). Each of those paragraphs was referred to in the endorsement on the originating process. The primary judge held that the proceeding "was founded on a tort committed within Victoria and alternatively the proceeding is brought in respect of damage suffered wholly or partly in Victoria caused by a tortious act and omission occurring in New Jersey"<sup>107</sup>.

96 The first relevant ground on which the appellant challenged the primary judge's assumption of jurisdiction concerned the interpretation of the cited rule. The appellant disputed that the tort for which it was being sued had been committed in Victoria within par (i). This argument enlivened its call for a departure from previous expressions of the common law on the basis of the lack of locality of the Internet. But if the primary judge is correct and par (j) also applies, there is no need, for the purposes of the jurisdiction issue, to embark on the exploration of such novel questions. Jurisdiction will be established.

97 *The parties' arguments:* The appellant's argument took two steps. The first was that, in judging the meaning of par (j), it is necessary to classify the

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**106** The joint reasons at [46].

**107** *Gutnick* [2001] VSC 305 at [83].

claim of the party filing the originating process, ie the respondent. As pleaded, his claim was solely that the tort of defamation alleged had been committed in Victoria. Originally this claim was made only by virtue of the Internet publication. Subsequently it relied, in addition, on evidence that five copies of the journal, containing the matter complained of, had been sold on news stands in Victoria.

98 The primary judge gave the respondent leave to amend his statement of claim to add a new cause of action based on the publication of *Barron's* magazine in Victoria. However, in his reasons on the jurisdiction issue, the judge concluded that the issue of jurisdiction could be decided without reference to the alleged publication of the printed versions in Victoria. He said that any such publication was minimal and that his decision on the argument of Internet publication would, in substance, conclude the issue of the court's jurisdiction<sup>108</sup>. It is appropriate for this Court to proceed on the same basis.

99 The second step in the appellant's argument was that par (j) did not, as a matter of construction, extend to torts that had occurred in Victoria. It was submitted that this was so because the paragraph was not necessary in order to afford jurisdiction over local torts. That had already been achieved by par (i). It followed, according to the appellant, that par (j) related only to a case where the pleaded cause of action was alleged to be a wholly foreign tort. It was submitted that this construction was reinforced by the history of the revision of the SCR, of their origins and adoption and of the consecutive appearance within r 7.01(1) of pars (i) and (j)<sup>109</sup>.

100 *Conclusion:* I reject this submission. It involves reading pars (i) and (j) too narrowly when those paragraphs are viewed in context. Each of them affords "long-arm" jurisdiction to the Supreme Court of Victoria based on specified, and different, factual premises. Whereas par (i) addresses attention to the propounded foundation of the proceeding in question, par (j) is not concerned, as such, with the pleading of the tort. It is concerned with the characterisation of the proceedings as brought "in respect of damage suffered wholly or partly in Victoria". Whatever else is in doubt, it is uncontested that the respondent's proceedings alleged that the respondent had suffered damage in Victoria. Once this is shown, the only question to be answered, to attract par (j), is whether such damage was "caused by a tortious act or omission wherever occurring". The language used requires nothing more than "damage" caused by a tort. For the purpose of par (j), the place of the occurrence of the tort (whether in Victoria,

<sup>108</sup> *Gutnick* [2001] VSC 305 at [6].

<sup>109</sup> cf Williams, "The New Supreme Court Rules", (1984) 58 *Law Institute Journal* 678 at 679-680.

New Jersey or anywhere else) is irrelevant<sup>110</sup>. Because it is irrelevant, it is an issue that does not have to be resolved in order to determine whether r 7.01(1)(j) attaches to the respondent's originating process.

101 It might be complained that "long-arm" rules such as that in r 7.01(1)(j), providing jurisdiction based upon the mere happening of damage within a jurisdiction, conflicts with the ordinary principle of public international law obliging a substantial and bona fide connection between the subject matter of a dispute and the source of jurisdiction of a national court over its resolution<sup>111</sup>. The validity of the relevant rule has not been challenged in the present proceedings<sup>112</sup>. The rule in question in this case has overseas equivalents. The law in the United States itself contains many provisions for long-arm jurisdiction<sup>113</sup>.

102 It follows from my analysis that the primary judge was correct to decide the first issue (jurisdiction) in favour of the respondent. Having found jurisdiction on the basis of par (j), it was strictly unnecessary to decide whether another basis for jurisdiction was established under par (i). The appellant's appeal against this part of the primary judge's reasoning fails.

103 As a result of this conclusion, the respondent enjoys the advantage of properly constituted proceedings in an Australian court. The objections that the appellant is not present in this country, has no office or assets here (as I would be prepared to infer); has only minimal commercial interest in the sale of *Barron's* magazine or online services in Victoria or to Australians; and publishes them principally for the benefit of, and sale to, United States readers, are considerations irrelevant to the issue of jurisdiction once the propounded long-arm rule is found valid and applicable.

<sup>110</sup> The reason for this is evident. In order to found proceedings properly in the Supreme Court of Victoria, that Court needs jurisdiction over the defendant. The long-arm rules specify circumstances in which originating process may be served on a defendant who is not present in the territory of the Court.

<sup>111</sup> *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 at 496-497; *Tolofson v Jensen* [1994] 3 SCR 1022 at 1047; *Zhang* (2002) 76 ALJR 551 at 570-571 [105]-[106]; 187 ALR 1 at 27-28; cf *Zippo Manufacturing Co v Zippo Dot Com, Inc* 952 F Supp 1119 at 1122 (W D Pa 1997).

<sup>112</sup> In *Flaherty v Girgis* (1985) 4 NSWLR 248 at 267-270 the New South Wales Court of Appeal held that the equivalent rule in the Supreme Court Rules 1970 (NSW) was a law for the peace, welfare and good government of New South Wales and therefore constitutionally valid. No appeal was taken on this issue to the High Court: see *Flaherty v Girgis* (1987) 162 CLR 574.

<sup>113</sup> eg *Hsin Ten Enterprise USA, Inc v Clark Enterprises* 138 F Supp 2d 449 (S D N Y 2000). See also Juenger, "Traveling to The Hague in a Worn-Out Shoe", (2001) 29 *Pepperdine Law Review* 7.

104 It remains to decide whether the foregoing considerations, or any of them (and any other considerations) are relevant to the remaining issues which are presented in these proceedings: First, the appropriate identification of the place of the tort and consequently the applicable law; and secondly, whether the primary judge's discretion miscarried on the issue of the appropriateness or otherwise of the Victorian forum for the determination of the cause of action. For the resolution of those issues, it is now necessary to address in more detail the appellant's submission that the conventional requirements of the law of defamation should be altered to recognise that the publication of the allegedly defamatory material on the Internet, and therefore the tort of defamation, occurred in this case in New Jersey (or New York) in the United States.

Choice of law: the law of the place of the wrong

105 *Jurisdiction and applicable law:* The decision that the Victorian Court has jurisdiction over the parties does not resolve the law that such a Court must apply. The distinction between jurisdiction and choice of law is repeatedly made in decisions of this Court. It has insisted that such issues be kept separate and distinct<sup>114</sup>. A court may have jurisdiction, but it may equally be bound by the applicable rules of private international law to exercise its jurisdiction by giving effect to the law of a foreign jurisdiction. Where necessary, this is done by receiving evidence to prove what that foreign law is. The mere fact that foreign law is applicable, and must be proved, does not, of itself, decide the third (convenient forum) issue. In *Regie National des Usines Renault SA v Zhang*<sup>115</sup>, this Court held that "[a]n 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*."

106 The majority in *Zhang* agreed that the principle, earlier accepted in *John Pfeiffer Pty Ltd v Rogerson*<sup>116</sup> with respect to intra-Australian torts, extended equally to "international torts"<sup>117</sup>. This was so, despite the absence, in the case of international torts, of the federal consideration that had encouraged this Court in

<sup>114</sup> *Zhang* (2002) 76 ALJR 551 at 553-554 [10], 570 [105]; 187 ALR 1 at 4-5, 27-28 applying *Pfeiffer* (2000) 203 CLR 503.

<sup>115</sup> (2002) 76 ALJR 551 at 566 [81]; cf at 559 [39] quoting *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 41; 187 ALR 1 at 21-22; cf at 12.

<sup>116</sup> (2000) 203 CLR 503.

<sup>117</sup> (2002) 76 ALJR 551 at 563 [60] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ and at 577 [133] of my own reasons. The position was reserved by Callinan J at 596 [214]; 187 ALR 1 at 17, 37, 63.

*Pfeiffer* to abandon the "double actionability" rule in *Phillips v Eyre*<sup>118</sup> and to depart from local decisions that had applied that rule<sup>119</sup>.

107 The rule for the ascertainment of the applicable law is therefore that it is the law where the tort was committed (*lex loci delicti*)<sup>120</sup>. In *Zhang*, I acknowledged that it will sometimes be "debatable as to where precisely the 'wrong' occurred"<sup>121</sup>. Neither *Pfeiffer* nor *Zhang* dealt precisely with the issue raised by the present proceedings. Here, depending upon the identification of the elements of the tort alleged by the respondent, they could be categorised as referring to an Australian tort, an international tort, or both. The present is a case where each party urges the contrary locus.

108 *The parties' arguments:* The respondent, invoking what he asserted to be "hundreds of years" of defamation law, submitted that the conclusion of the primary judge was correct. This was so because of two basic principles:

- First, that each publication of defamatory material represents a separate tort for which a plaintiff could sue<sup>122</sup> and this rule applies to publications on the Internet as much as to those in any other medium; and
- Secondly, that the "publication" for the purposes of the law of defamation did not occur when the offending words were written, committed to digital form, "uploaded" or otherwise processed (in the United States). Potentiality to harm, reasonable expectations that this would be a consequence and even an intention to have that result were not enough. For defamation, it was necessary that the plaintiff's reputation should be damaged in fact. Relevantly to the impugned material and the tort as pleaded, this had happened at the time and place the matter complained of was received and comprehended by a person (other than the publisher and the plaintiff) in Victoria, ie when the material sued for appeared on the appellant's website and was "downloaded" (or when the hard copies of the magazine distributed in Victoria were acquired and read)<sup>123</sup>.

<sup>118</sup> [1870] LR 6 QB 1 at 28-29.

<sup>119</sup> eg *Breavington v Godleman* (1988) 169 CLR 41; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1.

<sup>120</sup> *Zhang* (2002) 76 ALJR 551 at 576 [129]-[130]; 187 ALR 1 at 35-36.

<sup>121</sup> (2002) 76 ALJR 551 at 577 [133]; 187 ALR 1 at 37; cf Juenger, "Tort Choice of Law in a Federal System", (1997) 19 *Sydney Law Review* 529 at 531.

<sup>122</sup> Invoking *Duke of Brunswick v Harmer* (1849) 14 QB 185 [117 ER 75].

