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‘Place Of Wrong’ in the Tort of Defamation - Behind the Scenes of a Legal Fiction

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Through the application of a six-step model, outlining the sequence of events potentially resulting in harm in cases of defamation, this article examines the possibility of focusing on some other location. Advantages and disadvantages of each identified step are discussed. The conclusion reached is that, despite the problems associated with the Australian approach, no better focal point exists. However, the article also concludes that there is a range of avenues for addressing and minimising the problems associated with the Australian approach.

KEYWORDS: defamation, jurisdiction, publication, choice of law

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- BEHIND THE SCENES OF A LEGAL FICTION

*By Dan Jerker B. Svantesson **

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Through the application of a six-step model, outlining the sequence of events potentially resulting in harm in cases of defamation, this article examines the possibility of focusing on some other location. Advantages and disadvantages of each identified step are discussed. The conclusion reached is that, despite the problems associated with the Australian approach, no better focal point exists. However, the article also concludes that there is a range of avenues for addressing and minimising the problems associated with the Australian approach.

Introduction

The need to determine the relevant 'place' or 'location' in defamation proceedings is by no means a novelty. Typically, location is of importance in relation to the questions of jurisdiction and choice of law. So it is today, and so it has been for centuries. Yet the interest in the question of location has been renewed due to a recent phenomenon – the Internet.

Placing particular emphasis on the online context, this article examines which 'locations' are of relevance in the tort of defamation. The rules of conflict of laws (or private international law as the area is referred to in civil law countries) of many, not to say most, states focus both on 'the place of wrong' and the 'place of damages'. In Australia, the rules of jurisdiction in several states and territories follow this

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approach,¹ while some states and territories only focus only on the 'place of wrong'.^{2 3} In addition the choice of law rule in torts, which is established through common law and thereby used Australia wide, focuses on the 'place of commission of the tort' (or 'place of wrong' as it often is expressed).⁴

Despite the popularity of attaching significance to 'the place of wrong' and the 'place of damages', it is blatantly obvious that neither of these locations can be ascertained without further definitions – it simply is not immediately clear what the 'the place of wrong' and the 'place of damages' are, for example, in the context of cross-border defamation. Furthermore, as is discussed below, it is equally obvious that the current definitions given to the 'place of wrong' and the 'place of damages' give rise to some highly problematic implications.

Having outlined the current Australian approach to the 'the place of wrong' and the 'place of damages' and the problems associated with this approach, the article examines the possibility of focusing on some other relevant 'places'. This is done through the application of a six-step model outlining the sequence of events, which potentially results in harm in defamation. Advantages and disadvantages of placing attention of each identified step are discussed, and it is concluded that despite the problems of the current definitions of the 'place of wrong' and the 'place of damages', no better focal points exists. However, the article also concludes that there is a range of avenues for addressing and minimising the problems associated with focusing on the 'place of wrong' and the 'place of damages' as defined under Australian law.

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- 1 Victoria, New South Wales, Northern Territory, Queensland and South Australia. See further: Peter Nygh and Martin Davies, *Conflict of Laws in Australia* 7th ed (Sydney: Butterworths, 2002), at 63.
 - 2 Western Australia, the Australian Capital Territory and Tasmania. See further: Peter Nygh and Martin Davies, *Conflict of Laws in Australia* 7th ed (Sydney: Butterworths, 2002), at 63-64.
 - 3 The position taken in Australian law is discussed in detail below.
 - 4 I.e. the *lex loci delicti* rule (See: *Regie National des Usines Renault SA v Zhang* (2002) 76 ALJR 551; 187 ALR 1, as confirmed in *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, at para 9.)

The Position of Australian Law

The starting point of a study such as this must necessarily be the realisation that, the location that constitutes the focal point in cross-border defamation is not given through any law of nature. Rather we nominate and define the relevant 'place' and in doing so create a legal fiction. There is nothing preventing us from changing what is seen as the relevant place, if we find such a change appealing.

The Australian position, as to what locations are relevant in a case of cross-border defamation, was extensively discussed in *Dow Jones & Company Inc v Gutnick*.⁵ The fact of the case have been outlined elsewhere,⁶ but put briefly, US publishing company, Dow Jones, published an article in its business journal *Barrons Magazine*. The article implied, amongst other things, that Mr Gutnick had laundered money through the jailed Victorian money launderer Nachum Goldberg. The article was available on Dow Jones' website, www.wsj.com and out of approximately 550,000 people subscribing to the Internet version of the magazine it was estimated that 1,700 paid for the service using Australian-issued credit cards. Mr Gutnick sued Dow Jones in the Supreme Court of Victorian (VSC) seeking damages for defamation that took place in Victoria, to his reputation in Victoria, through publication in Victoria. The question as to whether the Victorian court had jurisdiction, and if so, which law should be applied, came before the High Court, on appeal, on the 28th of May 2002.

