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INTERNET DEFAMATION AND CHOICE OF LAW IN *DOW JONES & COMPANY INC. v. GUTNICK*

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This article focuses on choice of law in the context of Internet defamation with reference to a recent Australian High Court decision, *Dow Jones v. Gutnick*. The case raised a myriad of issues ranging from comparative defamation laws (and value systems) of the United States versus Australia, the meaning of "publication" and the need for Internet-specific legal reforms. These issues interact with and have an impact upon the choice of law problem. This article discusses the various alternatives for resolving the choice of law problem. It concludes by tentatively recommending some choice of law rules in the context of Internet defamation.

I. INTRODUCTION

This case started innocuously enough with a run-of-the-mill application by Gutnick in the Supreme Court of Victoria, Australia, to serve a writ on Dow Jones outside of Victoria. Dow Jones, the publisher of *Wall Street Journal* newspaper and *Barron's* magazine, operates a website known as WSJ.com on the World Wide Web. The website contains Barron's Online, which reproduces the printed edition of *Barron's* magazine. A particular edition of Barron's Online contained an article entitled "Unholy Gains". Gutnick claimed that the article had defamed him by alleging, *inter alia*, that he was a tax evader who had laundered large amounts of money. He also undertook to sue in respect of the damage to his reputation in Victoria *only*.

Dow Jones applied to set aside the service or, alternatively, to permanently stay Gutnick's action in the Supreme Court of Victoria, arguing that Victoria was clearly an inappropriate forum to hear the case. It was quite apparent from the judgment in *Dow Jones & Company Inc. v. Gutnick* that Dow Jones considered its own interests would be better served if the dispute

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were litigated in the United States of America and governed by the defamation law of the United States, which is relatively more pro-defendant than in Australia.[1]

The primary judge of the Supreme Court of Victoria (Hedigan J.) dismissed the application.[2] In response, Dow Jones applied for leave to appeal to the Court of Appeal of Victoria but its application was again dismissed. On further appeal, the seven judges of the High Court of Australia delivered four separate judgments,[3] but with the unanimous verdict that the appeal by Dow Jones be dismissed. In addition, the High Court of Australia opined that the applicable substantive law in the case was the law of Victoria.

Subsequent to the decision delivered by the High Court of Australia, Alpert (the American reporter for *Barron's* magazine) filed a writ with the United Nations Human Rights Commission claiming that the decision of the High Court of Australia had denied him the right of free speech pursuant to Article 19 of the International Covenant on Civil and Political Rights.[4] This has set up a "battle of sorts" between the defamation laws of the United States and those of Australia. As this case reinforces, the "battle-lines" in the law of defamation between the value of free speech and that of protecting one's reputation are constantly being drawn (and re-drawn). As these respective values underlying defamation laws differ markedly in the United States and Australia, the need to determine the appropriate substantive law (or, for that matter, the appropriate choice of law rules) applicable to the dispute becomes even more pronounced.

The focus of this article is choice of law in the context of Internet defamation. As complex issues arising from defamation in cyberspace continue to test the limits of the law,[5] the field of private international law (particularly, that relating to choice of law) must strive to develop logical, sensible and practicable (and, as will be argued, value-neutral) solutions or rules to guide potential participants in the ether world of cyberspace. This objective is even more imperative in situations where there is a fierce controversy between the substantive defamation laws of different countries (in the present case, the United States and Australia) which are premised on contrary value systems. Choice of law may also be important in determining whether the forum court has jurisdiction over the dispute. As will be seen, the case of

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1 (2002) 194 A.L.R. 433 [*Gutnick*]. See also Kirby J.'s judgment at paragraph 74.

2 *Gutnick v. Dow Jones & Co. Inc.* [2001] V.S.C. 305.

3 *Gutnick, supra* note 1. Gleeson C.J., McHugh, Gummow and Hayne JJ. delivered a joint judgment ("joint judgment"); and Gaudron J., Kirby J. and Callinan J. each delivered their own separate judgments.

4 See "Australian laws challenged at UN", dated 18 April 2003, online: The Sydney Morning Herald <http://www.smh.com.au/articles>.

5 See the recent English cases of *Harrods Limited v. Dow Jones & Company Inc.* [2003] E.W.H.C. 1162 (Queen's Bench Division) and *Reuben v. Time Inc.* [2003] E.W.H.C. 1430.

Dow Jones & Company Inc. v. Gutnick raised a myriad of issues ranging from human rights, the meaning of "publication" and the need for Internet-specific legal reforms. These issues interact with and impact on the selection of the applicable substantive law to govern the dispute in question. As such, there is no easy solution for the choice of law problem presented by *Gutnick*.[6] Nevertheless, this article will attempt to discuss as well as analyse the various alternatives available and as expressed by the High Court in *Gutnick*. The writer will also venture to tentatively recommend some choice of law rules in the context of Internet defamation for further reflection and possible reform.

II. The Background—Choice of Law and Jurisdiction

The *Gutnick* case essentially arose from an application by Dow Jones to set aside the writ or alternatively, to stay the proceedings in the Supreme Court of Victoria. The writ was served by Gutnick in accordance with the Supreme Court (General Civil Procedure) Rules 1996 (the "Victorian Rules"), which set out the requirements relating to the service of originating process outside of Australia. Rule 7.01(1) sub-paragraphs (i) and (j) of the Victorian Rules provide that—

> 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. [Emphasis added.]

Dow Jones had its editorial offices for *Barron's*, Barron's Online and WSJ.com in the city of New York. The offending article in question was written and edited in New York. The article in the form of electronic data was subsequently transferred to six servers maintained by Dow Jones at New Jersey. Dow Jones argued that the article contained in Barron's Online was "published" in New Jersey when it became available on the servers which Dow Jones maintained at that place.[7]

Whatever the place of publication of the allegedly defamatory article, the plaintiff Gutnick had undertaken to the court to sue in respect of the

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6 In fact, American academics and judges have referred to the topic of choice of law as being in disarray and chaotic: see E.S. Fruehwald, *Choice of Law for American Courts: A Multilateralist Method* (Westport, Conn.: Greenwood Press, 2001), 1. See also L.L. McDougal III, R.L. Felix and R.U. Whitten, *American Conflicts Law*, 5th ed. (Ardsley, N.Y.: Transnational Publishers, 2001) at 454–455.

7 *Gutnick*, *supra* note 1 at paragraph 18.

damage to his reputation in Victoria alone (and *no other place*). Hence, on the jurisdiction issue *per se*, it is quite clear that the *damage* was suffered in Victoria,[8] thus satisfying sub-paragraph (j) of Rule 7.01(1) of the Victorian Rules. The Supreme Court of Australia would clearly have jurisdiction over the action based *solely* on sub-paragraph (j).

Dow Jones contended, however, that Victoria was clearly an inappropriate forum. All the judges (save Callinan J.) took the view that Victoria was not a clearly inappropriate forum. Callinan J. went a step further by stating, in a more positive fashion, that Victoria was a clearly appropriate forum for the litigation of Gutnick's claim.[9] The Australian doctrine of *forum non conveniens* differs from the "more appropriate forum" test in England as expressed in *Spiliada Maritime Corporation v. Cansulex Ltd.*[10] In Australia, the test in an application for a stay of proceedings is to ascertain whether Australia (as the forum) is "clearly inappropriate".[11] The Australian doctrine thus appears relatively more inclined towards the forum having jurisdiction over the dispute in question as compared to the English rule, particularly in the context of an application for a stay of proceedings where the burden of proof falls on the defendant.[12]

In determining that Victoria was not a clearly inappropriate forum (or was clearly an appropriate forum, *per* Callinan J.), the High Court of Australia resorted to connecting factors in respect of the stay application. The High Court noted that Gutnick lived and had his business headquarters in Victoria. A great deal of his social and business life was focused in Victoria, though he also conducted business outside Australia (including the United States of America) and made significant contributions to charities in the United States and Israel.[13] He was the chairman of a corporation, shares in which

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8 This was uncontested by the parties; see *Gutnick*, *supra* note 1 at paragraph 100.

9 *Gutnick*, *supra* note 1 at paragraph 202.

10 [1987] 1 A.C. 460 [*Spiliada*].

11 See *Voth v. Manildra Flour Mills Pty. Ltd.* (1990) 171 C.L.R. 538 [*Voth*]; and *Oceanic Sun Line Special Shipping Company Inc. v. Fay* (1988) 165 C.L.R. 197 [*Oceanic Sun*]. In *Oceanic Sun*, only two judges, Deane and Gaudron JJ. applied the "clearly inappropriate forum" test whilst Brennan J. (paragraph 35) preferred to base the Australian doctrine on the view that the invoking of the forum's jurisdiction was not vexatious or oppressive or an abuse of the process of the court. The remaining two minority judges (Wilson and Toohey JJ.) applied the *forum non conveniens* doctrine as enunciated in *Spiliada*. See generally, M. Gardner, "Towards An Australian Doctrine of *Forum Non Conveniens*" 38 I.C.L.Q. (1989) 361. The "clearly inappropriate forum" test was subsequently confirmed in *Voth as* applicable in Australia. See also P. Brereton, "*Forum Non Conveniens* in Australia: A Case Note on *Voth v. Manildra Flour Mills*" 40 I.C.L.Q. (1991) 895.

12 See *Regie National des Usines Renault SA v. Zhang* [2002] H.C.A. 10; (2002) 187 A.L.R. 1 (H.C.A.) [*Zhang* cited to H.C.A.]; see also A. Briggs, "The Legal Significance of the Place of a Tort (*Regie National des Usines Renault SA v. Zhang*)" O.U.C.L.J. Vol. 2, No. 1 (2002) 133 at 138.

13 *Gutnick*, *supra* note 1 at paragraph 2.

are traded in the United States and he had sought investment in that corporation from investors in the United States.[14] In addition, Gutnick was an officer of several companies listed on the Australian Stock Exchange.[15] Gutnick's undertaking to bring the defamation proceeding in Victoria (and no other place) was also a relevant connecting factor, notwithstanding that the material, accessible by subscription, was downloaded by a relatively small number of Victorians. In view of the position in Australia that each access and reading of the allegedly defamatory material would constitute a publication, Gutnick's undertaking would be an important criterion in favour of jurisdiction in Victoria since if jurisdiction is confined to Victoria, there would be no danger of multiple proceedings in various other jurisdictions.

The governing substantive law to be applied in the action was also raised as a relevant connecting factor. Clearly, if it is determined that the Victorian court has jurisdiction over the dispute, it would decide on the appropriate choice of law based on Victoria's choice of law rules. Conversely, if it is determined that a U.S. court has jurisdiction over the dispute, it is likely that a different set of choice of law rules may be applied by the U.S. court to ascertain the applicable law (with probably different outcomes). At the same time, the applicable law may constitute a significant factor to be taken into account by the forum court in ascertaining whether the Victorian court or some other court (*e.g.*, New York or New Jersey) should have jurisdiction over the dispute. The interactive linkage should therefore be noted.