<sup>123</sup> eg *Isaacs & Sons Ltd v Cook* [1925] 2 KB 391; *Bata v Bata* [1948] WN 366.

109 For its part, the appellant, supported by the interveners, invited this Court to reformulate, at least in the context of publications on the Internet, the legal ingredients of the tort of defamation; and to adopt, at least in respect of such publications, a single publication rule expressed in terms of the place of "uploading". Alternatively, the appellant argued the place of the wrong for choice of law purposes should be ascertained by reference to where *in substance* the cause of action rose<sup>124</sup>. If that question were asked in the present case, the appellant suggested that the answer would be New Jersey (or New York), not Victoria.

110 *Interrelationship of issues:* The interrelationship of the three issues in the appeal can be seen immediately. Each of the foregoing submissions would be relevant to the jurisdiction issue (if jurisdiction were determined only by whether a tort had been committed within Victoria). It is only because of the wider criterion of jurisdiction contained in r 7.01(1)(j) of the SCR that such arguments are not determinative of the jurisdiction issue in this case. However, they are clearly relevant for the choice of law issue. And this, in turn, is important for the convenient forum issue and, in a sense, foreshadows that issue.

#### Defamation and the Internet: a new paradigm?

111 *A novel development:* The fundamental premise of the appellant's arguments concerning the reformulation of the applicable rules of defamation depended on the technological features of the Internet. According to the appellant, those features were sufficiently different from pre-existing technology to demand a substantial reconsideration of the relevant law that had been stated in a different context in earlier times. If a more general revision were thought inappropriate or unnecessary, the task should at least be undertaken for any allegedly defamatory imputations published on the Internet.

112 I accept that a number of arguments support this proposition. Involved in responding to it are important questions of legal principle and policy. The proposition cannot be answered by an enquiry limited to expressions of past law. When a radically new situation is presented to the law it is sometimes necessary to think outside the square. In the present case, this involves a reflection upon the features of the Internet that are said to require a new and distinctive legal approach.

113 First, the Internet is global. As such, it knows no geographic boundaries. Its basic lack of locality suggests the need for a formulation of new legal rules to

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<sup>124</sup> *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 466 ("*Distillers*"); cf *Voth* (1990) 171 CLR 538 at 567.

address the absence of congruence between cyberspace and the boundaries and laws of any given jurisdiction<sup>125</sup>. There are precedents for development of such new legal rules. The Law Merchant (*lex mercatoria*) arose in medieval times out of the general custom of the merchants of many nations in Europe. It emerged to respond to the growth of transnational trade. The rules of the common law of England adapted to the Law Merchant. They did so out of necessity and commonsense<sup>126</sup>.

114 *Effective legal responses:* The general principle of public international law obliging comity in legal dealings between states suggests that arguably, with respect to the legal consequences of the Internet, no jurisdiction should ordinarily impose its laws on the conduct of persons in other jurisdictions in preference to the laws that would ordinarily govern such conduct where it occurs. At least this should be so unless the former jurisdiction can demonstrate that it has a stronger interest in the resolution of the dispute in question than the latter<sup>127</sup>. In conformity with this approach, the advent of the Internet suggests a need to adopt new principles, or to strengthen old ones, in responding to questions of forum or choice of law that identify, by reference to the conduct that is to be influenced, the place that has the strongest connection with, or is in the best position to control or regulate, such conduct<sup>128</sup>. Normally, the laws of such a place are those most likely to be effective in securing the objectives of law, such as here, the protection of the right to free expression and access to information and the defence of reputation.

115 *Effectiveness of remedies:* Any suggestion that there can be no effective remedy for the tort of defamation (or other civil wrongs) committed by the use of the Internet (or that such wrongs must simply be tolerated as the price to be paid for the advantages of the medium) is self-evidently unacceptable. Instruments of international human rights law recognise the right of "[e]veryone ... to hold opinions without interference" and to enjoy "the right to freedom of expression

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<sup>125</sup> Perritt, "Jurisdiction in Cyberspace: The Role of Intermediaries", in Fitzgerald and Fitzgerald, *cyberlaw*, (2002) 122 at 122; Jew, "Cyber Jurisdiction – Emerging Issues and Conflicts of Law When Overseas Courts Challenge Your Web", in Fitzgerald and Fitzgerald, *cyberlaw*, (2002) 186 at 187.

<sup>126</sup> Johnson and Post, "Law and Borders – The Rise of Law in Cyberspace", in Fitzgerald and Fitzgerald, *cyberlaw*, (2002) 123 at 123. Other analogies have been suggested, including the common law invention of the postal exception to delivery upon the advent of reliable postal services: *Cowan v O'Connor* (1888) 20 QBD 640 at 642.

<sup>127</sup> Johnson and Post, "And How Shall the Net be Governed? A Meditation on the Relative Virtues of Decentralised, Emergent Law", in Fitzgerald and Fitzgerald, *cyberlaw*, (2002) 123 at 129.

<sup>128</sup> *Spinozzi v ITT Sheraton Corp* 174 F 3d 842 at 844-845 (7th Cir 1999).

... [including] freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers ... through any ... media of his choice"<sup>129</sup>. However, such instruments also recognise that those rights carry "duties and responsibilities". They may therefore "be subject to certain restrictions, but these shall only be such as are provided by law and are necessary ... [f]or respect of the rights or reputations of others"<sup>130</sup>.

116 The International Covenant of Civil and Political Rights also provides that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation". And that "[e]veryone has the right to the protection of the law against such interference or attacks"<sup>131</sup>. Accordingly, any development of the common law of Australia, consistent with such principles<sup>132</sup>, should provide effective legal protection for the honour, reputation and personal privacy of individuals. To the extent that our law does not do so, Australia, like other nations so obliged, is rendered accountable to the relevant treaty body for such default<sup>133</sup>.

117 The law in different jurisdictions, reflecting local legal and cultural norms, commonly strikes different balances between rights to information and expression and the protection of individual reputation, honour and privacy. These disparities suggest the need for a clear and single rule to govern the conduct in question according to pre-established norms. If it is to be effective, such a rule must be readily ascertainable. To tell a person uploading potentially defamatory material onto a website that such conduct will render that person potentially liable to proceedings in courts of every legal jurisdiction where the subject enjoys a reputation, may have undesirable consequences. Depending on the publisher and the place of its assets, it might freeze publication or censor it or try to restrict access to it in certain countries so as to comply with the most restrictive defamation laws that could apply. Or it could result in the adoption of locational stratagems in an attempt to avoid liability.

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129 International Covenant on Civil and Political Rights done at New York on 19 December 1966, ATS 1980 No 23, Arts 19.1, 19.2 ("ICCPR"). Arguably, such provisions of the ICCPR can be said to reflect customary international law. In any case, as a state party Australia is subject to legally binding obligations under the ICCPR.

130 ICCPR, Art 19.3 and see *Chakravarti v Advertiser Newspapers Ltd* (1998) 193 CLR 519 at 575.

131 ICCPR, Arts 17.1 and 17.2.

132 cf *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

133 Pursuant to the first Optional Protocol to the ICCPR. See *Mabo v Queensland [No 2]* (1999) 175 CLR 1 at 42.

118 *A new rule for a unique technology:* In response to the suggestion that similar questions have existed at least since telegraph and international shortwave radio and that such potential liability is a commonplace in the world of global television distributed by satellite, the appellant pointed to the peculiarities of Internet publication. Viewed in one way, the Internet is not simply an extension of past communications technology. It is a new means of creating continuous relationships in a manner that could not previously have been contemplated<sup>134</sup>. According to this view, the Internet is too flexible a structure to be controlled by a myriad of national laws, purportedly applied with no more justification than is provided by the content of such laws, usually devised long before the Internet arrived<sup>135</sup>. For stored information, accessible in cyberspace, the new technology was said to demand a new approach. This would be true as much for the law of taxation<sup>136</sup>, commercial transactions<sup>137</sup> and other areas, as for the law of defamation.

119 *The urgency of a new rule:* To wait for legislatures or multilateral international agreement to provide solutions to the legal problems presented by the Internet would abandon those problems to "agonizingly slow" processes of lawmaking<sup>138</sup>. Accordingly, courts throughout the world are urged to address the immediate need to piece together gradually a coherent transnational law appropriate to the "digital millennium"<sup>139</sup>. The alternative, in practice, could be an institutional failure to provide effective laws in harmony, as the Internet itself

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134 Jew, "Cyber Jurisdiction – Emerging Issues and Conflicts of Law When Overseas Courts Challenge Your Web", in Fitzgerald and Fitzgerald, *cyberlaw*, (2002) 186 at 189.

135 Draft Report by the ABA Global Cyberspace Jurisdiction Project on "Global Jurisdiction Issues Created by the Internet", in Fitzgerald and Fitzgerald, *cyberlaw*, (2002) 192 at 195-196 [9.3].

136 Draft Report by the ABA Global Cyberspace Jurisdiction Project on "Global Jurisdiction Issues Created by the Internet", in Fitzgerald and Fitzgerald, *cyberlaw*, (2002) 192 at 194-195 [9.2].

137 Hill, "Flogging a Dead Horse – The Postal Acceptance Rule and Email", (2001) 17 *Journal of Contract Law* 151.

138 Johnson and Post, "And How Shall the Net be Governed? A Meditation on the Relative Virtues of Decentralised, Emergent Law", in Fitzgerald and Fitzgerald, *cyberlaw*, (2002) 123 at 124; see Dinwoodie, "A New Copyright Order: Why National Courts Should Create Global Norms", (2000) 149 *University of Pennsylvania Law Review* 469.

139 Fitzgerald, "Software as Discourse: The Power of Intellectual Property in Digital Architecture", (2000) 18 *Cardozo Arts and Entertainment Law Journal* 337 at 385; Fitzgerald, "An Emerging Liberal Theory of International Law and the Non-Enforcement of Foreign Public Laws", (1995) 16 *Australian Year Book of International Law* 311 at 319.

is, with contemporary civil society – national and international. The new laws would need to respect the entitlement of each legal regime not to enforce foreign legal rules contrary to binding local law or important elements of local public policy<sup>140</sup>. But within such constraints, the common law would adapt itself to the central features of the Internet, namely its global, ubiquitous and reactive characteristics<sup>141</sup>. In the face of such characteristics, simply to apply old rules, created on the assumptions of geographical boundaries, would encourage an inappropriate and usually ineffective grab for extra-territorial jurisdiction<sup>142</sup>.

120 The adoption of a single publication rule, expressed in terms of the place of uploading of material on the Internet might, in this case, favour the jurisdiction of the courts and the law of the United States. However, it would not always be so. Thus, if the liability propounded concerned an Australian who had uploaded material on the Internet within Australia, had taken pains to conform to Australian defamation law but was sued for defamation in some other jurisdiction whose defamation laws were more restrictive than Australia's, respect for the single global publication rule, if it became internationally accepted, could help reduce the risks of legal uncertainty and the excessive assertion of national laws.