The questions, of relevance for this article, the Court had to consider were, where the tort of defamation is 'committed',⁷ where 'damages are suffered'⁸ due to defamation, and what is the 'place of wrong'⁹ in the tort of defamation. Under Australian defamation laws, the 'wrong' – the cause of action - is defined to be the 'publication'.¹⁰ Until publication has occurred, the tort of defamation has not been 'committed' and no 'damages are suffered'. Arguably then, all these three places are the same – the place of publication. Support for such a conclusion can be found in the High Court's reasoning in the Gutnick case:

5 *Dow Jones & Company Inc v Gutnick* [2002] HCA 56.

6 See e.g. Dan Svantesson, *Dow Jones v Gutnick – update on the High Court appeal*, Internet Law Bulletin Vol. 5 Issue 3 (September 2002), pp. 25 – 31.

7 Victorian Supreme Court Rules (VSCR) r 7.01(1)(i).

8 Victorian Supreme Court Rules (VSCR) r 7.01(1)(j).

9 Lex loci delicti.

10 See e.g. *Defamation Act 1947* (NSW), section 9, *Defamation Act 1889* (Qld), section 7, and more generally, Peter Nygh and Martin Davies, *Conflict of Laws in Australia* 7th ed (Sydney: Butterworths, 2002), at 423.

Mr Gutnick has sought to confine his claim in the Supreme Court of Victoria to the damage he alleges was caused to his reputation *in Victoria* as a consequence of the publication that occurred *in that State*. The place of commission of the tort for which Mr Gutnick sues is then readily located as Victoria. That is where the damage to his reputation of which he complains in this action is alleged to have occurred, for it is there that the publications of which he complains were comprehensible by readers.¹¹

This seems to equate the place where the tort of defamation is committed with the place where damages are suffered due to defamation. Further, the court stated that 'it is now established that in trying an action for tort in which the parties or the events have some connection with a jurisdiction outside Australia, the choice of law rule to be applied is that matters of substance are governed by the law of the place of commission of the tort'.¹² The 'place of commission of the tort' would doubtlessly seem to be the same as the place where the tort was 'committed'. Thus, all three places point to the same location – the place of publication. It should, however, also be pointed out that Kirby J, in his separate, concurring judgment, stressed the importance of dealing with jurisdiction and choice of law separately. The decision that the Victorian Court has jurisdiction over the parties does not resolve the law that such a Court must apply. The distinction between jurisdiction and choice of law is repeatedly made in decisions of the High Court. It has insisted that such issues be kept separate and distinct. A court may have jurisdiction, but it may equally be bound by the applicable rules of private international law to exercise its jurisdiction by giving effect to the law of a foreign jurisdiction.¹³ The fact that one should always remember to deal with the issue of jurisdiction separate to the issue of choice of law, does however not necessarily exclude the possibility of the two being dealt with by reference to the same focal point, such as the location of publication in this case.

If this is accepted, that the place where the tort of defamation was 'committed', where 'damages are suffered' due to defamation and the 'place of wrong' in the tort of defamation all point to the place of publication, we must necessarily identify the location of publication.

'Publication'

In determining where and when 'publication' (i.e. the actionable wrong) takes place, the judgment of the VSC discusses a range of cases, mainly from the 19th century. The

11 *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, at paragraph 48.

12 *Ibid*, at paragraph 9.

13 *Ibid*, at paragraph 105 (footnote omitted).

defendant had apparently relied primarily on two cases to illustrate that 'publication' takes place upon the defamatory material being uploaded;¹⁴ *R. v Burdett*¹⁵ and *Duke of Brunswick and Luneberg v Harmer*.¹⁶ The *Burdett* case related to the criminal act of seditious libel¹⁷ and was dismissed by Hedigan J essentially for the reason that 'if *Burdett* is capable of being applied to case of defamatory civil libel rather than being confined to seditious libel, then it runs contrary to a long line of authorities'.¹⁸ Hedigan J also noted that '[w]hen *Burdett* has been cited in texts, it is for the proposition that in the case of seditious libel it is uncertain whether composition of the material with the intention that it be published, but without publication, can constitute the offence'¹⁹ (i.e. whether the fulfilment of step one is sufficient in seditious libel).