Indeed, Dow Jones had argued that Victoria was a clearly inappropriate forum because the substantive issues to be tried should be governed by the laws of one of the States of the United States.[16] In response, the joint judgment of the High Court of Australia gave the following reasons why the law of Victoria should be the applicable substantive law in respect of the dispute:

(i) The publication (or the place of commission of the tort) occurred in Victoria;
(ii) Damage to Gutnick's reputation occurred in Victoria as it is in Victoria where the publications complained of were comprehensible by readers; and
(iii) Gutnick sought to vindicate his reputation in Victoria.[17]

Although there was no explicit rejection of Dow Jones's argument that Victoria was a "clearly inappropriate forum", the joint judgment appeared to

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[14] *Per* Callinan J., *Gutnick*, *supra* note 1 at paragraph 170.
[15] *Gutnick*, *supra* note 1 at paragraph 153.
[16] *Gutnick*, *supra* note 1 at paragraph 47.
[17] *Gutnick*, *supra* note 1 at paragraph 48.

have *implied* that as the applicable substantive law was the law of Victoria, it followed that Victoria was *not*, as contended by Dow Jones, a "clearly inappropriate forum". The implication here appears to be that the applicable substantive law, being the law of Victoria, *determines* the issue of *forum non conveniens*. If this is indeed the implication to be drawn, it is respectfully submitted that the analysis of the joint judgment in respect of the *forum non conveniens* issue is inaccurate or at least incomplete.

In this regard, Kirby J.'s judgment is more instructive. Kirby J. took pains to emphasise that there is a distinction between jurisdiction and choice of law and that such issues should be kept separate and distinct.[18] Hence, whilst the applicable substantive law is an important factor, Kirby J. was of the view that it is only one of the factors to be considered in deciding whether the state of Victoria is "clearly an inappropriate forum".[19] In other words, the applicable substantive law does not *determine* the issue as to whether the state of Victoria is "clearly inappropriate forum".

In a similar fashion, Gaudron J. had opined that in a case where it is *fairly arguable* that the substantive law of the forum is applicable, the selected forum should not be regarded as clearly inappropriate.[20] It was also held that it is not necessary at the stage of a stay application to determine the applicable substantive law in order to decide whether a stay should (or should not) be granted.[21] However, Gaudron J. (as well as the four judges delivering the joint judgment) had, in the present case, decided to forsake its prior advice and took the liberty to decide on the substantive law applicable in *Gutnick*, notwithstanding the fact that the High Court of Australia was merely hearing an appeal on a stay application.[22] In practical terms, this impliedly evidences the significance accorded by the High Court to the issue of the choice of law in the overall determination of the jurisdictional issue.

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18 *Gutnick*, *supra* note 1 at paragraph 105. Kirby J. quoted the Australian case of *Zhang*, *supra* note 12, that "an Australian court cannot be a clearly inappropriate forum merely by virtue of the circumstances that the choice of law which apply in the forum require its courts to apply foreign law and the *lex causae*".

19 Interestingly, Kirby J. in *Zhang*, *supra* note 12, disagreed at paragraphs 93 to 96 with the "clearly inappropriate forum" test and preferred the "more appropriate forum" test in *Spiliada*; however, he was in the minority in *Zhang* on this *forum non conveniens* issue and therefore concluded in *Gutnick* that the primary judge in the present case was bound to apply the "clearly inappropriate test" in accordance with appellate principles.

20 Gaudron J. in *Oceanic Sun*, *supra* note 11 at paragraph 24.

21 *Ibid.*

22 It is however recognised that the determination of the applicable law by the High Court as a preliminary issue in *Gutnick* would be practically useful to the Supreme Court of Victoria in determining the merits of the case.

III. Comparative Values and Legal Culture—Why a Choice of Law Decision Needs To Be Made

The crux of the dispute in *Gutnick* hinges upon the commonly-known fact that the defamation laws of the United States and Australia are substantially different and would likely produce disparate outcomes with respect to Gutnick's claim. This significant difference in the respective defamation laws reflects the disparity in the underlying values held by both the United States and Australia with respect to the competing interests of protecting free speech and the protection of reputation, respectively.[23] However, the significance attached to the respective values held by each country is not absolute, but relative. Thus, courts (whether U.S. or Australian) deciding on defamation actions have struck and will continue to strike a balance between these two competing interests or values: is free speech or reputation more important?[24] It is interesting to note that Callinan J. had explicitly recognised that defamation law is not value-neutral: the learned judge observed in the case of *Gutnick* that Australian law places real value in one's reputation (as compared to the United States) and, in his opinion, "rightly so".[25]

The U.S. First Amendment stipulates that the "Congress shall make no law respecting ... bridging the freedom of speech, or of the press ... and to petition the government for a redress of grievances". In *New York Times v. Sullivan*,[26] Justice W. Brennan opined that the purpose of the First Amendment was to ensure "unfettered exchange of ideas" with a view to generating social and political reforms. Thus, if the criticism of official conduct is subject to the requirement in defamation law to guarantee truth in its assertions, it would be tantamount to self-censorship.[27] Hence, in the United States, the Supreme Court has ruled that a public official (plaintiff) in a defamation suit would have to prove that the alleged defamatory statement was made with actual malice (*i.e.* knowledge that the alleged statement was false *or* reckless as to whether it was false or not) before recovery of damages would be allowed. This rule was later extended to include a "public figure".[28]

In Australia, malice is required to be proved by the plaintiff in a defamation case *only* to defeat the defence of qualified privilege, and not as part of making out a *prima facie* case, unlike in the United States. Hence, in

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23 See *e.g.* F. Schauer, "Social Foundations of the Law of Defamation: A Comparative Analysis" (1980) 1 J. Media Law & Prac. 3.

24 *Ibid.* at 13.

25 *Gutnick*, *supra* note 1 at paragraph 190.

26 (1964) 376 U.S. 254.

27 *New York Times v. Sullivan* (1964) 376 U.S. 254 at 279.

28 See *Curtis Publishing Co. v. Butts* (1967) 388 U.S. 130; *Associated Press v. Walker* (1967) 388 U.S. 130.

Australia, there is a presumption of falsity in the alleged defamatory statement and the defendant has the onus of proving that the statement is true based on the defence of justification. Indeed, the majority of the High Court of Australia in *Theophanous v. Herald & Weekly Times Ltd.*[29] rejected the application of the *New York Times* doctrine in Australia. The crux of the rejection was that the doctrine, if applied in Australia, would tilt the balance unduly in favour of free speech and against the protection of one's reputation.[30] This is notwithstanding the fact that the Australian courts may treat a case as one of qualified privilege if it concerns matters of public concern on government matters and the conduct of parliamentarians.[31]

The United States utilises the concept of libel or slander *per quod*,[32] which notion is unknown in Australian law. Libel or slander *per quod* refers to statements that evince a defamatory meaning from the extrinsic knowledge of those to whom such words are published or which may arise from the context of the words. In libel or slander *per quod*, the plaintiff is required to prove special damages in the United States; Australian defamation law does not make such a distinction in terms of damages recoverable.

The U.S. inclination towards promoting free speech (at the expense of reducing the scope for defamation actions) is further manifested in the Communications Decency Act (CDA).[33] The policy underlying the CDA was to "promote the continued development of the Internet" and to "preserve the vibrant and competitive free market that presently exists for the Internet ... unfettered by Federal or State regulation".[34] The protection of free speech via the CDA was even extended to a service provider who had received notice from the plaintiff of alleged defamatory materials posted on the network (operated by the former) but the service provider refused to remove the offending materials. The Court reasoned that stipulating liability of service providers upon notice would have a "chilling effect on the freedom of Internet speech".[35]

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29 (1994) 182 C.L.R. 104.

30 (1994) 182 C.L.R. 104 at 134.

31 See *Lange v. Australian Broadcasting Corporation* (1997) 189 C.L.R. 520 and *Theophanous v. Herald and Weekly Times Ltd.* [1994] 3 L.R.C. 369. In *Theosophanus*, Deane J. felt that there should be absolute privilege whilst the other three judges in the majority (Mason C.J., Toohey and Gaudron JJ.) opined that the defendant publisher would have to show that it acted "reasonably" with respect to the publication. See also *Lange* on the need for the defendants to act "reasonably", *i.e.* taking reasonable steps to obtain and publish a response from the person commented upon.

32 See M. Schacter, *The Law of Internet Speech* (Durham, N.C.: Carolina Academic Press, 2002) at 332–33.

33 (2000) 47 U.S.C. S230.

34 See Schacter, *supra* note 32 at 282.

35 See Schacter, *supra* note 32, at 288 and 307; *Kenneth M. Zeran v. America Online, Incorporated*, United States Court of Appeals for the Fourth Circuit, No. 97-1523 F. 3d 327, November 12, 1997; *Sidney Blumenthal and Jacqueline Jordan Blumenthal v. Matt Drudge*

Returning to the U.S. rule in *New York Times*, the distinction between defamation which affects a private individual versus a public official or figure was further elaborated upon in the subsequent case of *Gertz v. Robert Welch, Inc.*[36] The U.S. Supreme Court held in *Gertz* that a public official or figure will be required to satisfy the test of "actual malice" for recovery, unlike a private individual. However, where the alleged defamatory statements involve a private plaintiff on a matter of "public concern", the private plaintiff is required to prove *negligence*[37] on the part of the defendant in permitting the false statement to appear (in a case where the defamatory potential was apparent to the reasonably prudent person). Moreover, the damages will be confined to the "actual injury" suffered by the plaintiff (*i.e.* special damages which are required to be proved) and presumed damages are prohibited. This is substantially different from Australian defamation law in which a *prima facie* case for a defamation action is based on strict liability.[38]

Applying the U.S. principles of defamation to the fact scenario in *Gutnick*, the plaintiff may be regarded as a "public figure" which would mean he would have to show "actual malice" on the part of Dow Jones as part of his *prima facie* case. Even if he is not regarded as a public figure, it is likely that the alleged defamatory statement (*i.e.* in respect of tax evasion and money laundering) is one of "public concern" and the defamatory potential in the defamatory statement would be apparent to any reasonable person. Hence, Gutnick would have to prove, at the very least, that Dow Jones was negligent in making the alleged defamatory statement. In any event, it is clear that the plaintiff would have to shoulder a greater burden under the defamation laws of the United States than if he were to litigate the case in Victoria applying Victorian defamation laws.

The U.S. courts' attitudes towards foreign defamation laws are reflected in their reluctance to enforce foreign libel judgments on the grounds of public policy and the different (or deficient, from the U.S. perspective) value placed on free speech. This throws into relief the abovementioned problem

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and America Online, Inc., United States District Court for the District of Columbia, No. CIV.A. 97–1968 P.L.F., 992 F. Supp. 44, 22 April 1998; *Schneider v. Amazon.com, Inc.* 108 Wn. App. 454, 458, 31 P. 3d 37 (Washington Court of Appeal 2001).