121 *Enforceability of judgments:* Any rule adopted with respect to publication of defamatory matter on the Internet must eventually face the practical question concerning the enforceability of a judgment recovered in such proceedings. The balance that is struck between freedom of expression and access to information and protection of individual reputation, honour and privacy tends to be a subject about which divergent views exist in the laws of different countries. Sometimes such laws are reinforced by domestic constitutional provisions<sup>143</sup>. A judgment of a country's courts, recovered in defamation proceedings, may be enforced against any property of a foreign judgment debtor that exists within the jurisdiction. But if it is necessary to enforce the judgment in another jurisdiction, the difficulty or impossibility of such enforcement may amount to a practical reason for providing

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140 eg *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

141 *Bonnier Media Ltd v Smith* unreported, Court of Sessions (Scotland), 1 July 2002 at [17].

142 Johnson and Post, "And How Shall the Net be Governed? A Meditation on the Relative Virtues of Decentralised, Emergent Law", in Fitzgerald and Fitzgerald, *cyberlaw*, (2002) 123 at 124; cf Fitzgerald, "Life in Cyberspace: A Simulating Experience", in Fitzgerald and Fitzgerald, *cyberlaw*, (2002) 131.

143 *Desai v Hersh* 719 F Supp 670 (ND Ill 1989); *Bachchan v India Abroad Publications* 585 NYS 2d 661 (1992); *Yahoo!, Inc v La Ligue Contre Le Racisme Et L'Antisemitisme* 169 F Supp 2d 1181 (N D Cal 2001).

relief to the objecting foreign party on one or more of the grounds of objection raised in this case<sup>144</sup>.

122 By reference to these and like considerations, the appellant submitted that this Court should look afresh at the common law of defamation. It argued that we, as one of the first final courts asked to consider this problem, should adjust previously stated law to the new technological and legal realities. The adoption of a simple universal rule apt to the new medium, to the effectiveness of law as an influence upon publishing conduct and realistic about the prospects of recovery upon judgments against foreign defendants, was the approach that the appellant invited this Court to take.

#### Reasons for declining an Internet-specific single publication rule

123 *Limits to judicial innovation:* The foregoing considerations present a persuasive argument for the formulation of a new rule of the common law that is particular to the publication of allegedly defamatory matter on the Internet. For myself, I do not regard them as mere slogans<sup>145</sup>. They present a serious legal issue for decision. Judges have adapted the common law to new technology in the past<sup>146</sup>. The rules of private international law have emerged as a result of, and remain alive to, changes in the means of trans-border communication between people. The Internet's potential impact on human affairs continues to expand and is already enormous. Later judges, in a position to do so, can sometimes reformulate the law in order to keep it relevant and just. Specifically they may re-express judge-made rules that suit earlier times and different technologies. For a number of reasons I have concluded that this Court would not be justified to change the rules of the Australian common law as would be necessary in this case to respond to the submissions of the appellant.

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144 *Telnikoff v Matusевич* 702 A 2d 230 (Md 1997); cf Maltby, "Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in US Courts", (1994) 94 *Columbia Law Review* 1978; Kyu Ho Youm, "Suing American Media in Foreign Courts: Doing an End-Run Around US Libel Law?", (1994) 16 *Hastings Communications and Entertainment Law Journal* 235; Sanders, "Extraterritorial Application of the First Amendment to Defamation Claims Against American Media", (1994) 19 *North Carolina Journal of International Law and Commercial Regulation* 515.

145 cf *Gutnick* [2001] VSC 305 at [70].

146 *Libman v The Queen* [1985] 2 SCR 178 at 213-214 per La Forest J cited in *Lipohar v The Queen* (1999) 200 CLR 485 at 558-559 [183]-[184]; cf *Zhang* (2002) 76 ALJR 551 at 576-577 [132]; 187 ALR 1 at 36-37.

124 First, a starting point for the consideration of the submission must be an acceptance that the principles of defamation law invoked by the respondent are settled and of long standing. Those principles are: (1) that damage to reputation is essential for the existence of the tort of defamation<sup>147</sup>; (2) that mere composition and writing of words is not enough to constitute the tort; those words must be communicated to a third party who comprehends them<sup>148</sup>; (3) that each time there is such a communication, the plaintiff has a new cause of action<sup>149</sup>; and (4) that a publisher is liable for publication in a particular jurisdiction where that is the intended or natural and probable consequence of its acts<sup>150</sup>. Where rules such as these are deeply entrenched in the common law and relate to the basic features of the cause of action propounded, their alteration risks taking the judge beyond the proper limits of the judicial function.

125 *Rules should be technology-neutral:* Whilst the Internet does indeed present many novel technological features, it also shares many characteristics with earlier technologies that have rapidly expanded the speed and quantity of information distribution throughout the world. I refer to newspapers distributed (and sometimes printed) internationally; syndicated telegraph and wire reports of news and opinion; newsreels and film distributed internationally; newspaper articles and photographs reproduced instantaneously by international telefacsimile; radio, including shortwave radio; syndicated television programmes; motion pictures; videos and digitalised images; television transmission; and cable television and satellite broadcasting<sup>151</sup>. Generally

**147** Holdsworth, *A History of English Law*, 3rd ed (1945), vol 5 at 206-207; cf *Lee v Wilson & MacKinnon* (1934) 51 CLR 276 at 287.

**148** *Webb v Bloch* (1928) 41 CLR 331 at 363; *Lee v Wilson & MacKinnon* (1934) 51 CLR 276 at 287; *Evans & Co v Stein & Co* 1904 12 SLT 462 at 463; *Lazarus v Deutsche Lufthansa AG* (1985) 1 NSWLR 188 at 191-192; *Toomey v Mirror Newspapers Ltd* (1985) 1 NSWLR 173 at 177; Holdsworth, *A History of English Law*, 2nd ed (1937), vol 8 at 371; *Gatley on Libel and Slander*, 9th ed (1998) at 127-129 [6.1].

**149** *R v Carlisle* (1819) 1 Chitty 451 at 453. This was also originally the law in the United States: *Ogden v Association of the United States Army* 177 F Supp 498 at 499-500 (1959); cf *Australian Broadcasting Corporation v Waterhouse* (1991) 25 NSWLR 519 at 535; *Gatley on Libel and Slander*, 9th ed (1998) at 154 [6.30]; *Dacey and Morris on the Conflict of Laws*, 13th ed (2000) at 1567-1568 [35-136].

**150** cf *Voth* (1990) 171 CLR 538 at 568; *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524 at 527; *Sadgrove v Hole* [1901] 2 KB 1 at 4-5; *Sims v Wran* [1984] 1 NSWLR 317 at 320; Rheinstein, "The Place of Wrong: A Study in the Method of Case Law", (1944) 19 *Tulane Law Review* 4 at 28.

**151** Prosser, "Interstate Publication", (1953) 51 *Michigan Law Review* 959 at 959-960; *Meldrum v Australian Broadcasting Co Ltd* [1932] VLR 425 at 440-441; *Jenner v Sun Oil Co Ltd* [1952] 2 DLR 526; *Hartmann v Time, Inc* 166 F 2d 127 (1947).

speaking, it is undesirable to express a rule of the common law in terms of a particular technology. Doing so presents problems where that technology is itself overtaken by fresh developments<sup>152</sup>. It can scarcely be supposed that the full potential of the Internet has yet been realised. The next phase in the global distribution of information cannot be predicted. A legal rule expressed in terms of the Internet might very soon be out of date.

126 *The need for legislative reform:* There are special difficulties in achieving judicial reform of the multiple publication rule in Australian law, even if one were convinced that it should be reformed to meet the technological characteristics of the Internet. Legislation in at least one Australian State is expressed in terms that assume the existence of the multiple publication rule<sup>153</sup>.

127 In *Australian Broadcasting Corporation v Waterhouse*<sup>154</sup>, Samuels JA stated his opinion that a single publication rule could only be introduced throughout Australia by statute. Whilst that remark was not essential to his Honour's reasoning, was made before the particular features of the Internet were known and does not bind this Court, it reflects the recognition of a judge with much experience in defamation law of the limits that exist on judicial alteration of basic principles to fit the apparent needs of a new technology. Because of such limits other means have been adopted within Australia to reduce the inconvenience of the multiple publication rule<sup>155</sup>. Some, or all, of these would be available in the case of an Internet publication to reduce the suggested inconvenience of that rule.

128 The defects of the multiple publication rule have been considered by the Australian Law Reform Commission ("ALRC"). In successive reports, the

**152** The postal rule is an example: see Hill, "Flogging a Dead Horse - The Postal Acceptance Rule and Email", (2001) 17 *Journal of Contract Law* 151.

**153** *Defamation Act* 1974 (NSW), sub-ss 9(2), (3). See Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11, (1979) at 60 [112].

**154** (1991) 25 NSWLR 519 at 537.

**155** In *Australian Broadcasting Corporation v Waterhouse* (1991) 25 NSWLR 519 at 537, Samuels JA instanced four "mechanisms": (1) relief against abuse of process; (2) aggregation of damages; (3) consolidation of proceedings; and (4) the application of statutory provisions against double compensation. He might also have mentioned the surviving cross-vesting legislation and *Anshun estoppel*, the latter mentioned in the reasons of Gaudron J at [60]-[63], see also the other considerations noted in the joint reasons at [36], [50]-[54].



ALRC has proposed different solutions to the problem<sup>156</sup>. In its report on defamation law, the ALRC recommended legislation to abrogate the rule<sup>157</sup>. However, its recommendations have not so far been enacted. Whilst this is not necessarily a reason for this Court to stay its hand<sup>158</sup>, it is appropriate to recall that in a parliamentary democracy such as that established by the Australian Constitution, this is a reason for caution in judicial alteration of basic and long held legal rules. Such caution is reinforced by the consideration that recently, when invited to do so, the House of Lords rejected the global theory of defamation liability. One of the reasons of the majority was that any such change would be incompatible with the long established principle in the *Duke of Brunswick's Case* which, by inference, their Lordships felt to be beyond judicial repair<sup>159</sup>.

129 There are a number of difficulties that would have to be ironed out before the settled rules of defamation law that I have mentioned could be modified in respect of publication of allegedly defamatory material on the Internet.

130 Take for example the suggestion that, before proof of damage or comprehension by anyone (apart from the author), the place and law of "publication" was fixed by the jurisdiction in which the text was first uploaded (as the appellant proposed) or in which the publisher last exercised control over dissemination (as the interveners proposed). The respondent complained that either of these rules, if substituted for the present law, would lead to "chaos". Even allowing for an advocate's overstatement, there are indeed difficulties. Publishers could easily locate the uploading of harmful data in a chosen place in an attempt to insulate themselves from defamation liability. They might choose places with defamation laws favourable to publishing interests. Just as books are now frequently printed in developing countries, the place of uploading of

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**156** Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11, (1979) at 60-61 [113]; Australian Law Reform Commission, *Choice of Law*, Report No 58, (1992) at 57 [6.53]-[6.54].