In the *Duke of Brunswick* case, the plaintiff sent his servant to obtain a particular issue, published approximately 17 years earlier, of a newspaper containing an article defamatory of the plaintiff. The defendant provided the plaintiff's servant with a copy of the newspaper (another copy was apparently available at the *British Museum*). It was held that a 'new' publication had taken place, by which the statute of limitation was circumvented, and the plaintiff could sue. Further, it was also held that 'it was not necessary to tell the jury, in estimating the damages as to such matter, to take into consideration the fact that the only publication proved had been the sale to the [plaintiff's] agent'.²⁰ This case is very interesting in that it is said to be the foundation of the common law principle of multiple publication (i.e. that each separate publication is a separate tort).²¹ At the same time, the defendant was relying on this case to show that publication takes place where the defamatory material is uploaded. In accordance with Hedigan J's judgment, the quote Dow Jones relied upon was: 'The defendant, who on the application of a stranger, *delivers* to him the writing which libels the third person publishes the libellous matter to him, although he may have been sent to procure the work by that person.'²² However, as noted by Hedigan J, the

14 *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, at paragraph 23.

15 *R. v Burdett* (1820) 4 B. & Ald. 115.

16 *Duke of Brunswick and Luneberg v Harmer* (1849) 14 QB 184.

17 It might be relevant to note that relying on criminal case law in a civil matter always is 'a bit of a long-shot'. It is also interesting to note that the crime of seditious libel has only been successfully prosecuted in the Australian courts three times in 'recent times', the latest being in the early 1960s. Des Butler and Sharon Rodrick, *Australian Meida Law* (Pymont: LBC Information services, 1999), at 333.

18 *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, at paragraph 25.

19 *Ibid*, at paragraph 27.

20 *Duke of Brunswick and Luneberg v Harmer* (1849) 14 QB 184, at 185.

21 *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, at paragraph 31.

22 *Duke of Brunswick and Luneberg v Harmer* (1849) 14 QB 184, at 189. Emphasis added.

Court went on to say: 'So far as in him lies he lowers the reputation of the principal *in the mind of the agent*, although that of an agent is as capable of being affected by the assertions as if he were a stranger.'²³ Although the paragraph relied upon by the defendant appears to nominate 'publication' as taking place where the defamatory material is uploaded, the passage identified by Hedigan J provides that 'publication' takes place upon comprehension by a third party. However, directly after the passage cited by Hedigan J, the Court went on to state that '[t]he act is complete by the delivery: and its legal character is not altered, either by the plaintiff's procurement or by the subsequent handing over of the writing to him',²⁴ which again seems to point to 'publication' occurring where the defamatory material is uploaded or possibly downloaded. Nevertheless, Hedigan J certainly took the view that the *Duke of Brunswick case*, '[h]aving regard to the language used, and to say the least unusual the [sic] circumstances of the case, it is not a commencing [sic] authority for the [defendant's] proposition'.²⁵

The case law referred to by the plaintiff was rather uncritically accepted, and indeed adopted, by Hedigan J. This, it is submitted, might have contributed to certain cases being given greater significance than is warranted. For example, the fact that a case provides that '[t]he material part of the cause of action in libel is not the writing, but the publication of the libel',²⁶ does not identify where publication takes place – it merely excludes the possibility of publication occurring where the defamatory material is created. Furthermore, case law pointing to the 'communication' must be closely scrutinised. Hedigan J cited *Boorman v Hill & Co*,²⁷ in which Lord Esher stated that 'if a letter was not communicated to anyone but the person to whom it is written, then there is no publication of it',²⁸ while Lopes L.J. in the same case stated the following '[w]hat is meant by publication? Communication of the defamatory matter to a third person'.²⁹ It is submitted that it is vital to draw a distinction between communication of the vehicle carrying the defamatory matter (e.g. the communication of a letter), and communication of the defamatory matter. The former refers to where the defamatory material is uploaded or possibly downloaded, while the latter most definitely refers to where the defamatory material is comprehended by a third

23 Ibid, at 189. Emphasis added.

24 Ibid, at 189.

25 *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, at paragraph 29.

26 Ibid, at paragraph 36.

27 *Boorman v Hill & Co* (1891) 1 QB 524.

28 *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, at paragraph 34, per Hedigan J.