36 (1974) 418 U.S. 323.

37 The degree of fault as applied to private plaintiff cases may differ from state to state within the United States. The only limitation on each state to define the standards for private plaintiff cases is that the state may not impose liability without fault: see P.A. Davis, "The Defamation of Choice-of-Law in Cyberspace: Countering the View that the Restatement (Second) of Conflict of Laws is Inadequate to Navigate the Borderless Reaches of the Intangible Frontier" (2002) 54 Federal Communications Law Journal 339 at 344.

38 In the United States, where the defamation is between private parties and does not involve matters of public concern, punitive and presumed damages may be allowed without the requirement to show actual malice: see *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749.

of having different substantive defamations applied in different states. In *Matusevitch v. Telnikoff*,[39] it was held by the Court of Appeals of Maryland that "the principles governing defamation actions under English law, which were applied to Telnikoff's libel suit, are so contrary to Maryland defamation law, and to the policy of freedom of the press underlying Maryland law, that Telnikoff's judgment should be denied recognition under principles of comity". In *Bachchan v. India Abroad Publications Inc.*,[40] Fingerwood J. opined that the protection of free speech and the press embodied in the First Amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to the standards deemed appropriate in England but which may be considered antithetical to the protection afforded by the press under the U.S. Constitution.

If the U.S. courts were to allow the enforcement in the United States of foreign libel judgments inimical to the underlying spirit of the First Amendment, this would—from a U.S. perspective—be tantamount to importing so-called deficient values into the U.S. legal system through the "backdoor". Potential plaintiffs could sue for defamation in a country which is more pro-plaintiff than the United States and then attempt to enforce the foreign judgment in the United States. It is logical and understandable from the perspective of preventing the importation of perceived (and inimical) foreign values *per se* that the U.S. courts will not lend a hand to such enforcement or be seen to "approve" such foreign judgments. However, conversely, by disallowing the enforcement of such foreign libel judgments, the U.S. courts could be criticised for being unduly protectionistic in respect of the First Amendment, particularly in a case where there is no impeding of information to the American public.[41]

This problem of the vast difference in substantive defamation laws between the United States and Australia reared its ugly head in the guise of Article 19 of the United Nation's International Covenant on Civil and Political Rights or ICCPR[42] (referred to in Section A above). Dow Jones reporter

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39 877 F. Supp. 1 (D.C. Cir. 1995) at 249 [*Matusevitch*].

40 585 N.Y.S. 2d 661 (Sup. Ct. N.Y. 1992) at 664.

41 See Appellant's Reply Brief in *Matusevitch, supra* note 39: Telnikoff stated that "there is no need, no public good to [be] served, to export the [actual malice] standard as a form of cultural imperialism. The United States is a citizen in a world of nations. It should not become the Libya of reputation terrorists". See also the dissenting judgment of Judge Chasanow in *Matusevitch, ibid.*

42 Article 19 of ICCPR states that "everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through other media of his choice". The exercise of the rights may "be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) for protection of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals".

Alpert claimed that the Australian High Court's decision had denied him the right to free speech and thereby breached the ICCPR. This claim reinforces the commonly-held perception that defamation laws invariably involve constitutional underpinnings and values. The American jurist Holmes once observed that the life of the law was not logic, but experience.[43] This statement is as true (if not truer) of defamation laws which are based on a country's particular legal culture and constitution, invariably conditioned by history and sociology.[44] Indeed, it is doubtful whether any general pronouncement by the international tribunal on the human rights perspectives regarding free speech and reputation would be helpful in a complex case involving what, in the writer's opinion, is essentially a choice of law problem.

IV. Determining Choice of Law in Internet Defamation

The foregoing sections have emphasised the need to make appropriate choice of law decisions to resolve the *impasse* arising from the substantive differences amongst various countries' defamation laws in general and between the defamation laws of the United States and Australia in *Gutnick* in particular. I will discuss the various choice-of-law approaches, principles and rules which have been developed by commentators, jurists and the courts which may be useful in arriving at a recommended solution for choice of law in the context of Internet defamation. The Australian choice of law position will be discussed in the context of *Gutnick*. This present writer will also refer to the American[45] choice of law approaches, principles and rules as a counterpoint to the Australian position enunciated in *Gutnick*.

In Section III of this paper, the problem of subjectivity in the different substantive defamation laws has been raised. In a situation where there is a clash of values perceived by each side as fundamental (as was the situation in *Gutnick*), it would be optimistic to expect a "meeting of the minds" amongst the different countries or states insofar as substantive defamation laws are concerned. It would be ideal if substantive defamation laws of different countries could be harmonised. However, as a fall-back position, it is hoped that the various countries could work towards some agreement, at least, on appropriate choice of law rules in the context of Internet defamation.

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43 O.W. Holmes, *The Common Law* (Boston: Little, Brown, 1881) at 1.

44 R. Smolla stated that "cultures ... must work through these conflicts at a natural pace, on their own terms, in the light of their own experiences": see R.A. Smolla, *Free Speech in an Open Society* (N.Y.: Knopf, 1992) at 357.

45 For a good overview of the main American choice of law approaches, see W. Tetley, "A Canadian Looks at American Conflict of Law Theory and Practice, Especially in the Light of American Legal and Social Systems (Corrective vs Distributive Justice)" (1999) 38 Columbia Journal of Transnational Law 299.

As a first premise, it is submitted that the appropriate choice of law rules should aim to be as objective as possible. In my opinion, courts should not be too quick to resort to the *lex fori* without a careful consideration of objective choice of law rules. The choice of law rules may, depending on the facts of a case, point to the *lex fori* or the law of a particular foreign jurisdiction. As an important criterion of objectivity, it is submitted that the choice of law approach or rule should not be perceived, *in advance*, to favour or discriminate against the law of any jurisdiction. For example, a choice of law approach which stipulates that the law favourable to the publishers be applied in the context of Internet defamation would likely be rejected outright. It will be clearly perceived as protective, *in advance*, of the interests of the state where the preponderance of the international publishers are currently based. In other words, the appropriate choice of law should be one which would have been selected by a rational person under a "veil of ignorance".[46] The choice of law approach should ideally be chosen by a fictional court which does not know, *in advance*, whether the substantive defamation law to be applied to a particular dispute will be in favour or contrary to any one particular jurisdiction's interests (especially if the jurisdiction happens to be its own). This is to ensure that the choice of law rule/approach is as "value-neutral" or "fair" as possible[47] to the extent that the courts applying such a rule would not be able to manipulate the outcome so as to apply the *lex fori* in all or most cases. Finally, the choice of law rules must also possess a sufficient measure of *certainty* in application so as to minimise judicial manipulation and forum shopping. At the same time, they should allow some *flexibility* to take into account exceptional circumstances that occur. In the interests of certainty, the choice of law rules should point towards one single applicable substantive law.

As will be seen from the following pages, and consistent with the main ideas outlined above in this section, this present writer will argue in favour of utilizing three main connecting factors in determining choice of law in the context of Internet defamation, namely:

(a) the place of publication of the defamatory material;
(b) the place of the damage to the plaintiff's reputation; and
(c) the place of the plaintiff's habitual residence.

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[46] See Fruehwald, *supra* note 6 at 119.

[47] It may not be theoretically possible to purge *all* value judgments from choice of law rules: a choice of law rule which refers to a particular connecting factor, for example, the place of damage to reputation, may be perceived unwittingly as a rule which favours the "value" of protecting reputation at the expense of free speech. The main purpose of "value-neutrality" is to *reduce*, as much as possible, the subjectivity of values in choice of law rules which the forum state, applying such choice of law rule, may use to the forum's advantage. In this regard, the courts should restrain themselves from using public policy to exclude foreign law save in very exceptional circumstances.

As mentioned above, an attempt at formulating choice of law rules will be made in Section V which is premised, to a considerable extent, on the significance of the "convergence" of the above connecting factors.

The Australian position on choice of law rules for tort as expressed in *Gutnick* is itself premised on the *lex loci delicti*.[48] The double actionability test, which has its origin in the English common law and is still applicable in Singapore in respect of defamation actions, has been rejected recently in Australia for international torts.[49] With respect to *Gutnick*, the *lex loci delicti* was applied by the joint judgment of the High Court of Australia via at least two connecting factors, namely that Victoria was (a) the place of publication, and (b) the place where the damage to reputation occurred. We will discuss the merits of these connecting factors in greater detail under the heading "*Lex loci delicti*" in Section B below.

In the United States, a particular state must first have a significant contact or contacts which creates a state interest in order that the choice of law ultimately arrived at is neither arbitrary nor fundamentally unfair.[50] By way of a very brief introduction, as far as tort actions are concerned, American courts generally apply the "most significant relationship" test in the Restatement (Second) of Torts together with the governmental interest analysis (or its variants),[51] though there is a great disparity amongst the states as to the actual application as such of these particular choice of law methods. Leflar's "choice-influencing considerations" are also fairly influential in the U.S. courts.[52] The above American choice of law approaches will be further discussed in this section.[53]

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48 See *Zhang*, *supra* note 12; see also B. Olbourne, "International Torts and Choice of Law in Australia" 61 C.L.J. (2002) 537.

49 *Zhang*, *supra* note 12. In the light of the requirements of objectivity, value-neutrality and fairness in choice-of-law determination outlined above, it is submitted that the English double actionability rule is not preferred in defamation actions, not to mention that the rule encourages forum shopping and is uncertain in application (see *e.g. Boys v. Chaplin* [1997] A.C. 356).

50 *Allstate Ins. Co. v. Hague* (1981) 449 U.S. 302.

51 Tetley, *supra* note 45 at 323.

52 See J.T. Cross, "The Conduct-Regulating Exception in Modern United States Choice-Of-Law" (2003) 36 Creighton L. Rev. 425.

53 There are, of course, various other American choice of law approaches such as Baxter's comparative impairment theory (see F.W. Baxter, "Choice of Law and the Federal System" 16 Stan. L. Rev. (1963)), McDougal "best rule of law" approach (see L.L. McDougal III, "Toward Application of the Best Rule of Law in Choice of Law Cases" 35 Mercer L. Rev. (1984) 483 and "The Real Legacy of Babcock v Jackson: Lex Fori Instead of *Lex Loci Delicti* and Now It's Time For a Real Choice of Law Revolution" 56 Alb. L. Rev. (1993) 795) as well as that contained in the First Restatement of Torts.