**157** Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11 (1979) at 208, 218-219; Draft Commonwealth Bill for an Unfair Publication Act, cl 7(1) (definition of "multiple publication") and cl 34(1) and 35.

**158** It did not prevent the reformulation of the choice of law in tort rule in *Pfeiffer* notwithstanding the publication of the ALRC's reports and the absence of legislative action: see (2000) 203 CLR 503 at 559-560 [148].

**159** *Berezovsky v Michaels* [2000] 1 WLR 1004 at 1011-1012, 1024, 1026-1027; [2000] 2 All ER 986 at 993, 1005, 1007-1008; cf Robertson & Nicol at 103. See also *Loutchansky v Times Newspapers Ltd (No 2-5)* [2002] QB 783 at 814-818 [62]-[76].

materials onto the Internet might bear little or no relationship to the place where the communication was composed, edited or had its major impact.

131 As if to recognise this problem, the appellant postulated various exceptions to its criterion of the place of uploading. These included exceptions for "adventitious or opportunistic" conduct; or conduct that "targeted" a particular place; or which existed where the website was "promoted". Apart from raising the question of whether the appellant's own publications would, in this case, fall within exceptions of the latter kind, it will be observed that we are already involved in overthrowing established legal rules for new ones that would require great precision in the formulation of detailed exceptions if a satisfactory judicial reformulation were to be achieved.

132 The uploading approach would also oblige a plaintiff to discover matters of conduct normally exclusively within the knowledge of the persons involved in processing the data. The plaintiff would have to find such facts in advance of the commencement of the proceedings. There are many similar practical problems. However, I have said enough to show that the propounded reformulation presents many complex questions. They are not appropriate for solution in judicial proceedings addressed to deciding a controversy between particular parties mainly or only interested in the outcome of their own dispute.

133 *Attractions of alternative formulations:* A connected issue demands consideration. If the place of uploading were adopted as the place of publication which also governs the choice of applicable law, the consequence would often be, effectively, that the law would assign the place of the wrong for the tort of defamation to the United States. Because of the vastly disproportionate location of web servers in the United States when compared to virtually all other countries (including Australia) this would necessarily have the result, in many cases, of extending the application of a law of the United States (and possibly the jurisdiction and forum of its courts) to defamation proceedings brought by Australian and other foreign citizens in respect of local damage to their reputations by publication on the Internet<sup>160</sup>. Because the purpose of the tort of defamation (as much in the United States as in Australia) is to provide vindication to redress the injury done to a person's reputation<sup>161</sup>, it would be small comfort to the person wronged to subject him or her to the law (and possibly the jurisdiction of the courts) of a place of uploading, when any decision so made would depend upon a law reflecting different values and applied in courts unable to afford vindication in the place where it matters most.

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**160** cf *Digital Equipment Corporation v Altavista Technology, Inc* 960 F Supp 456 at 462-463 (D Mass 1997).

**161** *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 69.

134 At least in the case of the publication of materials potentially damaging to the reputation and honour of an individual, it does not seem unreasonable, in principle, to oblige a publisher to consider the law of the jurisdiction of that person's habitual residence<sup>162</sup>. In its review of this subject, the ALRC expressed the opinion that "[i]n the case of defamation of a natural person, the law to be applied would normally be that of the place where the person was ordinarily resident"<sup>163</sup>. In its subsequent report on choice of law, the ALRC concluded that "residence is the best option for a choice of law rule for defamation"<sup>164</sup>. The ALRC went on to recommend that it was "unnecessary to qualify residence as 'usual' or 'habitual' for the purposes of this rule, since to do so might take the rule further away from the place of loss of reputation"<sup>165</sup>.

135 In his reasons in *Australian Broadcasting Corporation v Waterhouse*<sup>166</sup>, proposing the need for legislative reform of defamation law within Australia, Samuels JA suggested much the same. He said that the criterion of the habitual residence of the subject of the publication would present an objective criterion. It would discourage forum shopping. It would also give "effect to the expectations of the parties" on the basis that the place of residence would be where "[a] plaintiff will generally suffer most harm"<sup>167</sup>. His Honour's analysis shows how deeply embedded in the concept of the tort of defamation are the ideas of proof of damage to reputation; comprehension of the matter complained of; and acknowledgment that the sting is felt each time a publication is repeated.

136 When this point is reached it is natural, and proper, for a court such as this to refuse the invitation to re-express the common law, even if persuasive criticism of the present law has been advanced, as I think it has. Although the ALRC's reports proposing relevant reforms<sup>168</sup> have not been implemented, it is

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<sup>162</sup> cf *Telco Communications v An Apple a Day* 977 F Supp 404 (E D Va 1997).

<sup>163</sup> Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11, (1979) at 191.

<sup>164</sup> Australian Law Reform Commission, *Choice of Law*, Report No 58, (1992) at 58 [6.55].

<sup>165</sup> Australian Law Reform Commission, *Choice of Law*, Report No 58, (1992) at 59 [6.57].

<sup>166</sup> (1991) 25 NSWLR 519.

<sup>167</sup> (1991) 25 NSWLR 519 at 539.

<sup>168</sup> Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11, (1979) and Australian Law Reform Commission, *Choice of Law*, Report No 58, (1992); cf Australian Law Reform Commission, *Censorship Procedure*, Report No 55, (1991) at 33 [3.36].

(Footnote continues on next page)

not true to suggest that the parliaments of Australia have neglected regulation of liability for particular aspects of Internet content<sup>169</sup>. Further, while the recommendations of the ALRC may provide guidance to the identification of the place of the tort of defamation for choice of law purposes in light of this Court's decisions in *Pfeiffer* and *Zhang*, they do not assist the argument of the appellant. International developments, involving multilateral negotiations, must also be considered if there is to be any chance of the adoption of a uniform approach suitable to the world-wide technology, as the appellant urged<sup>170</sup>. In other sensitive areas of the law requiring international agreement, the Australian Parliament has recently moved with proper speed to implement the emerging international consensus<sup>171</sup>.

137 *Change exceeds the judicial function:* Although, therefore, the appellant (and interveners) have established real defects in the current Australian law of defamation as it applies to publications on the Internet, their respective solutions for altering the elements of the tort and expressing it in terms of conduct substantially in the control of the publisher or its agents (and out of the control of the plaintiff whose reputation is alleged to have been damaged) are too simplistic.

138 It would exceed the judicial function to re-express the common law on such a subject in such ways. This is a subject of law reform requiring the evaluation of many interests and considerations that a court could not be sure to cover. Subject to what follows, I, like the other members of this Court, do not think that a single publication rule should be adopted in terms of the place of uploading as the place of publication of allegedly defamatory material on the Internet, which would also govern the choice of applicable law.

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There have also been Parliamentary Research Papers eg Griffith, *Censorship in Australia: Regulating the Internet and other recent developments*, Briefing Paper 4/2002 (2002).

<sup>169</sup> eg *Broadcasting Services Act* 1992 (Cth), s 216B and Sched 5 ("Online services"); *Crimes Act* 1914 (Cth), s 85ZE(1)(a). The Victorian Parliament has also enacted Internet-related laws: eg *Electronic Transactions (Victoria) Act* 2000 (Vic), see esp s 13.

<sup>170</sup> For a discussion of the negotiations toward the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children done at The Hague on 19 October 1996, [1996] ATSD 4416 see Fitzgerald and Fitzgerald, *cyberlaw*, (2002) at 198-215. See esp Art 10 at 202.

<sup>171</sup> eg *Family Law Amendment (Child Protection Convention) Act* 2002 (Cth), implementing the ratification of the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children done at The Hague on 19 October 1996, [1996] ATSD 4416.

The place of the wrong and the applicable law

139 *The applicable test:* The appellant then submitted that, even if a single publication rule were not adopted for defamatory publications on the Internet by reference to its special features, the result that it sought still followed from an existing principle of Australian private international law concerning the place of wrongs that have connections with two or more jurisdictions. In particular, the appellant argued that, in such circumstances, the applicable test obliged a court to look "over the series of events constituting [the tort] and ask the question, where in substance did this cause of action arise?"<sup>172</sup>

140 The issue of the test for localising a tort, particularly in situations such as the present where the cause of action has connection with more than one jurisdiction, did not need to be resolved by this Court either in *Pfeiffer* or in *Zhang*<sup>173</sup>. Simply adopting the law of the place of the wrong as the applicable law in international tort claims does not answer that question. It is not the end of the inquiry, it is merely the beginning. It leads immediately to the additional question of identifying the place of the wrong. In *Pfeiffer*, all of the elements of the cause of action were in the same place. In *Zhang*, some elements occurred in France (design and manufacture of the motor car) while some in New Caledonia (the accident itself), however both these jurisdictions were governed by French law. While the law of the place of the wrong was adopted as a simple rule which can be applied with certainty and predictability<sup>174</sup>, this appeal illustrates the fact that much controversy can exist in relation to the proper identification of where the place of the wrong is.

141 *The parties' arguments:* The appellant urged that the test from *Distillers Co (Biochemicals) Ltd v Thompson*<sup>175</sup> provided the correct approach to resolving the foregoing issue. This was so because it was said to involve a process of judicial evaluation of factors that the parties could not easily manipulate, and therefore it could be said to avoid many of the problems discerned in the alternative criteria propounded, such as the place of uploading on the Internet or the place of the last exercise of control by the publisher.

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**172** *Distillers* [1971] AC 458 at 468; *Voth* (1990) 171 CLR 538 at 567; cf *Davis v Costa-Gavras* 580 F Supp 1082 (1984).

**173** cf *Pfeiffer* (2000) 203 CLR 503 at 563 [158].

**174** *Zhang* (2002) 76 ALJR 551 at 564 [66], cf 573 [115]; 187 ALR 1 at 18, cf 31. Also *Pfeiffer* (2000) 203 CLR 503 at 528 [44], 539 [83], 555 [136].

**175** [1971] AC 458 at 468. Reference was also made to the earlier case of *Jackson v Spittall* (1870) LR 5 CP 542.

142 The judgment for the Privy Council in *Distillers*, on appeal from New South Wales, before all such Australian appeals were finally abolished in 1986, was delivered by Lord Pearson. After examining a number of alternative ways of answering "where in substance did the cause of action arise", his Lordship expressed a preference for identifying the locality of the tort as the place where "the act on the part of the defendant which gives the plaintiff his cause of complaint"<sup>176</sup> occurred. In *Voth*, this Court applied Lord Pearson's test from *Distillers* in answering the question whether the tort alleged was a "foreign tort"<sup>177</sup>.