29 Ibid.

person.³⁰ In addition, Hedigan J appears to take the view that *Sadgrove v Hole*,³¹ in which Smith M.R. stated that '[i]t is clear that he did not prove any publication of a libel on him until the postcard got into the hands of the builder, because then for the first time could any knowledge arise as to the person to whom the postcard referred'³² supports his 'traditional' approach. This quoted passage, however, seems to point to the place where the defamatory material is received rather than comprehended, and is, thereby, not in line with Hedigan J's reasoning. Nevertheless, it can hardly be disputed that Hedigan J had rather solid grounds to conclude that:

[T]he law in defamation cases has been for centuries that publication takes place where and when the contents of the publication, oral or spoken³³, are seen and heard, (i.e. made manifest to) and comprehended by the reader or hearer [...] I therefore conclude that delivery without comprehension is insufficient and has not been the law.³⁴

There are several cases supporting this conclusion.³⁵ Perhaps the position is best described in *Webb v Bloch*:³⁶ 'To publish a libel is to convey by some means to the mind of another the defamatory sense embodied in the vehicle'.³⁷ Indeed, this approach appears to rest on a sound and logical foundation. As discussed below, simply receiving defamatory material does not lower the defamed in the estimate of the third person, but the comprehension of the defamatory material, by that third person, potentially does. Yet the High Courts decision in the *Gutnick* case has arguably

30 It has been suggested that a further distinction should be drawn between the communication of the defamatory matter and the communication of the defamatory meaning. Since whether the meaning of the matter is capable of being defamatory is objectively decided, it is not necessary that the defamatory meaning enters the mind of a third person, however, it is necessary that the defamatory matter enters the mind of a third person, for 'publication' to take place. See further: Terry Tobin and Michael Sexton, *Australian Defamation Law and Practice* (Sydney, Butterworths, 1999), at 3051.

31 (1901) 2 KB 1, at 5.

32 *Sadgrove v Hole* (1901) 2 KB 1, at 5. Referred to, by Hedigan J, in paragraph 36. Emphasis added.

33 Oral and spoken is, obviously, the same thing. It must be assumed from the context that Hedigan J means written or spoken.

34 *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, at paragraph 60.

35 For a discussion of the relevant cases, refer to *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, particularly paragraphs 34-37.

36 *Webb v Bloch* (1928) 41 CLR 331.

37 *Ibid*, at 363.

managed to cause some confusion.³⁸ The joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ noted:

Harm to reputation is done when a defamatory publication *is comprehended* by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act - in which the publisher makes it available and a third party has it *available for his or her comprehension*.³⁹

While focus is placed on actual comprehension in the first sentence, focus is placed on the third person taking possession in the last sentence. Having something available for comprehension is not the same as actual comprehension. While these linguistic contradictions may be viewed as a display of the richness of the English language, and while one must bear in mind that judgments can not be expected to have the linguistic rigor of statutes, it is nevertheless very unfortunate that the Court did not take greater care in the terminology used. Even more importantly, the statement that 'publication' is not a unilateral act, but a bilateral one, is irreconcilable with the common law position expressed by Hedigan J as 'comprehension' is necessarily a unilateral act. Furthermore, only if 'publication' is defined as a unilateral act, will it be possible to rely on it for the identification of a single location (which is argued to be a necessity in relation to the applicable law⁴⁰). Of course, it could be argued that the Court was referring to publication in its more generic meaning, as contrasted to the strict legal meaning.⁴¹ If so, it certainly would have been desirable for the Court to make that clear.

Variations in terminology can be found throughout the High Court's judgment. In several paragraphs, focus is placed on the material being available for comprehension. For example, in para 28 the Court made reference to 'the place in which the publication is *presented in comprehensible form*'⁴². In other paragraphs, focus is placed

38 This has previously been discussed in: Dan Svantesson, *The 'Place of Action' Defence – A Model for Cross-Border Internet Defamation*, Australian International Law Journal 172 (2003).

39 *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, paragraph 26. Emphasis added.

40 It could, however, be said that there is no need for the choice of law rule to nominate only one law as long as the rule defines the relation between the laws nominated if more than one is in fact nominated.

41 Perhaps in response to the appellant's assertion that the single publication rule is preferable.

42 Emphasis added. See also paragraph 40 'the several places in which the publication *is available for comprehension*', paragraph 44 'In the case of material on the World Wide Web, it is not *available in comprehensible form* until downloaded on to the computer of a person who has used a web browser to pull the material from the web server' and paragraph 48

on actual comprehension. For example, in para 135: 'His Honour's analysis shows how deeply embedded in the concept of the tort of defamation are the ideas of proof of damage to reputation; *comprehension of the matter complained of*; and acknowledgment that the sting is felt each time a publication is repeated'.⁴³ Yet other paragraphs are open to different interpretations. For example para 124 provides that 'mere composition and writing of words is not enough to constitute the tort; those words must be *communicated to a third party who comprehends them*'. This passage could be understood to mean that actual comprehension is required, but could also be interpreted to mean that as long as the person coming into possession of the defamatory words would be capable of understanding those words if he/she reads them, publication takes place at the point of transfer of possession.