A. Lex fori—*Interest Analysis Approach*

This is primarily a U.S. approach. Interest analysis is primarily based on the theories of Currie[54] which are focused on the legitimate interests of the state whose policies are directly concerned with the question in dispute, with a distinct *lex fori* inclination. Governmental interest analysis has been applied directly in several U.S. court decisions in respect of torts.[55] Under Currie's theory, a choice of law decision need not be made where there is a false conflict, *i.e.* where it was intended that only one of the states had an interest in applying its state policy to the dispute at hand. This intention could be inferred, for instance, from a legislative enactment. In such a case, the applicable law would normally be that of the *lex fori*. Alternatively, there could be a true conflict, *i.e.* where two or more states have an interest to apply its policy to the dispute. In such a situation, Currie argues that the judge should consider whether a more restrained interpretation of the policies or interests of one state could obviate the conflict. Otherwise, the *lex fori* would be applied. As such, Currie's governmental interest analysis leans heavily in favour of the *lex fori*.[56] He is of the view that the judge should not weigh the competing interests in a true conflict situation; this responsibility should be undertaken by the legislature instead.

Gutnick presents a *true* conflict case. Both Victoria (Australia) and New Jersey/New York (the United States) would have an interest in applying their respective state (national) policies relating to the protection of reputation and free speech. The differences between the defamation laws of each of Australia and the United States, as aforementioned, are fairly fundamental and undergirded by significant differences in the underlying legal culture (a point also canvassed in Section III above). Moreover, practically speaking, applying either the Australian or U.S. defamation laws would have led to vastly different outcomes in *Gutnick*.

Currie's interest analysis is therefore unlikely to resolve the *impasse* in *Gutnick*. In fact, it is submitted that, in directing the courts to decide on the respective state interests involved (with a fall-back on the *lex fori*), Currie's approach accentuates the original position of conflict between two

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[54] See B. Currie, *Selected Essays on the Conflict of Laws* (Durham, N.C.: Duke University Press, 1963); "The Disinterested Third State" (1963) 28 Law and Contemporary Problems 754 and "Notes on Methods and Objectives in the Conflict of Laws" (1959) Duke L.J. 171.

[55] See *e.g. Babcock v. Jackson* (1963) 12 N.Y. 2d 473; *Neumeier v. Kuehner* (1972) 31 N.Y. 2d 121, where the New York Court of Appeals fashioned narrower choice of law rules based on the broad governmental interest approach. See also *Schultz v. Boy Scouts of America, Inc.* (1985) 65 N.Y. 2d 189.

[56] See also the emphasis on the *lex fori* in A. Ehrenzweig, *Private International Law: A Comparative Treatise on American International Law, Including the Law of Admiralty* (Leyden, Sijthoff: Dobbs Ferry, N.Y., Oceana, 1967–1977).

vastly different substantive defamation laws and their underlying value systems. Determination of state interests in a particular case is notoriously difficult due in part to the nebulousness of state interests, the problem of subjectivity[57] and the consequent problems in practical application.[58] Where true conflicts happen (as was the situation in *Gutnick*), Currie's approach that the forum should, in such a situation, apply the *lex fori* does not resolve (but merely sidesteps) the problem. Indeed, his proposal runs contrary to the general approach we have suggested earlier that the choice of law rule should be a "fair" one developed from behind a "veil of ignorance", so to speak.

The other major objection to Currie's approach is this: due to its inclination for the *lex fori*, it encourages forum shopping. This would allow the plaintiff considerable leeway to manipulate in order to bring about or determine to a large extent the outcome of the defamation action. At the same time, Currie's *lex fori* approach neglects the benefits of certainty and predictability of outcomes.[59]

We now look at a variant of Currie's interest analysis. Contrary to Currie's rejection of the weighing of competing state interests in choice of law decision-making, von Mehren and Trautman's functional analysis[60] would advocate some principles for doing so, for example, by examining whether the law chosen reflects an emerging policy.[61] Weintraub[62] has also propounded substantially similar criteria for weighing the competing interests. Whilst von Mehren and Trautman's functional analysis and Weintraub's approach are less ethnocentric and parochial, they nonetheless require the courts to assess relative state interests, which is, as argued above, too "value" laden and even subjective, bearing in mind the vast disparity in the competing "interests" between the United States and Australia

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57 See *e.g.* McDougal, Felix and Whitten, *supra* note 6 at 338–339.

58 See F.K. Juenger, "Conflict of Laws: A Critique of Interest Analysis" in *Selected Essays in the Conflicts of Laws* (2001), 166.

59 See McDougal, Felix and Whitten, *supra* note 6 at 340.

60 See A.T. von Mehren and D.T. Trautman, *The Law of Multistate Problems* (Boston: Little Brown, 1965) at 341–375; A.T. von Mehren, "Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology" (1965) 88 Harv. L. Rev. 347.

61 The principles are as follows: (1) the choice of the state's law whose policies are most strongly held; (2) the choice of the law reflecting an "emerging" policy over one embodying a "regressive" policy; (3) the choice of a law expressing the more specific rather than the more general policy; (4) selection of the rule best designed to effectuate an underlying policy; and (5) avoidance of a choice which would frustrate an underlying policy.

62 See R.J. Weintraub, *Commentary on the Conflict of Laws*, 3rd ed. (Mineola, N.Y.: Foundation Press, 1986 and Supp, 1991). The criteria are: (1) the advancement of clearly discernible trends in the law; (2) the avoidance of unfair surprise to the defendant; (3) the avoidance of anachronistic rules; and (4) the reference to the foreign jurisdiction's choice of law rule to determine the extent of its interest.

in *Gutnick*. There is more than a fair chance that national or state courts faced with the above analysis or approach would tend to favour the interests of the *lex fori*, notwithstanding that the *lex fori* is not expressed for the purposes of choice of law.

B. Lex loci delicti

1. *The Place of Publication*

The approach considered in this sub-section is primarily Australian. Indeed, the High Court of Australia in *Gutnick* took pains to define what it meant by "publication" in the context of Internet defamation. Firstly, the act of publication and the fact of publication to a third party must be distinguished.[63] Secondly, harm to reputation is done "when the defamatory publication is comprehended by the reader, the listener or the observer".[64] This position is consistent with or supported by academic texts[65] as well as by analogy to established Australian cases. For example, in respect of defamation via other media such as broadcasting, the Australian courts have held that the tort of defamation is committed at the place where the defamatory material is published, as opposed to the place where the material is written, spoken or sent.[66]

With particular respect to material on the World Wide Web, the High Court of Australia held in *Gutnick* that it is not available in comprehensible form until downloaded onto the computer of a person who has used a web browser to pull the material from the web server. It is where the person downloads the material that reputational damage may result, which is the place where the tort of defamation is committed.[67] As mentioned in Section II, the joint judgment of the High Court had relied on the place of publication of the defamatory material as a factor in determining what the choice of law was.

However, endorsing the place of publication as the relevant connecting factor for choice of law can nevertheless pose a few problems. It is quite conceivable that a single defamatory article may be published in more than one state in the context of Internet defamation. Hence, utilising the place of publication as the sole connecting factor for choice of law may result in more than one substantive law governing the dispute[68] (in a case of multiple

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63 *Gutnick*, *supra* note 1 at paragraph 11.

64 *Gutnick*, *supra* note 1 at paragraph 26.

65 See *e.g.* J.G. Fleming, *The Law of Torts*, 9th ed. (Sydney: L.B.C. Information, 1998) at 593.

66 *Gorton v. Australian Broadcasting Commission* (1973) 22 F.L.R. 181; *Allsopp v. Incorporated Newsagencies Co. Pty. Ltd.* (1975) 26 F.L.R. 238.

67 *Gutnick*, *supra* note 1 at paragraph 44.

68 See Australian Law Reform Commission (ALRC), *Choice of Law*, Discussion Paper (1992), Report No. 58, paragraph 6.54.

publication in various jurisdictions), and thus fails to fulfil the choice-of-law objective of finding one single law to govern a particular defamation action.

The other problem to be resolved lies in the contrast between the multiple publication rule in Australia and the U.S. single publication rule. Dow Jones attempted to argue that the single publication rule[69] should be applied in Australia and that one single law based on a single publication (at the place where the servers are maintained) should be applied. The single publication rule in the United States of America focuses on having one action to determine all the issues (including damages) in all jurisdictions arising from the publication of one edition of a book or a newspaper.[70] In the recent U.S. case of *Firth v. State of New York*,[71] the New York Court of Claims reaffirmed the application of the single publication rule in the context of cyberspace. It stated that there was no distinction between the publication of a book or report through traditional printed media and publication through electronic means just because a copy was made available through the Internet for the purposes of the statutes of limitation.

Drawing upon the U.S. single publication rule, Dow Jones had urged the High Court of Australia to abolish the common law rule that every publication of defamatory material constitutes a new and separate tort and that Internet defamation should consequently be treated as a "one global tort (rather than a multiple wrong committed by every single publication and every Internet hit)".[72] In this regard, the old common law rule of *Duke of Brunswick v. Harmer*,[73] which is focused on a domestic rule relating to limitations, does not appear appropriate to deal with the issues presented by the Internet.[74]

There are admittedly benefits to be gained from the single publication rule, namely, the prevention of recovery of excessive damages as well as the conserving of judicial resources in having the dispute resolved in one action, rather than in a multitude of actions.[75] However, the joint judgment of the High Court in *Gutnick* sought to clarify (in my view, correctly) that

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69 See the American Restatement of Tort (Second) (1977), s. 577. It states that "any one edition of a book or a newspaper, ... is a single publication .... As to any single publication, only one action for damages can be maintained, all damages suffered in all jurisdictions can be recovered in one action; and a judgment for or against the plaintiff upon the merits of any action bars any other action for damages between the same parties in all jurisdictions".

70 See *Cox Entreprises Inc. v. Gilreath* 142 Ga. App. 297, 298, 235 S.E. 2d 633, 634 (Ga. Ct. App. 1977).

71 775 N.E. 2d 463 (Ct. App. 2002).

72 *Gutnick*, *supra* note 1 at paragraph 72.

73 (1849) 14 Q.B. 185.

74 See also M. Hall, "The Place of Publication of an Internet Libel (*Dow Jones & Co. Inc. v. Gutnick*)" O.U.C.L.J. Vol. 3, No. 1 (2003) 119 at 120.

75 See L.A. Wood, "Cyber-defamation and the Single Publication Rule" 81 Boston University Law Review (2001) 895 at 898.

the rule is not *directly* related to the determination of the choice of law.[76] In the first instance, the main purposes of the single publication rule are to prevent multiple lawsuits and to prevent undue harassment to defendants.[77] Indeed, the joint judgment of the High Court indicated that:

> What began as a term describing the 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.[78]

In this regard, it is also pertinent to note that *Firth* was primarily concerned with Statutes of Limitations (*i.e.*, the specific issue of when the initial publication or subsequent republication of the defamatory material triggers the limitation period to run),[79] *not* choice of law. There does not appear to be a sufficiently strong correlation between the underlying policies for statutes of limitation and choice of law objectives.[80]

In Australia, the courts allow the plaintiff to claim damages for all publications arising from the same defamatory statement in one proceeding,

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[76] It must be noted, however, that the multiple publication rule envisages each publication of the defamatory material in a particular jurisdiction as constituting a connecting factor for purposes of determining choice of law applicable to the multiple torts which have arisen. Hence, the publication rule selected is *not* completely remote from the issue of choice of law. However, it may be argued that under the single publication rule, each publication in the various jurisdictions may *also* be taken into consideration in determining the appropriate choice of law except that they are now encapsulated within one single tort.