143 Lord Pearson's formulation appears, at least on the face of things, to assist the appellant. This is because it focuses attention on the act of a defendant. Thus, it can be said that in this case the last act of the appellant that gave the respondent his cause of action took place at the point of uploading, which occurred in New Jersey. Furthermore, the appellant and the interveners submitted that the "substance" or "common sense" criterion applied to the subject matter of the present proceedings would clearly assign the place of the alleged wrong to New Jersey (or New York<sup>178</sup>). That was where the matter complained of was composed, finally edited and uploaded on the appellant's website to be made available all over the world. The place where the overwhelming majority of those who could be expected to (and did) have access to the matter resided, was also in the United States. As well, that was the place where any law addressed to changing conduct (and sanctioning a civil wrong) would enjoy its principal impact. It represented the place where the actors involved, who made the material available to the world would, normally, have access to legal advice and be subject to laws that they could reasonably be expected to ascertain and comply with.

144 The issue in *Distillers* was whether the plaintiff in that case had a "cause of action which arose within the jurisdiction" of the Supreme Court of New South Wales for the purposes of s 18(4) of the *Common Law Procedure Act 1899* (NSW)<sup>179</sup>. In that sense, the case was concerned with the first of the three issues

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**176** [1971] AC 458 at 467.

**177** *Voth* (1990) 171 CLR 538 at 566-570.

**178** This controversy is not immaterial or unforeseen. The reason the ALRC rejected the place of origin of the statement as the choice of law criterion was precisely because the material may be compiled in different legal jurisdictions: Australian Law Reform Commission, *Choice of Law*, Report No 58, (1992) at 57 [6.54].

**179** *Distillers* [1971] AC 458 at 463.

raised in this appeal, namely jurisdiction<sup>180</sup>. Neither *Distillers* nor *Voth* were addressed to the issue of identifying the applicable law.

145 In these proceedings, as I have already found, the long-arm jurisdiction of the Supreme Court of Victoria would be properly invoked by reference to r 7.01(1)(j) (because the respondent suffered damage in Victoria). Therefore, it was not essential or even necessary to localise the tort in Victoria for jurisdiction purposes<sup>181</sup>. In *David Syme & Co Ltd v Grey*<sup>182</sup> Gummow J suggested that there was no compelling reason why the "process of identification and localisation is to be performed in the same way in relation to both jurisdiction and choice of law". His Honour went on to cite the following passage from *Cheshire and North*<sup>183</sup>:

"It has always been questionable whether jurisdictional cases should be used as authority in the choice of law context ... [W]hilst a court may be prepared to hold that a tort is committed in several places for the purposes of a jurisdictional rule, it should insist on one single *locus delicti* in the choice of law context."

146 Even if one were to accept that *Distillers* provides the applicable test for identifying the place of the tort for choice of law purposes, in that case the Privy Council emphasised the need to characterise properly the act or wrong-doing of the defendant that gives rise to the plaintiff's cause of action. In *Distillers*, an Australian plaintiff sued the English manufacturer of the drug Distaval whose principal ingredient was Thalidomide, in the Supreme Court of New South Wales. The drug was manufactured in the United Kingdom, while the consequences in human loss and suffering were felt in many other countries. The alleged negligent act on the part of the defendant was not in the design or manufacture of the drug. Instead it was its unsuitability for pregnant women because of the potential to cause defects and deformities in the unborn foetus. The Full Court of the Supreme Court of New South Wales, held that it was not the manufacture of the drug (in England), but the placing of the drug on the New

<sup>180</sup> There being no equivalent long-arm rule to the Victorian r 7.01(1)(j) in NSW at the time. See Phegan, "Conflict of laws – Rules for service out of jurisdiction – Damage suffered in jurisdiction", (1983) 57 *Australian Law Journal* 471 at 471.

<sup>181</sup> Whether or not the tort is local may bear upon the issue of whether the Victorian forum is convenient.

<sup>182</sup> (1992) 38 FCR 303 at 314.

<sup>183</sup> *Cheshire and North, Private International Law*, 11th ed (1987) at 540; cf *Distillers* [1971] AC 458 at 469.

South Wales market without the appropriate warning that constituted the wrong<sup>184</sup>. The Privy Council affirmed that conclusion.

147 Similarly, in *Voth*, Lord Pearson's test was applied by this Court in the context of identifying whether New South Wales was a clearly inappropriate forum for the proceedings there in question. One of the relevant considerations in that case (which involved a statement, or more precisely an omission, made in Missouri but directed to an Australian company) was whether the alleged tort of negligent misstatement was a foreign or a local tort.

148 It may be argued that *Voth* is also helpful to the appellants. In that case this Court held that a negligent statement by the defendant made in Missouri directed at Australian companies that relied upon such statements in New South Wales (which was also where the loss resulted) was in fact a foreign tort. However, the Court there characterised the act of the defendant that gave rise to the plaintiff's cause of action as the provision of accountancy services to the plaintiff companies. That act was said to have been initiated and completed in Missouri<sup>185</sup>.

149 This brings me to the second problem of using the test from *Distillers* for the purposes of identifying the place of the tort for choice of law purposes in these proceedings. Both in *Distillers* and in *Voth*, the tort alleged was negligence. In the present proceedings, it is defamation. The act on part of the appellant (defendant) complained of is the publication of material that allegedly damaged the respondent's reputation, not the making of a negligent statement. Formulating the act in this way brings attention back to the place of publication, which, as I have held, included Victoria.

150 Even if, for the purposes of the choice of law rule in *Zhang*, the right approach to localisation of the tort is "when the tort is complete, to look back over the series of events constituting it and ask the question, where in substance did this cause of action arise?"<sup>186</sup>, I agree that no single overly-generalised criterion such as the place of injury or damage, or the place where the defendant acted would be appropriate for identifying the place of the wrong in all actions of tort. Rather, the place of the wrong needs to be ascertained in a principled fashion, based on an analysis of the relevant legal issues in view of the rights, interests and legitimate expectations of the parties.

<sup>184</sup> See *Distillers* [1971] AC 458 at 465-466.

<sup>185</sup> *Voth* (1990) 171 CLR 538 at 569.

<sup>186</sup> *Distillers* [1971] AC 458 at 468; see also the discussion by the Court of Appeal in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 at 441-447.

151 In a cause of action framed in defamation, the publication of the material which damages the reputation of the plaintiff is essential. Merely creating and making the material available is insufficient. The material has to be accessed or communicated in a jurisdiction where the plaintiff has a reputation. That will usually be the place where the plaintiff is resident. Unlike product liability or some other negligence claims, damage to reputation cannot occur "fortuitously" in a place outside of the defendant's contemplation<sup>187</sup>. Where a person or corporation publishes material which is potentially defamatory to another, to ask the publisher to be cognisant of the defamation laws of the place where the person resides and has a reputation is not to impose on the publisher an excessive burden. At least it is not to do so where the potential damage to reputation is substantial and the risks of being sued are commensurately real. Publishers in the United States are well aware that few, if any, other jurisdictions in the world observe the approach to the vindication of reputation adopted by the law in that country.

152 The foregoing approach may pose problems, particularly in cases where the plaintiff has a substantial reputation in more than one legal jurisdiction and seeks to recover for the damage in all such jurisdictions in a single proceeding. In such a case, potential liability in defamation for the publication of material relating to such a person on the Internet may indeed have a chilling effect on free speech merely because one of those jurisdictions has more restrictive defamation laws than the others. This approach could subject Australian defendants to the more restrictive defamation laws of foreign jurisdictions<sup>188</sup>. However, such problems are the result of the absence of uniformity in defamation laws, combined with an ability to access and broadcast material across national boundaries (which is not limited to the Internet) and the absence of international treaties or reciprocal laws to govern those issues. Problems of a similar nature will arise whatever test is adopted for choice of law purposes unless this Court were to revert to a parochial approach of answering all questions in proceedings properly founded in an Australian forum by reference only to the law of that forum.

153 *Conclusion:* The present case does not present an acute example of the foregoing difficulties. To the knowledge of the appellant, the respondent

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<sup>187</sup> This was Lord Pearson's concern in *Distillers* [1971] AC 458 at 468.

<sup>188</sup> This was the reason why the United Kingdom Parliament maintained the common law double actionability rule from *Phillips v Eyre* [1870] LR 6 QB 1 in actions for defamation, despite abolishing it in other tort claims: *Private International Law (Miscellaneous Provisions) Act 1995* (UK), ss 9(3) and 13. For the background see Clarkson and Hill, *Jaffey on the Conflict of Laws*, (1997) at 259-260.

ordinarily resided in Victoria. He had his business address there. He was an officer there of several companies listed on the Australian Stock Exchange. He was prominent in the local Jewish (Lubavitcher) community. He was also well known there for charitable and sporting interests.

154 True, some readers of *Barron's Online*, or *Barron's* magazine with access to the appellant's website in New Jersey (or in New York), would have known of the respondent. Arguably, an action based on the tort of defamation could therefore also be brought in those jurisdictions of the United States. However, in this case it could not be suggested that the respondent had resorted to Victoria only in order to invoke the process of its courts or in an exercise of forum shopping. So far as damage to his reputation was concerned, Victoria, as the place of his residence, was where most such damage would be done, rather than amongst business, religious or other acquaintances in North America or with the very large number of strangers there who might read about the respondent in the appellant's Internet publications.

155 Importantly, in the proceedings before the primary judge the respondent confined his claim to the recovery of damages and the vindication of his reputation in Victoria. He also undertook not to bring proceedings in any other place. The conclusion is therefore overwhelming that the proceedings in the Supreme Court of Victoria were based on a local cause of action, and the applicable law in those proceedings would be the defamation law of Victoria. It follows that no error has been shown in the conclusions of the primary judge in this respect.

#### The Victorian court as a convenient forum

156 *The applicable test:* The appellant finally challenged the primary judge's conclusion concerning the provision of relief pursuant to r 7.05(2)(b). That rule permits the Supreme Court of Victoria to stay proceedings such as the present on the ground "that Victoria is not a convenient forum for the trial of the proceeding".

157 I have made it clear in earlier cases that I prefer the expression of the common law on this question in the terms adopted by the House of Lords in England in *Spiliada Maritime Corp v Cansulex Ltd*<sup>189</sup>. In my view, the issue is (as the terms of the Victorian rule suggest) whether the court in which the proceedings are pending is the natural forum for the trial or whether there is another forum that is "more appropriate"<sup>190</sup>. However, although the formulation

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<sup>189</sup> [1987] AC 460 at 478; cf *Oceanic Sunline Special Shipping Co Inc v Fay* (1987) 8 NSWLR 242 at 258-262. See *Voth v Manildra Flour Mills Pty Ltd* (1989) 15 NSWLR 513 at 533-535.