Looking closer at the terminology used, it becomes clear that the majority judgment almost exclusively refers to the material being *available for comprehension*, while Kirby and Callinan JJ, just as Hedigan J did,⁴⁴ refer to *actual comprehension*. It could consequently be argued that the decision of the High Court shifted the focus from the location of actual comprehension to the location where the material becomes available for comprehension. Indeed, at least one case has relied upon the *Gutnick* case to place focus on the location where the defamatory material is being downloaded, rather than on the location where the material is comprehended by a third person. Referring to, amongst other cases, the High Court's judgment in the *Gutnick case*, the court in *Don King v Lennox Lewis et al*⁴⁵ stated:

[I]t has long been recognised that publication is regarded as taking place where the defamatory words are published in the sense of being heard or read [...].

'That [Victoria] is where the damage to his reputation of which he complains in this action is alleged to have occurred, for it is there that the publications of which he complains *were comprehensible by readers*' (emphasis added in all examples).

43 Emphasis added. See also paragraph 184 'The most important event so far as defamation is concerned is the infliction of the damage, and that occurs at the place (or the places) *where the defamation is comprehended*' and paragraph 199 'Choice of law in defamation proceedings in this country raises a relatively simple question of identifying the place of publication as *the place of comprehension*: a readily ascertainable fact' (emphasis added in all examples).

44 As pointed out by Roger Clarke, *Defamation on the Web: Gutnick v Dow Jones* (<http://www.anu.edu.au/people/Roger.Clarke/II/Gutnick.html>) (last visited May 10, 2003), also Hedigan J's judgment contained a variety of different terms. However, all of the terms used by Hedigan J can be argued to refer to actual comprehension (step four).

45 *Don King v Lennox Lewis, Lion Promotions, L.L.C. and Judd Burstein* [2004] EWHC 168 (QB).

What is more, by analogy, the common law currently regards the publication of an Internet posting as taking place when it is down-loaded.⁴⁶

This statement is clearly misguided. If it is true, as it seems to be, that 'the common law currently regards the publication of an Internet posting as taking place when it is down-loaded', it can certainly not be based on any analogy with the traditional common law approach that 'publication is regarded as taking place where the defamatory words are published in the sense of being heard or read'. As will be discussed further below, one of the main benefits with placing focus on the location of actual comprehension, is that it is technologically neutral – whatever the means of communication, one can identify when and where the defamatory material enters the mind of a relevant person. If the common law has, indeed, changed the focus from the location of actual comprehension to the location where the material becomes available for comprehension, in the online context, this benefit is lost.

At the same time, however, it could be argued that if receipt of the defamatory material merely is to be viewed as *prima facie* evidence that the material was actually comprehended, and thereby 'published', the judgment in the VSC and the High Court could be reconciled. Similarly, it has, for example, been said that 'if a man writes a libel on the back of a post-cards and then sends it through the post there is evidence of publication, as in the case of a telegram',⁴⁷ and 'where the statement is in a newspaper, production of a copy of the paper will generally be accepted as *prima facie* evidence of publication'.⁴⁸ If this is the correct interpretation, no change to the principle that publication takes place at the location of actual comprehension has taken place.⁴⁹ If indeed the majority of the High Court only intended the defamatory material becoming available for comprehension to be *prima facie* evidence of 'publication', they should, however, have carefully so stated in order to avoid confusion. At the same

46 Ibid, paragraph 15.

47 *Sadgrove v Hole* (1901) 2 KB 1 at 4-5.

48 Patrick Milmo Q.C. et al. eds., *Gatley on Libel and Slander* 9th ed (London: Sweet & Maxwell Ltd., 1998), at 804. It is interesting to note that without providing any support *Gatley* goes on to state: 'Proof that defamatory material has been placed on the Internet must surely be sufficient evidence of publication to unspecified numbers who can access the network' (at 804). First, it is necessary to point out that this statement was made in the context of proof of publication, and it must be assumed that the authors merely refer to *prima facie* evidence of publication. Secondly, it is interesting to note that *Gatley* suggests that, in the online context, step two of the conceptual model establishes *prima facie* evidence of publication. It could perhaps be said to be unfortunate that a leading textbook, such as *Gatley*, should make such a broad statement without further discussing the matter.

49 It should be borne in mind that, *prima facie* evidence of 'publication', as such, does not necessarily say anything as to the location of the 'publication'.

time, if the High Court had intended for the discussed change to occur, they certainly should have explained the motivation for such a change. In light of all this, it would seem more likely that the High Court did not intend their terminology to indicate a dramatic change in the Australian defamation law.⁵⁰ Either way, the High Court's decision is undesirably unclear on this point.