[77] See *Keeton v. Hustler Magazine Inc.* (1983) 465 U.S. 770; see also Wood, *supra* note 75 at 897.

[78] *Gutnick*, *supra* note 1 at paragraph 35.

[79] 706 N.Y.S. 2d 835 at 841 (N.Y. Ct. Cl. 2000). See also *VanBuskirk v. New York Times Company* No. 99 Civ. 4265, 2000 U.S. Dist. (S.D.N.Y., Aug 24 2000). Note that the case of *Duke of Brunswick* was also concerned with the statutes of limitation and hence should not be regarded as a persuasive precedent for purposes of endorsing *per se* the multiple publication rule. For criticisms of the use of the common law rule in *Duke of Brunswick* by the High Court, see A. Briggs, "The Duke of Brunswick & Defamation by Internet" 119 L.Q.R. (2003) 210–215.

[80] In the context of statutes of limitation, the single publication rule protects the defendant from undue delay in the bringing of a defamation action by the plaintiff so that the defendant would not have to live under the "sword of Damocles" for an indefinite period of time (to the extent that the offending Internet material remains available and accessible to the public): see Wood, *supra* note 75, 908–909. During such period, damages may escalate and the memories of witnesses gradually fade away. However, the above considerations are not pertinent to choice-of-law decision-making.

notwithstanding multiple publications.[81] There are techniques under the common rule such as *res judicata* and issue estoppel which seek to prevent multiple proceedings. Indeed, to commence multiple proceedings in such an instance may constitute an abuse of process.[82] In respect of damages, the common law rule is that the plaintiff may treat multiple publications either as giving rise to separate causes of action or as going to damages, though subsequent cases appear to favour the former treatment.[83] Both the common law and statutory rules in Australia are silent on whether the rule affects decision-making insofar as choice of law is concerned.

The present writer would agree with the judges delivering the joint judgment of the High Court and Gaudron J. that the single publication rule is not *directly* related to the choice of law problem, but is more an issue concerning jurisdiction and the prospect of multiple proceedings. The learned judge relied on the rule in *Henderson v. Henderson*[84] that controversies are not finally determined until all the issues involved in a controversy are submitted for determination or, if they are not, they are treated as no longer being in issue.[85] As mentioned in Section B above, since the plaintiff in *Gutnick* had limited his controversy with Dow Jones to the publication of the defamatory material in Victoria, the controversy could be determined in its entirety in Victoria and there was no question of multiple actions in different jurisdictions.[86]

2. *The Place Where the Plaintiff's Reputation is Likely to be Damaged*

The High Court of Australia appeared to incline towards the place of *damage* as the pivotal event in defamation for choice of law purposes. As mentioned in Section II, the joint judgment of the High Court relied on the place of damage to Gutnick's reputation as it was in Victoria where the publications complained of were accessed by (and comprehensible to) the readers. Callinan J. observed that "the most important event so far as defamation is concerned is the infliction of the damage, and that occurs at the place where the defamation is comprehended.[87] Kirby J. also emphasised the significance of the place of damage to the plaintiff's reputation but (as a departure

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81 See *Mclean v. David Syme* (1970) 72 S.R. (N.S.W.); see also M. Gillooly, *The Law of Defamation in Australia and New Zealand* (1998), The Federation Press, 82.

82 See Gillooly, *supra* note 81 at 82.

83 See *Toomey v. Mirror Newspapers* (1985) 1 N.S.W.L.R. 173; *David Syme & Co. v. Grey* (1992) F.C.R. 303; see also Gillooly, *supra* note 81 at 86.

84 (1843) 3 Hare 100.

85 *Gutnick*, *supra* note 1 at paragraph 64.

86 *Gutnick*, *supra* note 1 at paragraph 65. See also *Port of Melbourne Authority v. Anshun Pty. Ltd.* (1981) 147 C.L.R. 589.

87 *Gutnick*, *supra* note 1 at paragraph 184.

from the joint judgment of the High Court) sought to link the place of reputational damage with the place of the plaintiff's residence.[88] Kirby J. also stated, consistent with the views of Callinan J., that Victoria was the place where "*most* such damage would be done".[89]

At this juncture, we need to say a few words about the "place of damage to the plaintiff's reputation" and its inter-relationship with the place of publication of the defamatory material. "Reputation" exists in the minds of the third party or audience, who may be shifting from location to location. Inevitably, choice of law rules based, whether wholly or partially, on the concept of the place of reputational damage (as a connecting factor) will have to rely on a *fiction* that the third party's incorporeal (and unflattering) "mental view" of the plaintiff has an abode of its own. It is submitted that this abode should be "fixed" at the "third party's location" at the point when he or she accesses and comprehends the defamatory message.[90] To allow the third party's location to be modified post-publication would enable the parties to manipulate the determination of the choice of law, which is undesirable. More importantly, the relevant point of publication would in most cases be the point at which the tort of defamation arises.

Though the place of publication and the place of the damage to the plaintiff's reputation would usually coincide, the fact that the defamatory material is published in country X does not necessarily mean that the damage to the plaintiff's reputation occurred in country X. For example, the allegedly defamatory article may have been downloaded (accessed and comprehended) by the readers in country X. Hence, the place of publication is in country X. However, there may be clear evidence, on the facts of an exceptional case, to suggest that no reasonable reader in country X would have regarded the article as defamatory of the plaintiff and hence, no reputational damage had been suffered by the plaintiff in country X, nothwithstanding the fact of publication.

The converse, however, is not true. Where it has been ascertained that damage to the plaintiff's reputation occurred in a particular jurisdiction, this necessarily implies that the allegedly defamatory article was published in that same jurisdiction. This is because a necessary requirement for damage to the plaintiff's reputation is that the allegedly defamatory article must first

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88 The learned judge stated at paragraph 151 in *Gutnick*, *supra* note 1, that the place where a plaintiff has a reputation is usually the place where the plaintiff is resident. Unlike product liability or some other negligence claims, the learned judge observed that damage to reputation could not occur "fortuitously" in a place beyond the defendant's contemplation.

89 *Gutnick*, *supra* note 1 at paragraph 154.

90 It is suggested that the place of reputational damage would usually be the place of the third party's residence as at the time of publication. Fortuitous locations such as the third party's brief holiday destination and business meeting stopover should be excluded.

have been comprehended by the relevant audience. This is regardless of whether damage is presumed or requires special proof.

Returning to an analysis of the place of reputational damage as a connecting factor in *Gutnick*, it is noted that the place of the *greatest* damage to reputation (as *per* Callinan and Kirby JJ.) may not be easily ascertainable where the injury to reputation is suffered in more than one jurisdiction.[91] This problem did not pose an issue on the narrow facts of *Gutnick* as the plaintiff had undertaken to sue in respect of the damage to reputation solely in Victoria. However, in the absence of such undertaking, and where injury to reputation is suffered in more than one state, the court would have to assess the relative harm to reputation in each state,[92] certainly not an enviable task. In this balancing act, should the judge, for instance, take into account the respective defamation laws of each state insofar as the assessment of damages is concerned? This would involve the assistance of foreign law experts and the attendant costs and time. In view of the potential costs involved merely to ascertain the applicable substantive law to apply to the dispute, perhaps the judge could simply apply the law of the forum in assessing the relative harm to reputation in each of the competing states though this latter proposal has its difficulties.[93]

Even if we reject a comparative assessment of reputational harm, there is another objection to selecting the law of the place where the plaintiff suffered damage to his or her reputation as the governing law in Internet defamation. Damages in libel cases and certain types of slander, for instance, are normally presumed or do not require any special proof (at least in Australia and England), unlike an action in negligence causing personal injury or pecuniary loss. Hence, the relatively insignificant role of damages in establishing liability in such cases might militate (in practice) against utilising the place of damage to reputation as an appropriate connecting factor for determining the appropriate choice of law rule in defamation.

However, the burden of proving damages aside, the place of damage to reputation normally offers an important source of evidence as to the appropriate amount of damages to be awarded to the plaintiff. Callinan J. added that a publisher will be likely to sustain a nominal or no damage for publication of defamatory materials in a jurisdiction in which a person defamed neither lives, has any interests, or in which he or she has no reputation to vindicate.[94] This proposition is reinforced by the Australian cases which

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91 This can occur where, for example, the plaintiff has an international reputation. This will be discussed in greater detail in this Section IV below.

92 See A.L.R.C., *supra* note 68 at paragraph 6.55.

93 This overlooks the fact that the law as to the assessment of damages and the requisite burden of proof in defamation actions can vary quite substantially from state to state.

94 *Gutnick*, *supra* note 1 at paragraph 184.

have held that the amount of harm done by the defamatory material is proportional to the number of persons who were aware of such defamatory material such that proof of extent of publication is vital to assessment of damages recoverable.[95]

The joint judgment of the High Court opined that "[i]dentifying the person about whom material is to be published will readily identify the defamation law to which that person may resort".[96] Publishers should normally be cognizant or are expected to be aware of the place(s) where the reputation of the potential plaintiff is likely to be injured, except in the rare cases where the publisher would not be expected to know that the defamatory material actually referred to the plaintiff.[97] Further, on the particular facts of this case, Dow Jones could reasonably anticipate that the alleged defamatory materials would be downloaded and read by subscribers in Victoria. In such a situation, there would be less surprise to the parties (particularly the defendants) and this promotes *certainty* in the application of relevant defamation laws, one of the attributes of an appropriate choice of law rule emphasised at the beginning of Section IV above. Hence, notwithstanding some problems mentioned above, it would be difficult to refute the practicality of regarding the place of damage to reputation as a significant connecting factor in choice of law.

The selection of the place of damage to reputation as the choice of law rule may, however, be problematic where the plaintiff concerned has an "international reputation". Note that we faced a similar (albeit not exactly the same) problem earlier with regard to the place of publication as discussed above. Suppose in this case that X who has an international reputation has been defamed. If the place of damage to reputation were accepted as the sole factor in choice of law, a publisher such as Dow Jones would be required, before publishing any defamatory material concerning X, to conduct a prior investigation of the attendant legal consequences under each of the various possible defamation laws where X might suffer reputational harm, and this can be costly.

Moreover, the concept of "international reputation" itself is somewhat vague. It is notoriously difficult at times to determine, particularly for a person with international reputation, the precise "threshold" in order for one to safely conclude that he or she indeed suffered reputational harm in certain specific jurisdictions but not in others.[98] For example, would the superstar Michael Jackson be entitled to claim that he has an international

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95 See *Carson v. John Fairfax & Sons* (1993) 178 C.L.R. 44 at 75–77.