<sup>190</sup> *Zhang* (2002) 76 ALJR 551 at 568 [94]; 187 ALR 1 at 24.

by the House of Lords has found favour in most Commonwealth jurisdictions, and is more harmonious with the rules of public international law respectful of comity between nations and their courts, I must accept that this Court has adopted an approach more defensive of the exercise of properly invoked jurisdiction by Australian courts<sup>191</sup>.

158 In my view it is a mistake to re-express the rule, having been made under statutory power<sup>192</sup>, in terms of past common law formulae. In this respect, I adhere to the view that I expressed in *Zhang*<sup>193</sup>. However, upon this point, my opinion (shared by Callinan J<sup>194</sup>) was a minority one. The majority of this Court concluded, in respect of the equivalent provision in the Supreme Court Rules 1970 (NSW) that, notwithstanding the language of the rule in that case, the test to be applied was whether the party objecting to the forum had shown that the court selected was a "clearly inappropriate forum"<sup>195</sup>.

159 The relevant rules of the Supreme Court of Victoria are somewhat different from those of the Supreme Court of New South Wales considered in *Zhang*. However, the divergence is presently immaterial. In resolving the convenient forum issue, the primary judge was bound to apply the "clearly inappropriate forum" test<sup>196</sup>.

160 The primary judge accepted, and applied, this Court's approach<sup>197</sup>. There was therefore no error of principle in his consideration of the third issue. In accordance with established appellate principles, this Court is not authorised to disturb a discretionary conclusion on the convenient forum issue, unless error is shown that warrants such disturbance. There was no error in the identification of the applicable test.

161 *The parties' arguments:* The principal argument of the appellant on this last point of challenge rested on its contention that error had occurred in the earlier legal mistakes concerning jurisdiction and the identification of the

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**191** *Zhang* (2002) 76 ALJR 551 at 568 [93]-[95]; 187 ALR 1 at 24-25.

**192** *Supreme Court Act* 1986 (Vic), s 25.

**193** (2002) 76 ALJR 551 at 579 [143]-[144]; 187 ALR 1 at 39-40.

**194** (2002) 76 ALJR 551 at 591-592 [193]; 187 ALR 1 at 56-57.

**195** (2002) 76 ALJR 551 at 556-557 [24]-[25]; 187 ALR 1 at 8-9 (emphasis added).

**196** cf *Voth* (1990) 171 CLR 538 at 564-565.

**197** *Gutnick* [2001] VSC 305 at [102]-[104].

applicable law. The appellant criticised the weight given by the primary judge to the undertaking of the respondent not to sue elsewhere and disclaiming any damages in any other place<sup>198</sup>. However, the essential ground for the disturbance of the primary judge's conclusion was that the applicable jurisdiction and law of the wrong alleged was either New Jersey or New York in the United States.

162 When those submissions are rejected, as I have held they properly were, the foundation for interfering in the conclusion at first instance is knocked away. In *Oceanic Sun Line Special Shipping Company Inc v Fay*<sup>199</sup>, Gaudron J remarked that "the selected forum should not be seen as an inappropriate forum if it is fairly arguable that the substantive law of the forum is applicable" to the proceedings. In *Voth*, this Court accepted that the applicability to the proceedings of the substantive law of the forum was a very significant, although not decisive, factor in the exercise of the Court's discretion on the convenient forum issue<sup>200</sup>.

163 *Conclusion:* Once jurisdiction and the place of the wrong are established in Victoria, the submission of error on the convenient forum issue becomes much more difficult to accept<sup>201</sup>. The primary judge applied the correct test. The present proceedings were founded on a local cause of action, and it is more than just "arguable" that the applicable law was the law of Victoria. No basis has been shown to disturb the conclusion that the proceedings in Victoria should not be stayed on the ground that the Supreme Court of that State was not a clearly inappropriate forum for the trial of those proceedings. Even if I were of a different inclination in the balance of evidentiary considerations, I would not be entitled to give effect to that view in the absence of a demonstrated error. None has been shown. It follows that the appeal fails.

The outcome: a result contrary to intuition

164 The dismissal of the appeal does not represent a wholly satisfactory outcome. Intuition suggests that the remarkable features of the Internet (which is still changing and expanding) makes it more than simply another medium of human communication. It is indeed a revolutionary leap in the distribution of information, including about the reputation of individuals. It is a medium that overwhelmingly benefits humanity, advancing as it does the human right of access to information and to free expression. But the human right to protection

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**198** *Gutnick* [2001] VSC 305 at [130].

**199** (1988) 165 CLR 197 at 266.

**200** (1990) 171 CLR 538 at 566.

**201** *Berezovsky v Michaels* [2000] 1 WLR 1004 at 1019-1020; [2000] 2 All ER 986 at 1000-1001.

by law for the reputation and honour of individuals must also be defended to the extent that the law provides.

165 The notion that those who publish defamatory material on the Internet are answerable before the courts of any nation where the damage to reputation has occurred, such as in the jurisdiction where the complaining party resides, presents difficulties: technological, legal and practical. It is true that the law of Australia provides protections against some of those difficulties which, in appropriate cases, will obviate or diminish the inconvenience of distant liability. Moreover, the spectre of "global" liability should not be exaggerated. Apart from anything else, the costs and practicalities of bringing proceedings against a foreign publisher will usually be a sufficient impediment to discourage even the most intrepid of litigants. Further, in many cases of this kind, where the publisher is said to have no presence or assets in the jurisdiction, it may choose simply to ignore the proceedings. It may save its contest to the courts of its own jurisdiction until an attempt is later made to enforce there the judgment obtained in the foreign trial. It may do this especially if that judgment was secured by the application of laws, the enforcement of which would be regarded as unconstitutional or otherwise offensive to a different legal culture.

166 However, such results are still less than wholly satisfactory. They appear to warrant national legislative attention and to require international discussion in a forum as global as the Internet itself<sup>202</sup>. In default of local legislation and international agreement, there are limits on the extent to which national courts can provide radical solutions that would oblige a major overhaul of longstanding legal doctrine in the field of defamation law. Where large changes to settled law are involved, in an area as sensitive as the law of defamation, it should cause no surprise when the courts decline the invitation to solve problems that others, in a much better position to devise solutions, have neglected to repair.

#### Order

167 The appeal should be dismissed with costs.

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<sup>202</sup> Robertson & Nicol at 102.

168 CALLINAN J. The question which this case raises is whether the development of the Internet calls for a radical shift in the law of defamation.

#### Facts

169 The appellant publishes for profit the *Wall Street Journal*, a daily financial newspaper, and *Barron's*, a weekly magazine, which is also concerned with financial matters. The edition of *Barron's* dated Monday, 30 October 2000, but which was available publicly two days earlier, contained an article by a journalist working for the appellant, Bill Alpert, headed "Unholy Gains" and sub-headed "When stock promoters cross paths with religious charities, investors had best be on guard." A large photograph of the respondent appeared on the first page of the magazine. The article, of about 7,000 words, also contained photographs of other persons including Mr Nachum Goldberg. *Barron's* has a large circulation in the United States. Altogether, it was likely that 305,563 copies of the magazine were sold. A small number of them entered Australia, some of which were sold in Victoria. *Barron's* also put the article on the Internet. The relevant article appeared on the appellant's website on 29 October 2000. Subscribers who paid an annual fee were able to obtain access to that site at its address wsj.com. The site had about 550,000 subscribers. The appellant has an office that it calls a "corporate campus" in New Jersey where it has a web server on which its website is stored. It was conceded by the appellant that it could not identify the addresses of all of its subscribers but that 1,700 or so of them paid subscription fees by credit cards whose holders had Australian addresses.

170 The respondent is a businessman. He is involved in philanthropic, political, sporting and religious affairs. His business activities have extended beyond Australia. He lives in Victoria and has many friends and associates there. He is the chairman of a corporation, shares in which are traded in the United States. He has sought investment in that corporation from investors in the United States.

171 It is unnecessary to set out the whole of the article. The first three paragraphs sketch some of the interests of the respondent. The fourth states that some of his business dealings with religious charities raise "uncomfortable questions"<sup>203</sup>. The author then uses some language that the media have appropriated from the law courts, implying that a balanced trial with equal opportunity to participate by all concerned has taken place: that a "*Barron's* investigation found that several charities traded heavily in stocks promoted by Gutnick."<sup>204</sup> (emphasis added) The article associates the respondent with Mr

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<sup>203</sup> Alpert, "Unholy Gains", *Barron's*, 30 October 2000 at 24.

<sup>204</sup> Alpert, "Unholy Gains", *Barron's*, 30 October 2000 at 24.

Nachum Goldberg who is apparently a convicted tax evader and another person awaiting trial for stock manipulation in New York.

172 A detailed discussion of various of the respondent's religious and political activities and business dealings follows. One paragraph of the article claims that an intercepted communication from the convicted tax evader was taken by Australian prosecutors to mean that the respondent was the former's "biggest money-laundering customer"<sup>205</sup>.

The proceedings in the Supreme Court of Victoria

173 The respondent brought proceedings against the appellant in defamation in the Supreme Court of Victoria. After an amendment of his statement of claim he alleged publication both online and by hard copies sold in Australia. He pleaded that the article meant, and was understood to mean that he:

- "(a) was a customer of Nachum Goldberg who had recently been imprisoned for tax evasion and money laundering; and
- (b) was Nachum Goldberg's biggest customer; and
- (c) was masquerading as a reputable citizen when he was, in fact, a tax evader who had laundered large amounts of money through Nachum Goldberg; and
- (d) had bought Nachum Goldberg's silence so as to conceal his identity as one of Goldberg's customers."

174 He also claimed punitive damages in reliance upon the following allegations:

- "(a) The [appellant] is a large corporation listed on the New York Stock Exchange with its headquarters at 200 Liberty Street, New York. The [appellant's] principal area of business is publication. The [appellant] publishes, amongst other things, 'Barron's' and the 'Wall Street Journal', both in print and as on-line services. In 1999 the [appellant's] revenue was US\$2 billion and its net income was US\$272 million.
- (b) At all relevant times the [appellant] published the internet service 'Barron's Online' as a subscription service for profit and published its journal 'Barron's' for profit.

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<sup>205</sup> Alpert, "Unholy Gains", *Barron's*, 30 October 2000 at 30.

- (c) The imputations alleged ... were seriously defamatory of the [respondent].
- (d) The [appellant] published the words without any honest belief in the truth of the imputations alleged, ... alternatively, recklessly, not caring whether the imputations were true or false.
- (e) The [appellant] published the words for commercial advantage and in order to attract readers to its subscription services and journal and in circumstances where the commercial advantage to the [appellant] outweighed the risk that as a result of defaming the [respondent] the [appellant] might have to pay damages to the [respondent].
- (f) The [appellant] has failed and refused to apologise to the [respondent]."