While the locations where the material becomes available for comprehension and the location of actual comprehension ordinarily will be the same in an online context, the distinction could be of significance in a situation where material is downloaded, and for example, read as a computer printout at another time and place. Furthermore, the distinction can, of course, be of great importance in relation to situations where a person accesses a website offline (i.e. a webpage stored locally on the persons computer), at a different location from where he or she visited the website online. In addition, the distinction can be important in relation to more traditional forms of mass media, such as newspapers and books, which in our globalised world, frequently are purchased in one jurisdiction and comprehended in another.

In conclusion, while highly unlikely, it is at least arguable that the common law of Australia points to the location where the defamatory material is downloaded, as a consequence of the majority judgment in the *Gutnick* case. Further, if the courts' understanding of the current state of common law in *Don King v Lennox Lewis et al.*⁵¹ is correct, perhaps also the position in other common law jurisdictions can be said to have changed to focusing on the location where the defamatory material is downloaded. However, much more likely, the position the High Court intended to express is summarised in the majority's statements that: 'ordinarily, defamation is to be located at the place where the damage to reputation occurs'⁵² and '[h]arm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer'.⁵³ Thus, downloading should merely be seen as *prima facie* evidence of publication.

Consequences of the Position of Australian Law

50 A move from placing focus on step four to placing the focus on step three is, in most cases, perhaps not practically a big change. However, conceptually the change is potentially dramatic, indeed, as it could be seen as a departure from the logical basis for placing focus on publication (i.e. that the damage results from comprehension of the defamatory material by a third person).

51 *Don King v Lennox Lewis, Lion Promotions, L.L.C. and Judd Burstein* [2004] EWHC 168 (QB).

52 *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, paragraph 44.

53 *Ibid*, paragraph 26.

As a consequence of the Australian approach, those who publish on the World Wide Web (WWW) expose themselves to jurisdictional claims by, as well as the laws of, all states from which people may access their websites. Bearing in mind the global nature of the WWW, this means that web-publishers are exposed to 'global liability' and would have to consider the laws (both substantive and procedural) of virtually all states of the world in evaluating the legal risks associated with their publications.

Making reference to this problems, Kirby J concluded that '[t]he dismissal of the appeal does not represent a wholly satisfactory outcome'⁵⁴ in the *Gutnick* case, and the position of Australian law could rightfully be criticised as being too plaintiff friendly, or perhaps more correctly, too defendant unfriendly. As a matter of fact, the distinction between the two goes to the very core of Internet's effect on the rules of jurisdiction and choice of law. In a case, such as the *Gutnick* case, it could be said to be appropriate that the courts of Victoria claim jurisdiction and apply Victorian law where an Australian citizen, habitually residing in Victoria, having the majority of his social and professional life in Victoria, is seeking to vindicate his reputation in Victoria and seeks damages only in relation to harm done in Victoria – in other words, the law is suitably plaintiff friendly. However, at the same time, it could certainly be said to be too burdensome for a US publisher to take into account the laws of, and risk being subject to the jurisdiction of, all states from which people may access their website – in other words, the law is unsuitably defendant unfriendly.

Searching for Alternatives: The Six Steps of Defamation

The above has illustrated that placing focus on the location of comprehension by a third party leads to a very serious problem. It is therefore of interest to examine whether there are any other locations that the focus suitably could be placed upon. If such locations can be found, the approach taken in amongst other states Australia, must be evaluated in light of these other alternatives.

The first thing to be done to properly evaluate which other locations may be relevant in relation to the location of the defamation, is to outline the sequence of events, which potentially results in harm. In doing so, it is useful to adopt a six-step conceptual model.⁵⁵

54 Ibid, paragraph 164.

55 It should be noted that, in a situation where the party creating the defamatory material is not the one making the defamatory material available to the third person (e.g. a store providing DVDs for rent), additional steps might take place.

The first step is taken when the defamatory material is created (i.e. written, painted, filmed, recorded etc.). Thus, step one may actually occur over a period of time and at a variation of locations. The creation of a newspaper article, for example, would ordinarily consist of several sub-steps such as writing and editing. However, step one is only *completed* when the material contains the allegedly defamatory meaning. Steps two and three involve the transfer of possession of the defamatory material. The second step consists of the dispatch of the defamatory material (i.e. through the delivery of a newspaper, the posting of a letter, etc.), while the third step consists of the third person taking possession of the defamatory material (i.e. the acquisition of a newspaper or DVD, the delivery of a letter into a post-box etc.).⁵⁶ The fourth step takes place when the substance of the defamatory material is comprehended and enters the mind of a third person (i.e. when a person reads a newspaper or letter, views a DVD, views a painting etc.). It is from this point and onwards that reputational injury potentially is suffered. Step five is, in contrast to the other steps, not really a specific step but rather a group of events. It occurs when and where consequences of defamation occur, such as the defamed being fired, an order getting cancelled or the defamed's partner taking out a divorce. Thus, step five may consist of multiple acts. Finally, step six occurs when and where the plaintiff feels the effects of the consequences of defamation (i.e. where the plaintiff economy is affected, or where emotional injury is suffered). Thus, step six may occur wherever the plaintiff is located, and when then plaintiff moves, the injury, and thereby also step six, may move with him/her.