96 *Gutnick*, *supra* note 1 at paragraph 54.

97 See *Hulton & Co. v. Jones* [1910] A.C. 20; *Newstead v. London Express Newspapers* [1939] 4 All E.R. 319 and the Australian case of *Lee v. Wilson* (1934) 51 C.L.R. 276.

98 On the difficulty of "demarcating" one's reputation, it is noted that Lord Hoffman (dissenting) had remarked of the plaintiff in *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004

reputation to protect in order to claim damages in almost any particular jurisdiction in the world where he is known as a superstar? Should the law of each jurisdiction where he is conferred "superstar" reputation apply to his claim of damages for defamation? If so, there is then the problem of ascertaining a single appropriate choice of law in such situations. If indeed a single substantive law needs to be applied, we may need to resort to other appropriate additional connections or factors (for example, the place of his domicile or residence or even the extent of his record sales within the jurisdiction, *etc.*) to narrow down the choice-of-law possibilities.

3. *The Substance of the Cause of Action and the Place of the Defendant's Conduct*

Dow Jones argued that the place of the wrong for choice of law should be determined by reference to where in *substance* the cause of action arose as in the case of *Distillers Co. (Biochemicals) Ltd. v. Thompson.*[99] In particular, Dow Jones cited Lord Pearson's statement that the place of a tort is where "the act on the part of the defendant which gives the plaintiff the cause of complaint".[100] Based on Dow Jones's contention, this would appear to lead to the applicable substantive law being New Jersey law where the alleged defamatory material was finally uploaded.[101] However, Kirby J., in refuting Dow Jones's argument, distinguished *Distillers* on the basis that in that case, the placing of the drug on the New South Wales market without the appropriate warning (not the manufacture of the drug in England) constituted the wrong.[102]

Kirby J. also referred to the Australian case of *Voth v. Manildra Flour Mills Pty. Ltd.*[103] One of the issues in that case was whether the alleged tort of negligent misstatement was a foreign or a local tort. The negligent statement by the defendant made in Missouri was held to be a *foreign* tort, notwithstanding the fact that the statement was directed at Australian companies which relied on the statement in New South Wales. The court in *Voth* characterised the relevant act of the defendant as the act of provision of accountancy services which was begun and completed in Missouri. Kirby J. also distinguished the cases of *Distillers* and *Voth* on the basis that they were

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at 1022–1023 that "[h]is reputation in England is merely an inseparable segment of his reputation worldwide".

99 [1971] A.C. 458 (Privy Council decision on appeal from New South Wales).

100 [1971] A.C. 458 at 467.

101 *Gutnick, supra* note 1 at paragraph 143.

102 *Gutnick, supra* note 1 at paragraph 146; see also *Distillers Co. (Biochemicals) Ltd. v. Thompson* [1971] A.C. 458 at 469.

103 (1990) 171 C.L.R. 538 (High Court of Australia).

concerned with the tort of negligence, unlike in the present case of defamation, where the relevant act is the publication allegedly damaging Gutnick's reputation.[104]

It is submitted that the distinction drawn by Kirby J. between the tort of negligence and an action in defamation may not be as persuasive as the judge envisaged. Consider a situation where the defendant in country X uploaded the defamatory material onto a server in country X (*i.e.*, the place of defendant's conduct) which is accessed by subscribers in country Y. If the plaintiff can show that the defendant made the statement negligently which resulted in the plaintiff's loss, he can choose to frame the action under the tort of negligence.[105] If Kirby J. is correct, such a tort of negligence would be governed by the laws of country X but the defamation action would be determined under the laws of country Y, notwithstanding that both arise from the *same* statement made by the defendant. There does not appear to be any good theoretical basis to support such a disparity in the respective outcomes. This problem is compounded when one considers that country Y (though disregarded as a connecting factor for choice of law in the negligence action) may well be the place where the plaintiff suffered reputational harm and hence is more relevant to the assessment of damages for negligence as compared to a defamation action. This is because under the tort of negligence, damages are normally required to be proved by the plaintiff for recovery but may (as we have seen) be presumed in defamation actions in libel and certain slander cases in Australia.

The *Distillers* test, that choice of law should be based on the place of the defendant's conduct which gives the plaintiff the cause of complaint, can also result in an arbitrary decision. The location of the defendant's conduct may be remote from the location which, in fact, gives the plaintiff his cause of complaint (the place where the plaintiff suffered the damage). For example, the Dow Jones reporter who prepared the defamatory article could have completed it whilst on an expedition say in Tahiti, which is unconnected with the case at hand. Moreover, there may be several people such as the editors and reporters working on the same article who may be working in different states. Locating a single governing law on the basis on the place of preparation of the alleged defamatory material would be impracticable.[106]

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[104] *Gutnick, supra* note 1 at paragraph 149.

[105] See *Spring v. Guardian Assurance* [1995] 2 A.C. 296, where the House of Lords held that an employer who provides a reference in respect of one of his employees to a prospective future employee will ordinarily owe a duty of care to his employee in respect of the preparation of the reference.

[106] See A.L.R.C., *supra* note 68 at paragraph 6.54.

4. *The Place Where the Servers Are Maintained*

As mentioned earlier, Dow Jones contended that the governing law should be the law of the place where it maintained its web servers (New Jersey) unless that place was merely adventitious or opportunistic. The interveners (Amazon.com Inc.) argued that the law should be the law of the place where the publisher last exercised control over dissemination.[107]

The arguments made by Dow Jones and the Interveners, on the face of it, promote *certainty* in the law as one can easily ascertain the applicable law based on the location of the servers or where the publisher last relinquished control over dissemination. It also enhances the convenience of and reduces costs for the publisher.[108] The publisher need not be concerned with the possibility of other defamation laws applying to the access of the alleged defamatory materials in various jurisdictions, and hence avoids the problems associated with either the place of publication or where reputational damage is suffered.

The present writer is, however, reluctant to endorse a choice of law rule based on the place where the defendants have located the servers for the following reasons. First, the choice of the location of servers may not bear any relationship to the parties' corporate presence or domicile, the place where the alleged defamatory material was prepared or the place where the defamatory material was accessed and read. Further, if Dow Jones's argument were accepted, publishers would be able to avoid the consequences of publishing the defamatory material by merely locating servers at a place where the law favours the defendant or worse, where no laws of defamation exist to protect the aggrieved plaintiff.[109] Plaintiffs whose reputations have been injured by such publications would not be able to obtain redress under such governing law, even when his or her reputation was clearly lowered in the eyes of his fellow community. This was the very objection raised at the start of Section IV above against choice of law rules which are too value-subjective or unfair on the face of the rule as it "discriminates", *in advance*, against one of the parties by vesting control (and the opportunity for manipulation) solely in the defendants.

If the law of the location of servers where the defamatory material was uploaded were applied to the dispute, it would subject non-U.S. citizens or residents to U.S. laws of defamation, even where the place of damage to reputation, the place of publication or the place of the plaintiff's residence is far removed from the United States. Callinan J. pointedly referred to this as an imposition of "an American hegemony in relation to Internet

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[107] *Gutnick*, *supra* note 1 at paragraph 130.

[108] See *Gutnick*, *supra* note 1 at paragraph 22.

[109] See *Gutnick*, *supra* note 1 at paragraph 130 *per* Kirby J., and paragraph 199 *per* Callinan J.

publications".[110] And, as we have seen in Section III above, the results can—as a consequence of a different legal culture and substantive law—be quite different indeed.

An academic has suggested that perhaps the Internet subscribers or users may be said to be "virtually" collecting the defamatory material from the server on which it is stored.[111] On this basis, it may be argued that the applicable substantive law should be the law where the servers are maintained. It is submitted, however, that such "virtual" collection, as the word implies, appears too artificial (or one might add, unreal) to function as a relevant connecting factor. In truth, the defamatory material possesses *real* effects *only* at the point when it is read and comprehended by readers in their homes or offices, after such collection of data at the servers. This approach has the advantage of being technology-neutral. If it were accepted that the applicable law is that of the law of the place of "virtual" collection at the servers, this choice of law rule may have to be modified each time the technology is being adapted.

C. *The Eclectic Approach of the American Restatement (Second)*

The Restatement (Second) may best be described as an eclectic mixture of many of the methodologies and approaches discussed above such as governmental interest analysis and the utilisation of connecting factors with particular emphasis on the proper law, *i.e.*, the law having the "closest and most real connection" with the parties and transactions in issue. It also lays out several general choice of law principles.[112] These choice of law principles are based on interest analysis (which have already been discussed above) as well as widely-encompassing criteria such as certainty, predictability and needs of the international system. Whilst these criteria are laudable objectives, they do not constitute sufficiently *definite* choice of law rules for application to particular Internet defamation disputes such as in *Gutnick*. Due to the eclectic nature of the Restatement (Second), there is great leeway for judicial discretion and subjectivity in choice of law, which may have led to confusion as to whether the significant relationship test or governmental interest analysis applies in the U.S. courts.[113]

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[110] *Gutnick*, *supra* note 1 at paragraph 200.

[111] C. Reed, *Internet Law: Text and Materials* (London: Butterworths, 2000) at 102.

[112] The principles are as follows: (1) the needs of the interstate and international systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of those states in the determination of the issue at hand; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability, and uniformity of result; and (7) ease in the determination and application of the law to be applied.

[113] See McDougal, Felix and Whitten, *supra* note 6 at 471.

Rule 145 provides that choice of law decision-making in tort is based on the law having the "most significant relationship" to the parties and the transaction. However, with regard to defamation actions in particular, the law of the state of publication is to be applied unless some other state has a more significant relationship.[114] We have already stated the reasons why the *sole* factor of the state of publication may, in and of itself, be unworkable. Further, the above rule appears to allow the general and wide exception relating to the criteria of the "most significant relationship" to absorb the primary rule relating to the place of publication.

D. *"No Law" Zone or a "Distinct Substantive Law"*[115] *for Cyberspace?*

This is not, strictly speaking, a choice-of-law rule. Ironically, it derives its basis (and strength) in part from the problems faced by choice of law jurists in determining the appropriate choice of law. Indeed, it eschews choice of law issues either by declaring a "no law" zone (*i.e.*, zero substantive law)[116] promising, as it were, a safe haven for free-wheeling Internet activities or by proposing a "distinct substantive law"[117] to govern the Internet space only, based perhaps on an internationally accepted or entirely new substantive rule or principle of law.

At first blush, this proposal for "No Law" Zone or a "Distinct Substantive Law" for Cyberspace appears quite tempting, considering the enormous difficulties faced in finding the elusive choice of law rule(s) for Internet defamation. With a "No Law" Zone or a "Distinct Substantive Law" solely for Internet defamation actions, one would not need to design the "perfect"

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[114] Rule 149.