175 Another paragraph of the respondent's pleading contained the following allegations:

"The publication of the article in Victoria ... was the intended consequence, alternatively the natural and probable consequence of the following acts of the [appellant] –

- (a) securing subscriptions to its wsj.com and Barron's Online websites from persons resident within Victoria;
- (b) writing the article or causing the article to be written;
- (c) editing the article;
- (d) formatting the article into a web page file for Barron's Online;
- (e) transferring the file containing the article from New York to the [appellant's] server in South Brunswick, New Jersey;
- (f) placing the file containing the article onto the [appellant's] web servers in New Jersey;
- (g) creating links to the article (both direct and indirect) on the wsj.com and Barron's Online websites; and
- (h) thereby making the article available for downloading in Victoria by the [appellant's] subscribers from time to time to the wsj.com and Barron's Online websites."

176 On service of the writ and statement of claim in the United States, the appellant entered a conditional appearance and applied to have service of the writ



and statement of claim set aside, or alternatively, to have the respondent's action permanently stayed. The appellant undertook, in the event of a stay of the Victorian action, to raise no limitations or jurisdictional objections there if the respondent were to sue in the United States. The application was supported by copious affidavit material and oral evidence on behalf of the appellant describing the nature of the Internet and access to it, and the law of New Jersey and elsewhere in the United States, relevant aspects of which were referred to by Hedigan J who heard the applicant's application.

177 The primary judge summarized the appellant's arguments: that publication was effected in New Jersey and not Victoria; that no act was committed in Victoria to ground service of Victorian proceedings out of Victoria without an order of the Court pursuant to Order 7 of the Rules of Court of that State; and, thirdly that Victoria was not a convenient forum for the trial of the respondent's action.

178 His Honour rejected all of the appellant's arguments and dismissed its application. The appellant applied for leave to appeal to the Court of Appeal of Victoria. Buchanan JA and O'Bryan AJA who constituted that Court also rejected the appellant's arguments. Their Honours said:

"The authorities establish that defamatory material is published at the time and in the place where it is made manifest in a form capable of being comprehended by a third party. That is sufficient to dispose of this case, although we think that publication is not constituted by delivery without comprehension. The principle has been applied to speech, writing, television, radio and telephone. For the most part those authorities pre-date the internet, but in our view the established principles are appropriate to this new form of communication.

In our view that conclusion largely disposes of the submissions of the applicant based upon O 7. The service of the writ out of Australia was justified by paragraphs (i) and (j) of R 7.01(1). The proceeding is founded upon a tort committed within Victoria and is brought in respect of damage suffered in Victoria. The later amendment of the statement of claim after the writ was served to plead defamation resulting from the publication of printed copies of the magazine in Victoria could not detract from the force of the unamended allegations based upon the publication of the article by means of the internet, which had earlier rendered service out of Victoria valid.

As to the plea of *forum non conveniens*, we perceive no appellable error in the exercise of the judge's discretion. Indeed we think the decision was plainly correct. Publication took place in Victoria. The [respondent] resides and carries on business in Victoria. He wishes to restore his reputation in Victoria, and has undertaken to sue in no other

place. The illegal activities in which the [respondent] is said to have participated took place principally in Victoria. The [respondent] has sued in respect of a section of the article which stands by itself. The [appellant] may well try to broaden the debate. However, a defence based upon *Polly Peck v Trelford*<sup>206</sup> as that decision has been interpreted in *David Syme v Hore-Lacy*<sup>207</sup> is hardly likely to lead to a case principally concerned with events in the United States of America."

179 Leave was therefore refused on the basis that the trial judge's decision was plainly correct.

#### The appeal to this Court

180 In this Court, the appellant repeated the arguments rehearsed in the courts below. The Internet, which is no more than a means of communication by a set of interconnected computers, was described, not very convincingly, as a communications system entirely different from pre-existing technology. The nature and operation of the Internet and the World Wide Web were explained by two highly qualified experts, Mr Barry Hammond BSc, Internet consultant to leading Australian companies, and Dr Roger Clarke, Visiting Fellow (formerly Reader in Information Systems) in the Computer Science Department, Australian National University. They described the Internet as a set of interconnections among computers all over the world to facilitate an exchange of messages. Using their computers, people can communicate with one another, and gain access to information. They claimed that it was a unique telecommunications system defying analogy with pre-existing technology. The description however, by the appellant of the server as passive is inaccurate. It also overlooks the legal significance, indeed the essential role of all participants in, and enablers of, the dissemination of defamatory matter which is to be found in longstanding jurisprudence of this country. In *Webb v Bloch*<sup>208</sup> Isaacs J said this:

"The meaning of 'publication' is well described in *Folkard on Slander and Libel*<sup>209</sup>, in these words: "The term *published* is the proper and technical term to be used in the case of libel, *without reference to the precise degree* in which the defendant has been instrumental to such publication; since, *if he has intentionally lent his assistance to its existence for the purpose of being published*, his instrumentality is evidence to show

<sup>206</sup> [1986] QB 1000.

<sup>207</sup> (2000) 1 VR 667.

<sup>208</sup> (1928) 41 CLR 331 at 363-364.

<sup>209</sup> 5th ed (1891) at 439.

a publication by him.' In *Starkie on the Law of Slander and Libel*<sup>210</sup>, it is said: 'The declaration generally avers, that the defendant published and caused to be published; but the latter words seem to be perfectly unnecessary either in a civil or criminal proceeding; in civil proceedings, *the principal is to all purposes identified with the agent* employed by him to do any specific act' .... In *Parkes v Prescott*<sup>211</sup>, Giffard QC quotes from the second edition of *Starkie*: 'All who are in any degree accessory to the publication of a libel, and by any means whatever conduce to the publication, are to be considered as *principals in the act of publication*: thus if one suggest illegal matter in order that another may write or print it, and that a third may publish it, all are equally amenable for the act of publication when it has been so effected.' In *R v Paine*<sup>212</sup> it is held: 'If one repeat and another write a libel, and a third approve what is wrote, they are all makers of it; *for all persons who concur, and show their assent or approbation to do an unlawful act, are guilty*: so that murdering a man's reputation by a scandalous libel may be compared to murdering his person; for if several are assisting and encouraging a man in the act, though the stroke was given by one, yet all are guilty of homicide.'" (original emphasis)

181 A publisher, particularly one carrying on the business of publishing, does not act to put matter on the Internet in order for it to reach a small target. It is its ubiquity which is one of the main attractions to users of it. And any person who gains access to the Internet does so by taking an initiative to gain access to it in a manner analogous to the purchase or other acquisition of a newspaper, in order to read it.

182 The appellant contends that the Internet is not "pushed" into any particular jurisdiction. The contention ignores the commercial and social realities that greater publication produces both greater profit and broader persuasion. Indeed, the appellant's arguments would suggest that all of its objectives were exclusively high-minded. Revenues from increased advertising and circulation, and the word "profit" never passed the appellant's advocate's lips. It may well be that "firewalls" to deny access to the unintended or non-subscribing reader are at present perhaps imperfect. So be it. Publishers are not obliged to publish on the Internet. If the potential reach is uncontrollable then the greater the need to exercise care in publication.

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**210** (1830), vol 2 at 29.

**211** (1869) LR 4 Ex 169 at 173.

**212** (1696) 5 Mod 163 at 167 [87 ER 584 at 587].

183 The appellant adopted the criticism of the application of traditional rules relating to publication on the Internet made by Dicey and Morris in *The Conflict of Laws*<sup>213</sup>, that to localize a defamatory statement is "somewhat unrealistic", and that "[i]t might therefore, be more appropriate to regard the place of commission, in such cases, as the country in which, in the light of all the circumstances of the case, the substantial events which give rise to the claim have occurred."

184 I disagree. The most important event so far as defamation is concerned is the infliction of the damage, and that occurs at the place (or the places) where the defamation is comprehended. Statements made on the Internet are neither more nor less "localized" than statements made in any other media or by other processes. Newspapers have always been circulated in many places. The reach of radio and television is limited only by the capacity of the technology to transmit and hear or view them, which already, and for many years, has extended beyond any one country. In any event, a "publisher", whether on the Internet or otherwise, will be likely to sustain only nominal, or no damages at all for publication of defamatory matter in a jurisdiction in which a person defamed neither lives, has any interests, nor in which he or she has no reputation to vindicate. Furthermore, it may be that an action inadvisably brought in such a jurisdiction might be met by a finding that the jurisdiction is not a convenient or appropriate forum<sup>214</sup>.

185 The appellant argued that the respondent, having set out to make money in the United States, must expect to be subjected to lawful scrutiny in that country. No doubt the fact of lawful scrutiny in that country, if such the publication was, would provide a defence to the appellant to defamation proceedings there. That fact does not however have anything to say about unlawful publication in this country.

186 The Court was much pressed with arguments about the ubiquity of the Internet. That ubiquity, it was said, distinguished the Internet from practically any other form of human endeavour. Implicit in the appellant's assertions was more than a suggestion that any attempt to control, regulate, or even inhibit its operation, no matter the irresponsibility or malevolence of a user, would be futile, and that therefore no jurisdiction should trouble to try to do so. I would reject these claims. Some brands of motor cars are ubiquitous but their manufacturers, if they wish to sell them in different jurisdictions must comply with the laws and standards of those jurisdictions. There is nothing unique about

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**213** 13th ed (2000) at 1568 [35-137].

**214** *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458 at 466 and contra, *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, which posits the "more appropriate forum" test.

multinational business, and it is in that that this appellant chooses to be engaged. If people wish to do business in, or indeed travel to, or live in, or utilise the infrastructure of different countries, they can hardly expect to be absolved from compliance with the laws of those countries. The fact that publication might occur everywhere does not mean that it occurs nowhere. Multiple publication in different jurisdictions is certainly no novelty in a federation such as Australia.

187 The appellant invited the Court to prefer, in effect, a United States jurisdiction to an Australian one because the latter would deprive it of the Constitutional protection available in the former. This was the essence of one of the respondent's arguments in *Regie National des Usines Renault SA v Zhang*<sup>215</sup>, that he might be deprived of legitimate juridical advantages available to a plaintiff in New South Wales if he were compelled to sue elsewhere. I do not think my opinion there, to which I would adhere here, was affected by my dissent in that case. In *Zhang* I said<sup>216</sup>:

"... it is erroneous to give, as the Court of Appeal did, undue weight to a perception of advantage to the respondent by allowing the proceedings in New South Wales to continue, rather than to assess the advantages and disadvantages accruing to both sides in each jurisdiction in considering whether New South Wales was an inappropriate one."

188 Australian defamation law, and, for that matter, English defamation law also, and the policy underlying them are different from those of the United States. There is no doubt that the latter leans heavily, some might say far too heavily, in favour of defendants. Nor has the metaphor for free speech developed by Holmes J in a series of cases and beginning with his dissenting judgment in

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**215** (2002) 76 ALJR 551; 187 ALR 1.