Applying this six-step model to e-mail communication, the first step obviously takes place when the sender writes the e-mail, the second step reasonably takes place when the sender presses 'send' in his/her e-mail program, the third step would seem to take place when the message enters the receivers 'inbox', and the fourth step obviously takes place when the receiver reads the e-mail. Regarding when step two and three takes place, one could imagine alternatives. For example, step two could be argued to take place when the all of the packets constituting the e-mail message has left the sender's network, and similarly one could argue that step three takes place when all the packets constituting the e-mail message have entered the receiver's network (compare to some approaches taken in relation to e-commerce). On a practical level, this type of alternative does not seem to have any direct consequences for the analysis.

Turning to WWW communications, step one undeniably takes place when the material is written (or otherwise created) and step two takes place upon the uploading

56 Guidance, in relation to the distinction between dispatch and receipt, can be found in contract law, with its extensive experience in dealing with the transfer of possession. See, e.g., Section 14 of the *Electronic Transactions Act 1999* (Cth).

of the material onto a web server. While it would seem clear that uploading constitutes step two in the case of WWW publication, it is nevertheless necessary to define what constitutes 'uploading'. There are essentially three alternatives: Does uploading take place where the person doing the uploading is located? Does uploading take place where the computer from which the material is sent, is located? Or does uploading take place where the server, to which the material is uploaded, is located? In *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, Kirby J appears to suggest that uploading takes place where the server, to which the material is uploaded, is located:

If the place of uploading were adopted as the place of publication which also governs the choice of applicable law, the consequence would often be, effectively, that the law would assign the place of the wrong for the tort of defamation to the United States. Because of the vastly disproportionate *location of webservers* in the United States when compared to virtually all other countries (including Australia) this would necessarily have the result, in many cases, of extending the application of a law of the United States (and possibly the jurisdiction and forum of its courts) to defamation proceedings brought by Australian and other foreign citizens in respect of local damage to their reputations by publication on the Internet.⁵⁷

It is respectfully submitted that the above is an unreasonable interpretation as the consequence would be that the location of uploading always is the same as the location of the server carrying the relevant material. However, it is possible to interpret Kirby J's statement to simply refer to the fact that a majority of *web publishers* are located in the US. If so, Kirby J's statement does not express any view on where uploading takes place. Either way, 'uploading', as defined in this article, occurs where the person doing the uploading is located. Focusing on the receiving server's location would be unsuitable for several reasons and focusing on the location of the sending computer may be misleading in light of the possibility of remote control (e.g. through Telnet).

Steps three and four would ordinarily occur at virtually the same time – upon the receiver accessing the website. However, it is important to remember that people do not always read all the material that is presented on their screen. It is, for example, not uncommon for people to visit a website and, instead of reading the material there and then, print it for later reference. In such a case, step three would take place when the receiver accesses the website, while step four does not take place until the receiver reads the printed material. Finally, steps five and six are not affected by the technology used to transmit the defamatory material.

⁵⁷ *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, paragraph 133. Emphasis added.

Having identified these six steps, each step can readily be evaluated.

Step One: Creation

It appears that no state attaches significance to the place of creation in respect of jurisdiction or choice of law in civil defamation proceedings.⁵⁸ This is only logical as creation without transfer of possession cannot possibly cause harm, and consequently no defamation has occurred in step one. Indeed, step one may be taken without any transfer of possession even being intended. In this regard, step one is unique – it is the only step that may be taken without the intention of the defamatory material coming to another person's knowledge.

Indeed, making the place of creation the focal point in the jurisdictional inquiry could be argued to constitute a violation of the right to hold opinions without interference, as provided for to the majority of people through Article 19(1) of the ICCPR. After all, in creating defamatory material, the creator has done nothing more than make a material representation of his or her opinion, and as long as no other person comes into contact with this material representation, it makes no difference, on a practical level, whether the opinion exists only as thoughts in a person's head or as a material representation of those thoughts.