[115] The idea of a distinct substantive law to circumvent choice of law problems is not new: see *e.g.* Juenger, *supra* note 58 at 188 on Article 2 of the Uniform Commercial Code which resolved an interstate negotiable instruments problem by invoking a federal (substantive) common-law rule derived from United Nations Convention on Contracts for the International Sale of Goods. Final Act, U.N. Doc. A/CONF 97/18 (1980).

[116] See *e.g.* A. Mefford, "Lex Informatica: Foundations of Law on the Internet" 5 Ind. J. Global Legal Studies (1997) 211 at 218.

[117] Examples include: (a) the proposal of a federal common law (applicable only within the context of the United States) (see J.D. Faucher, "Let the Chips Fall Where They May: Choice of Law in Computer Bulletin Board Defamation Cases" 26 U.C. Davis L. Rev. (1993) 1045); (b) the protection of speech regardless of technological medium (see D.J. Loundy, "E-law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability" 3 Alb. L.J. Sci. & Tech. (1993) 79 at 91); and (c) self-regulation by commercial networks (see H.H. Perritt, Jr., "President Clinton's National Information Infrastructure Initiative: Community Regained?" 69 Chi-Kent L. Rev. (1994) 991 at 997; this was cited and endorsed by E.J. McCarthy, "Networking in Cyberspace: Electronic Defamation and the Potential for International Forum Shopping" 16 University of Pennslyvania Journal of International Business Law (1995) 527 at 565.

or "one size fits all" solution for resolving choice of law problems in Internet defamation (assuming such a solution even exists at all!).

Leflar's "better law" approach[118] (mentioned in Section IV above) which introduced five "choice-influencing considerations"[119] to assist judges in the choice of law decision-making, may be called in aid to find the "Distinct Substantive Law" to be applied.[120] As can be seen from the fourth consideration,[121] Leflar's approach also utilises governmental analysis with a *lex fori* inclination, which has already been critiqued. The fifth consideration, *i.e.* "better rule of law", has been given greater emphasis than the other considerations generally,[122] but there is little in terms of concrete rules to determine with certainty the preferred substantive law applicable. Further, the lack of concrete rules encourages judicial manipulation.

It is submitted that the proposal for a "No Law" Zone or a "Distinct Substantive Law" should be rejected. If accepted, this zone would provide a "backdoor" for publishers to avoid existing defamation laws unfavourable to them which they would have been subject to in the non-Internet world had they been published in print. A publisher of defamatory materials under the law of country X should not be entitled to obviate legal restrictions of country X just because he posts the *same* defamatory materials on the Internet. It is merely a change in the media of communication or publication, not in the substantive content of the defamatory material, and therefore does not justify such disparity in treatment.

Moreover, defamation actions concern the injury to the reputations of persons in the real world, not in some remote, unreal realm known as the cyberspace. The protection of reputation by way of defamation law is a relevant objective, whether in the United States or Australia. Whether the injury to reputation occurs through the newspapers, books, broadcasting or the Internet, it must be remembered that the injury to reputation is suffered by a living person having a real existence. Hence, creating an unreal "No Law" Zone or a "Distinct Substantive Law" especially for cyberspace would appear to run contrary to one of the primary objectives of defamation law to protect a person's reputation.

Even if there is justification for a distinct substantive law to be applied to cyberspace, it is, as pointed out in Section III above, unlikely for countries

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[118] See R.A. Leflar, "Conflicts Law: More on Choice-Influencing Considerations" 54 Cal. L. Rev. (1966) 1584.

[119] The five considerations areas follows: (1) predictability of results; (2) maintenance of multistate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interests; and (5) application of the better rule of law.

[120] According to Leflar, the better law rule is not synonymous with the *lex fori*: see R.A. Leflar, *supra* note 118 at 1588.

[121] See *supra* note 151.

[122] See Tetley, *supra* note 45 at 315.

with vastly disparate defamation laws (together with its cultural and historical baggage) to agree on a set of international substantive rules to govern Internet defamation.[123] For that matter, even if a "No Law" Zone is to be created for Internet defamation, the states would still have to agree to ratify such a proposal for it to be feasible. As such, it may be pertinent at this juncture to return to a discussion of the last set of choice of law rules below followed by some recommended choice of law rules for Internet defamation based on a convergence of relatively definite connecting factors.

E. *The Place of the Plaintiff's (Habitual) Residence vs. the Plaintiff's Domicile*

In American choice of law jurisprudence, there is a strong presumption in the Restatement (Second) of Torts that the state with the most significant relationship will be the state where the plaintiff was *domiciled*[124] at the time, if the matter complained of was published in that state.[125] This is on the basis that the domicile is usually where the plaintiff's reputational contacts are found and the state of domicile generally has the greatest concern in vindicating the plaintiff's good name.[126] This presumption may be rebutted if it can be shown that another state has a more significant relationship to the issue at hand.[127] For instance, the presumption in favour of the law of the state of the plaintiff's domicile may be displaced by the law of the state where the defamatory statement caused the plaintiff the greatest injury.[128]

Relatively speaking, though, the place of the plaintiff's residence as a connecting factor in determining the governing law in Internet defamation is to be preferred to that of domicile.[129] It was noted that the choice of the place of the plaintiff's residence would be "fair", at least where the defamatory material was also published in the state of the residence as that would generally be the place where the injury to reputation had the greatest impact.[130] One can add that there would be little danger of judicial manipulation or forum shopping by the parties if the plaintiff's residence

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123 See the U.K. Law Commission, *Defamation and the Internet* (December 2002), Scoping Study No. 2, paragraph 4.54 which opined that an international treaty, accompanied by a greater harmonization of the substantive defamation law, would be required to resolve the *impasse*.

124 Domicile in the Restatement (Second) is defined as the "place where a person dwells and which is the centre of his domestic, social and civil life".

125 Section 150(2).

126 See *Wilson v. Slatalla* 970 F. Supp. 405 at 414 (E. D. Pa. 1997) (based on the choice of law principles of the state of Pennsylvania).

127 Section 150.

128 Section 150.

129 See A.L.R.C., *supra* note 68 at paragraph 6.55. See also Kirby J.'s judgment at paragraph 151.

130 See A.L.R.C., *supra* 68 at paragraph 6.55.

(as at the time of the making of the allegedly defamatory statement) were selected as a choice of law factor, unlike, for example, the place where servers are maintained by the defendants. Hence, a choice of law rule which is premised on the plaintiff's residence (as at the time of the making of the defamatory statement) does not give the plaintiff any advantage, *in advance*, in influencing the outcome of the particular dispute.

Under the law of domicile, a person is assumed to have one home. This obviates the problem of having two or more contrary laws being applied to the plaintiff in an Internet defamation case, as is the case if the plaintiff's place of residence *simpliciter* or ordinary residence is selected. It is recognised that a person may have more than one residence at a particular point in time.[131] Nevertheless, this problem with the concepts of ordinary residence and residence *simpliciter* may be eschewed by selecting other useful connecting factors should there be two or more competing laws arising from the use of the place of plaintiff' residence as the primary rule. Alternatively, one can utilise "habitual residence"; it is not likely that a person will have more than one "habitual residence",[132] unlike "ordinary residence" or "residence" *simpliciter*. Hence, *prima facie*, the concept of "habitual residence" appears relatively more persuasive for our purposes.[133]

The concept of "residence" is sufficiently certain compared to the more complicated notion of "domicile" due in part to the problems associated with the presumption of the continuance of the domicile of origin and the revival of the domicile of origin.[134] The element of intention on the part of the plaintiff is not necessary in the determination of one's "residence" (unlike in "domicile"), though the residence in question needs to be a voluntary one and for a settled purpose.[135] "Residence" thus avoids the common difficulties and the uncertainty associated with establishing a person's state of mind in respect of domicile by inference from surrounding circumstances. Further, the notion of "habitual residence" connotes a residence which has a more durable connection between the person and the place of residence[136] than ordinary residence which may be acquired within a very brief period of

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131 See *e.g. Re Taylor (ex parte Natwest Australia Bank Ltd.)* (1992) 37 F.C.R. 194 (Federal Court of Australia, General Division).

132 See J.G. Collier, *Conflict of* Laws, 3rd ed. (Cambridge: Cambridge University Press, 2001) at 56.

133 The connecting factor of the "habitual residence" of the victim (and the defendant) in a defamation case is utilised for the determination of the choice of law in conjunction with the place of damage in Commission of the European Communities, Proposal for "Regulation Of the European Parliament And The Council On The Law Applicable To Non-contractual Obligations", 22 July 2003 ("Rome II"), article 3.

134 See Collier, *supra* note 132 at 51.

135 See M. Tilbury, G. Davis and B. Opeskin, *Conflict of Laws in Australia* (Oxford: Oxford University Press, 2002) at 450.

136 See Tilbury, Davis and Opeskin, *supra* note 135 at 452.

time.[137] Notwithstanding that it may be difficult to draw the line between ordinary and habitual residence in some cases, the present writer feels that such conceptions of durability would be useful in ensuring that the place of the plaintiff's residence cited as a connecting factor for choice of law in Internet defamation cases is not fortuitious. The conception also helps in narrowing down the choice-of-law possibilities in respect of a plaintiff with an international reputation who travels frequently and resides in various places each time. This further limits the defendant's potential legal costs to conducting investigations of defamation laws in respect of the jurisdiction where the plaintiff "habitually resides" prior to publication of the defamatory materials. Moreover, by utilising the concept of "habitual residence", the opportunities for forum shopping by the plaintiff (though negligible in the first place as mentioned above) would be further reduced.[138]

However, in the unlikely scenario that the plaintiff's habitual residence is different from the place of publication/place of the damage to the plaintiff's reputation, the attraction of the plaintiff's habitual residence (as a connecting factor) diminishes. This is because firstly, the plaintiff's habitual residence is theoretically unconnected with any of the elements of the tort of defamation (though may be related in practice). Thus, the *theoretical* underpinning of the plaintiff's habitual residence as a *sole* connecting factor is relatively weak. Secondly, in the exceptional case where the members of the society in which the plaintiff habitually resides are not aware of the publication of the defamatory article and/or the reputational damages suffered in another jurisdiction, it would appear somewhat remote to select the law of the place of the plaintiff's habitual residence.

V. Recommended Solution and Concluding Remarks

We have already referred in Section IV above to the relative merits of each of the three connecting factors (namely, the place of publication, the place of damage to the plaintiff's reputation and the place of the plaintiff's habitual residence) as compared to the other choice of law approaches and principles. Whilst we recognised certain weaknesses in each of the three connecting factors, the present writer has also explained why each of the connecting factors would be preferred to the other choice of law approaches or

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[137] See Collier, *supra* note 132 at 56.

[138] This address Lord Hoffman's concerns in *Berezovsky v. Michaels* [2000] 1 W.L.R. 1004 at 1024–1025 of forum shopping and in a related vein, that the English court should not be seen as an "international libel tribunal" for a dispute between foreigners which have no connections to England.

connecting factors with more fundamental weaknesses (such as the *lex fori*—interest analysis, American Restatement, domicile, place where the servers are maintained, *etc.*).