**216** *Regie National des Usines Renault SA v Zhang* (2002) 76 ALJR 551 at 594 [206]; 187 ALR 1 at 59.

*Abrams v United States*<sup>217</sup>, a marketplace of ideas, escaped criticism in the United States. Writing in *The New Criterion*, Robert H. Bork pointed out<sup>218</sup>:

"The market for ideas has few of the self-correcting features of the market for goods and services."

189 Later he added<sup>219</sup>:

"In a word, what the Constitution says, as interpreted by today's Court, is that one idea *is* as good as another so far as the law is concerned; only the omnipotent individual may judge." (original emphasis)

190 Quite deliberately, and in my opinion rightly so, Australian law places real value on reputation, and views with scepticism claims that it unduly inhibits freedom of discourse. In my opinion the law with respect to privilege in this country, now and historically, provides an appropriate balance which does justice to both a publisher and the subject of a publication.

191 The appellant acknowledges that in order to succeed it has to persuade this Court that it should depart from a line of authority beginning with the *Duke of Brunswick's case*<sup>220</sup> in 1849 and applied consistently since that year. The departure, it is submitted, is justified by this consideration:

"In the context of global dissemination of information by a technology which has no clear or close comparison with any other, a publication rule which does not expose publishers to liability in every jurisdiction, or at least in multiple jurisdictions, but which nonetheless provides plaintiffs

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**217** *Abrams v United States* 250 US 616 (1919). See also *Gitlow v New York* 268 US 652 (1925). In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 76 ALJR 1 at 55 [261]; 185 ALR 1 at 75 I said:

"The expression 'marketplace of ideas' has been used as a justification for 'free speech', as if the two expressions were synonymous. The concept of a marketplace is of a place to which access is readily available to everyone. The notion of a 'marketplace of ideas' conveys an idea of an opportunity for everyone with ideas to put these into currency for entry into the public domain, and for them to be exchanged for other ideas. The concentration of media control and the absence of rights of reply to which I have referred deny these opportunities in practice." (footnotes omitted)

**218** Bork, "Adversary Jurisprudence", *The New Criterion*, May 2002 at 7.

**219** Bork, "Adversary Jurisprudence", *The New Criterion*, May 2002 at 10.

**220** *Duke of Brunswick v Harmer* (1849) 14 QB 185 [117 ER 75].

with access to a court which can compensate them for all damage suffered, strikes the most acceptable balance."

192 I reject this submission. Comparisons can, as I have already exemplified, readily be made. If a publisher publishes in a multiplicity of jurisdictions it should understand, and must accept, that it runs the risk of liability in those jurisdictions in which the publication is not lawful and it inflicts damage.

193 The appellant sought to equate its placement of matter on the Internet with the placement of books on library shelves. The comparison is, self-evidently, not well made. In addition, it overlooks that, in respect of booksellers, libraries and other innocent enablers, there will usually be a defence of innocent dissemination<sup>221</sup>. A "subordinate distributor" who is "innocent" is not taken to have published the defamatory material, and is therefore not liable in a defamation action at common law or under the Codes. A subordinate distributor will generally be treated as "innocent" if the subordinate distributor establishes that:

- (1) the subordinate distributor did not know that the publication contained the defamatory material complained of;
- (2) the subordinate distributor did not know that the publication was of a character likely to contain defamatory material; and
- (3) such want of knowledge was not due to negligence on the part of the subordinate distributor.

194 Whether such a defence may be available to publishers on the Internet will depend upon the particular facts and circumstances of the case, but it seems rather unlikely that a person in the position of the appellant here could ever persuasively mount it.

195 The decision at first instance was criticised by the appellant on the basis that his Honour erroneously treated the tort as a Victorian domestic tort by regarding the place of the last event that completed the tort as conclusive, instead of looking over the series of events constituting it and asking the question: where in substance did the cause of action arise?

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**221** See, for example *Defamation Act 1889* (Q), ss 25-27; *Defamation Act 1957* (Tas), ss 26, 27; *Defamation Act 1974* (NSW), s 36; *Emmens v Pottle* (1885) 16 QBD 354 at 357 per Lord Esher MR, at 358 per Bowen LJ; *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 585-586 per Brennan CJ, Dawson and Toohey JJ, at 592-593 per Gaudron J, at 618-619 per Gummow J.

196 The submission repeats the language of Lord Pearson delivering the judgment of their Lordships in *Distillers Co (Biochemicals) Ltd v Thompson*<sup>222</sup> which was largely adopted in this Court in *Voth v Manildra Flour Mills Pty Ltd*<sup>223</sup>. That language was however used in a different context, and has no application to the rules relating to publication of defamatory matter which are specific to that tort, have developed over a long period, and have frequently been the subject of detailed legislation.

197 Each publication under current law gives rise to a separate cause of action<sup>224</sup>. This is entrenched in Australian and English law. The principle was recently confirmed by the English Court of Appeal<sup>225</sup>. Samuels JA rightly observed in *Australian Broadcasting Corporation v Waterhouse*<sup>226</sup>, a single publication rule could only be introduced throughout Australia by statute.

198 As Hedigan J held, the torts of libel and slander are committed when and where comprehension of the defamatory matter occurs<sup>227</sup>. The rules have been universally applied to publications by spoken word<sup>228</sup>, in writing<sup>229</sup>, on television<sup>230</sup>, by radio transmission<sup>231</sup>, over the telephone<sup>232</sup> or over the

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**222** [1971] AC 458 at 467-468.

**223** (1990) 171 CLR 538 at 567.

**224** *Duke of Brunswick v Harmer* (1849) 14 QB 185 [117 ER 75]; *Pullman v Hill & Co* [1891] 1 QB 524 at 527; *McLean v David Syme & Co Ltd* (1970) 72 SR (NSW) 513 at 520, 528; *Emmerton v University of Sydney* [1970] 2 NSWLR 633 at 634, 639; *Toomey v Mirror Newspapers Ltd* (1985) 1 NSWLR 173 at 177; *Australian Broadcasting Corporation v Waterhouse* (1991) 25 NSWLR 519 at 535; *Berezovsky v Michaels* [2000] 1 WLR 1004 at 1012; [2002] 2 All ER 986 at 993; *Godfrey v Demon Internet Ltd* [2001] QB 201 at 208.

**225** *Louchansky v Times Newspapers Ltd (Nos 2-5)* [2002] QB 783.

**226** (1991) 25 NSWLR 519 at 537.

**227** *Webb v Bloch* (1928) 41 CLR 331; *Lee v Wilson & Mackinnon* (1934) 51 CLR 276; *Jones v Amalgamated Television Services* (1991) 23 NSWLR 364; *Beitzel v Crabb* [1992] 2 VR 121; *Gambrill v Schooley* 48 A 730 (1901).

**228** *Gambrill v Schooley* 48 A 730 (1901); *Fleetwood v Curle* (1620) Cro Jac 558 [79 ER 478]; *Jones v Davers* (1596) Cro Eliz 496 [78 ER 747]; *Price v Jenkins* (1601) Cro Eliz 865 [78 ER 1091]; *Amann v Damm* (1860) 8 CB(NS) 597 [141 ER 1300].

**229** *Bata v Bata* [1948] WN 366.

**230** *Gorton v Australian Broadcasting Commission* [1973] 1 ACTR 6; *Pindling v National Broadcasting Corp* (1985) 14 DLR (4th) 391.

Internet<sup>233</sup>. In *Browne v Dunn*<sup>234</sup> the House of Lords held that there was no publication of a defamatory petition to a person (Mrs Cook) who had signed but not read the petition.

199

The appellant's submission that publication occurs, or should henceforth be held to occur relevantly at one place, the place where the matter is provided, or first published, cannot withstand any reasonable test of certainty and fairness. If it were accepted, publishers would be free to manipulate the uploading and location of data so as to insulate themselves from liability in Australia<sup>235</sup>, or elsewhere: for example, by using a web server in a "defamation free jurisdiction" or, one in which the defamation laws are tilted decidedly towards defendants. Why would publishers, owing duties to their shareholders, to maximise profits, do otherwise? The place of "uploading" to a web server may have little or no relationship with the place where the matter is investigated, compiled or edited. Here, the State where the matter was uploaded was different from the State in which the article was edited. Matter may be stored on more than one web server, and with different web servers at different times. Different parts of a single web page may be stored on different web servers in different jurisdictions. Many publications in this country, whether by television, radio, newspaper or magazine originate in New South Wales. The result of the adoption of a rule of a single point of publication as submitted by the appellant, is that many publications in Victoria, South Australia, Tasmania, Western Australia and Queensland would be governed by the *Defamation Act* 1974 (NSW) which provides, in its present form, for a regime by no means commanding general acceptance throughout this country. Choice of law in defamation proceedings in this country raises a relatively simple question of identifying the place of publication as the place of comprehension: a readily ascertainable fact.

200

I agree with the respondent's submission that what the appellant seeks to do, is to impose upon Australian residents for the purposes of this and many other cases, an American legal hegemony in relation to Internet publications. The consequence, if the appellant's submission were to be accepted would be to confer upon one country, and one notably more benevolent to the commercial and other media than this one, an effective domain over the law of defamation, to the financial advantage of publishers in the United States, and the serious

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**231** *Jenner v Sun Oil Co Ltd* [1952] 2 DLR 526.

**232** *State ex rel Advanced Dictating Supply Inc v Dale* 524 P 2d 1404 (1974).

**233** *Godfrey v Demon Internet Ltd* [2001] QB 201.

**234** (1893) 6 R 67.

**235** Australian Law Reform Commission, *Choice of Law*, Report No 58, (1992) at 57 [6.54].

disadvantage of those unfortunate enough to be reputationally damaged outside the United States. A further consequence might be to place commercial publishers in this country at a disadvantage to commercial publishers in the United States.

201

There is another relevant consideration. The law of defamation has some elements in common with the law of injurious falsehood, copyright and contempt. With respect to the last, as Windeyer J in *Australian Consolidated Press Ltd v Morgan*<sup>236</sup> pointed out, "[t]he power [of punishing for contempt] has been not infrequently exercised in Australia in a salutary way against newspaper companies for publishing matter calculated to prejudice the fair trial of pending proceedings." It would be anomalous if an international publisher might be liable for contempt in this country but not in defamation.

202

Finally, Victoria is a clearly appropriate forum for the litigation of the respondent's claim to vindicate his reputation which has been attacked in Victoria, as well, plainly as elsewhere. For myself I would see no immediate reason why, if a person has been defamed in more than one jurisdiction, he or she, if so advised might not litigate the case in each of those jurisdictions. However, that issue does not arise here as the respondent has offered an undertaking to proceed in Victoria only. The proceedings should be neither stayed nor set aside.

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The appeal should be dismissed with costs.

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**236** (1964) 112 CLR 483 at 497.