It is noted that the significance (and strength) of the three connecting factors are particularly reinforced when they co-exist, as explained in Section IV above. At the same time, the two connecting factors (place of publication and the place of the damage to the plaintiff's reputation) may not be workable where their application throws up two or more applicable substantive laws. The strength of the place of the plaintiff's habitual residence as a *sole* connecting factor has also been doubted. As such, a tiered approach to choice of law rules based on the convergence of the connecting factors is recommended as follows:

Rule 1 (a) Where there is one single substantive law which is common to *all* of the connecting factors (i), (ii) and (iii) below (*i.e.*, "total convergence"), that substantive law shall be applied,

(i) the place of the plaintiff's habitual residence;

(ii) the place of the damage to the plaintiff's reputation; *and*

(iii) the place of publication of the defamatory material.[139]

(b) Where two or more competing substantive laws arise from the application of connecting factors (ii) and (iii), the substantive law to be applied, *from amongst the competing substantive laws*, shall be the law which is common to the place of the plaintiff's habitual residence as well as the place of the defendant's habitual (if not, ordinary) residence.

Rule 2 Where Rule 1 above is not applicable (where there is no "total convergence"), the judge may apply the following guidelines:

(a) If only *one* substantive law arises from the application of the connecting factors (ii) and (iii) (*e.g.* in country Y only), and the place of the plaintiff's habitual residence is in country X, then the law of country Y should be preferred where it can be shown that the plaintiff is ordinarily resident in country Y.[140]

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[139] The connecting factor (iii) would, in most cases, coincide with connecting factor (ii). Hence, Rule 1(a) would only require the convergence of the 2 connecting factors, namely the place of the damage to the plaintiff's reputation and the place of the plaintiff's habitual residence.

[140] Applying the above Rules to the facts in *Gutnick*, and taking into consideration the proposal to prohibit selective pleading by parties (see text immediately after note 141), it is submitted that Rule 2(b) would, on balance, be satisfied in favour of the law of Victoria as the appropriate choice of law. In considering the "fair" and "value-neutral" factors, note that Kirby J. had expressly indicated in his judgment that the plaintiff ordinarily resided in Victoria (paragraph 153). This inclines towards the law of Victoria as the applicable substantive law.

(b) If *two or more* competing substantive laws arise from the application of the connecting factors (ii) and (iii) and the place of the plaintiff's habitual residence gives rise to a different substantive law or the scenarios contemplated in Rule 1(a), 1(b) and 2(a) are not applicable, the court should take into consideration other relevant factors for determining the appropriate choice of law *from amongst the competing substantive laws.* The relevant factors should be, as far as possible, fair and value-neutral in accordance with the ideas outlined at the beginning of Section IV above.[141]

The plaintiff's undertaking to limit his claim for damages to one particular jurisdiction should not be a relevant factor for purposes of determining the choice of law under the above Rules. Consistent with the principles outlined at the beginning of Section IV above, the plaintiff should not be allowed to manipulate the outcome of the choice of law issue by selective pleading in one particular jurisdiction. In this respect, it is tentatively suggested that the pleading rules may have to be modified to require the plaintiff to plead all relevant facts *for purposes of determining choice of law.* If the above Rules are accepted, the plaintiff may then be required to provide relevant information to the courts including information on the various jurisdictions where the reputational damage and publication occurred as well as the plaintiff's habitual residence (if any) or ordinary residence, as the case may be. Similarly, in the interests of ensuring that no party has an undue advantage over the other, the defendant should be allowed to respond to the plaintiff's pleadings for purposes of supplementing or correcting the facts pleaded.

If there were evidence that Gutnick was also habitually resident in Victoria (though this was not explicitly addressed by the High Court), the position would be further strengthened. As additional support, note that the defendants, who knew that they were providing access to subscribers in Victoria, would have reasonably contemplated the applicability of the law of Victoria at the time when the defamatory statement was made, though Dow Jones could also conceivably argue that its target audience was the United States where the bulk of its subscribers are located. See text below, in particular the third last paragraph of this paper.

141 Note in comparison the approach in Article 3 of Rome II which essentially applies (i) the law of the country with which the tort is manifestly more closely connected; (ii) if rule (i) is not applicable, the law of the country where the plaintiff and defendant have their habitual residence when the damage occurs; and (iii) if rule (ii) is not applicable, the law of the country where the damage arises or is likely to arise. It is also subject to the proviso that the law of the forum will be applied if the foreign law designated by Article 3 is contrary to "fundamental principles of the forum as regards freedom of expression and information" (Article 6). It is submitted that the public policy exception to exclude a foreign law (arrived at upon application of this present writer's recommended choice-of-law rules) should only apply "residually" and in circumstances where the foreign law is exceptionally objectionable and fundamental, not merely because the foreign rule is different from the *lex fori* or that the foreign rule does not exist in the forum jurisdiction. See also *supra* note 47.

There are some advantages associated with the suggested Rules. Firstly, the Rules which offer a tiered approach recognise the practical reality that the convergence of significant connecting factors tends to "corroborate" choice of law decision-making in the context of Internet defamation. Rationally speaking, the greater the convergence, the higher the degree of corroboration would be and, at the same time, the higher the likelihood that the apparent weaknesses of a single connecting factor would diminish. The Rules also arise from an awareness that each of the three connecting factors may not yield one single substantive applicable law to resolve the case at hand (such as where a plaintiff's "international reputation" has been damaged or where the plaintiff does not have any habitual residence) and the consequent need to balance the strengths and weakness of the connecting factors in a logical, sensible and realistic manner.

Secondly, it is believed that these Rules are relatively definite and easy to apply, in particular under Rules 1 and 2(a). They avoid, by reference to specific connecting factors, the ambiguity and "looseness" in some of the American approaches and principles as well as those embedded within the concept of domicile (which have been discussed in Section IV above).

Thirdly, due to its relatively definite rules (as opposed to broad principles and approaches), there is likely to be greater *certainty* in the application of the above Rules to the facts of a particular case. In fact, due to the vast difference in the substantive defamation laws of various countries, the factor of *certainty* would tend to be highly prized in choice of law decision-making in the context of Internet defamation.

The requirement of certainty is satisfied where there is total "convergence" of all three connecting factors where there is one place of publication, one place of reputational damage and one place of the plaintiff's habitual residence (Rule 1(a)). In such a case, the defendant has elected to target the audience located at the plaintiff's place of habitual residence only, and thus should reasonably expect that his or her freedom of speech should be determined by the law of that place, even if the law may be relatively pro-plaintiff (*e.g.* Australia). From the plaintiff's perspective, it should also be reasonably expected that the plaintiff's right to protect his or her reputation would be subject to the law of the *only* place of reputational damage and the plaintiff's habitual residence, even if the law of that place is relatively pro-defendant (*e.g.* U.S.).

This means that the defendant could, in addition to publishing the defamatory statement in the place where he is targeting his audience (country X), take advantage of the pro-defendant laws (*e.g.* U.S. defamation law) in the plaintiff's place of habitual residence (country Y). He can do so by deliberately choosing to publish the defamatory statement in the plaintiff's habitual residence too, and not merely where his or her target audience is located. For example, an Australian publisher who makes disparaging remarks about the

plaintiff habitually resident in the U.S. to his target readers in Australia may find it worthwhile to send a few copies of the defamatory article to U.S. readers in order to take advantage of the law of the plaintiff's habitual residence. To circumvent this possibility, the present writer has proposed a proviso in Rule 1(b) to the effect that, in such a case, the defendant would have to show some connection with that place of damage/publication/plaintiff's habitual residence through another connecting factor. I have referred to the defendant's habitual residence or at least ordinary residence as one such connecting factor (see Rule 1(b)). If both the defendant and plaintiff reside in the same place where the reputational damage/publication also occurred, the prospect of manipulation by the defendant will be diminished.

Where "total convergence" of all three connecting factors is absent, two different scenarios arise. Under Rule 2(a), where the place of the publication and the place of the damage to the plaintiff's reputation yields one substantive law (of country X) and the place of the plaintiff's habitual residence yields a different substantive law (of country Y), it is suggested that the law of country X should be applied as the appropriate choice of law provided the plaintiff was ordinarily resident in country X at the time of the making of the allegedly defamatory statement. The relative weakness of the place of the plaintiff's habitual residence (country X) as a *sole* connecting factor has been mentioned above and should not be selected. Further, the place of the damage to the plaintiff's reputation (which necessarily imports the place of publication) would be preferred since there would be, in this instance, no complications arising from a plaintiff with an "international reputation". The concept of ordinary residence (which is easier to satisfy than the notion of "habitual residence") would strengthen the "connectedness" to country Y in this instance.

However, where the plaintiff has an "international reputation" which has been damaged in two or more jurisdictions where the defamatory statement was published (see Rule 2(b)), there is then less reason to select any one of the competing substantive laws based on the place of the damage to the plaintiff's reputation/publication alone. In such a situation, it is suggested that the judge be given some discretion to decide in accordance with a number of guidelines. Whilst the requirement of certainty is highly valued, the need for flexibility in exceptional circumstances cannot be dismissed. However, the underlying premise of the guidelines must be based on fairness and value-neutrality, as far as possible. As an illustration, the judge may consider whether, using an objective test, the defendant could have reasonably anticipated the application of the substantive law(s) and if so, which substantive law would have featured most strongly in the defendant's reasonable contemplation when the defendant made the defamatory statement. For example, the judge can consider where the article was disseminated to a closed category of persons such as subscribers in a particular location or

to the world at large. This factor based on the reasonable anticipation of the defendant has already been mentioned in Section IV above as conducive of *certainty* and predictability of outcomes. The concept of ordinary residence could also be used as a guideline under Rule 2(b) to determine the appropriate choice of law, provided the plaintiff's ordinary residence is determined as at the time of the making of the defamatory statement such that any danger of possible manipulation by the plaintiff is obviated.

Fourthly, to the extent that the Rules are definite and can be easily applied, they diminish the ability of the judge to manoeuvre or circumvent them by invariably resorting to the *lex fori*, hence defeating the purpose of conflicts of law when deciding cases with foreign elements. It is precisely in the context of Internet defamation, where the value systems underlying a country's defamation laws can be vastly disparate, that "value-neutral" choice-of-law rules should be adopted to diminish the over-reliance on the *lex fori*.

Fifthly, the above Rules, which are based on objective connecting factors, limit the capacity of the parties concerned to manipulate or exercise control over the choice of law issue and in doing so, prevent a party from acquiring an undue advantage over the other party in influencing the outcome of the dispute. Again, this is consistent with the requirements of "value-neutrality" and "fairness" in choice of law decision-making, the value of which the present writer has consistently sought to emphasise in this paper.