Even if focusing on step one has the advantage of being identifiable as occurring in one specific location,⁵⁹ and is advantageous in relation to the defendant's foreseeability, it must, in light of the disadvantages highlighted above, be seen as unsuitable as a focal point for the jurisdictional and choice of law questions.

58 See, however, the British seditious libel case *R. v Burdett* (1820) 4 B. & Ald. 115 discussed below.

59 That is, if focus is placed on the location where the material being created is complete to such a degree that it has become defamatory.

Step Two: Dispatch

As mentioned above, the laws of several states focus on the 'place of wrong'. As the uploading constitutes the last active act by the publisher, in relation to web-publications, one would perhaps think that it was this, step two that such rules refer to. However, as was shown above, that is not the case under the common law of Australia.

In contrast, it would seem possible that, for example, a court of the People's Republic of China would attach significance to the location of step two, at least if guidance is drawn from Article 1 of the *Interpretation of the Supreme People's Court on Application of Laws When Trying Dispute Cases Concerning Computer Network Copyright*:⁶⁰

The infringement dispute cases concerning the network copyright shall be under jurisdiction of the people's court at the place of the commission of an offense [sic] or at the place at which the defendant is. *The places of the commission of an offense [sic] cover the place at which the network server, computer terminal, and so on engaging in infringement are located.* If the place of the commission of an offense [sic] or the place of the defendant is difficult to be determined, the place at which the plaintiff discovers the computer terminals with infringement contents are located shall be regarded as the place of the commission of an offense [sic].⁶¹

At a first glance, step two appears to represent a sensible focal point for the jurisdictional and choice of law questions. Indeed, step two is particularly appealing from the defendant's perspective as it can exercise a high degree of control over where step two occurs. However, focusing on step two leads to certain difficulties. First, step two lacks technological neutrality. Step two takes many forms (i.e. uploading onto the WWW, the posting of a letter, the sending of an e-mail, the transmission of a radio broadcast and so on) and relies on technology-specific definitions. Secondly, an

60 Interpretation of the Supreme People's Court on Application of Laws When Trying Dispute Cases Concerning Computer Network Copyright, 22nd of November 2000, The Supreme People's Court, www.isinolaw.com.

61 Emphasis added. Interpretation of the Supreme People's Court on Application of Laws When Trying Dispute Cases Concerning Computer Network Copyright, 22nd of November 2000, The Supreme People's Court, www.isinolaw.com, Article 1. One must, of course, not uncritically draw conclusions in relation to the tort of defamation, from how the law is applied in the context of copyright. Copyright infringements are committed at the point of copying, and in contrast to defamation, do not require dissemination to a third party. However, the quoted Article is nevertheless of interest as it illustrates that the place of commission of an offence, in the IT context, can be given an extraordinarily wide definition under PRC law.

exclusive focus on step two could be unfair to the plaintiffs as the publishers could relocate to favourable states. Finally and arguably even more importantly, at step two, no actual harm, has been done.

In light of this, step two does not constitute a suitable focal point for the determination of jurisdiction or choice of law, if used exclusively.⁶² However, in the absence of international agreements dealing with cross-border defamation, it is difficult to argue that a state should not exercise jurisdiction over, and apply its laws to, actions taken within their sovereign territories even if the effect of those acts are felt outside that territory.

Step Three: Taking Possession

In offline situations, step two and step three often coincides, both when looking at location and when looking at time. That would, for example, be the case when a person buys a newspaper at a newspaper stand. In some offline cases, step two and three only coincide as far as location is concerned (e.g. when a person views a painting in an art gallery). On the other hand, step two and three frequently do not coincide, neither in relation to time nor in relation to place, in the offline context; for example, when one person, at one end of the country sends a letter to another person, at the other end of the country. Looking at the online context, it would seem rare that step two and three coincides as far as location is concerned, but it does happen (e.g. messages sent over some intranets).⁶³

Turning to the advantages and disadvantages of placing focus on step three, it can be noted that such practice is associated with the same problem of lacking technological-neutrality as focusing on step two. Also step three (taking possession) takes many forms and relies on technology-specific definitions (i.e. downloading of web content, the letter arriving into the mailbox, the e-mail arriving into the inbox, the radio broadcast being picked up by a person's radio and so on). Further, just as at step two, no actual harm, has been done at step three. Finally, placing focus on step three is associated with the additional problem of its multiple nature. People accessing material placed on a website, for example, might be taking possession of the material at multiple locations (i.e. web content may be downloaded by many different people

62 One can, however, envisage a balanced approach giving some weight to the location of step two. See further: Dan Svantesson, *The 'Place of Action' Defence – A Model for Cross-Border Internet Defamation*, Australian International Law Journal 172 (2003).

63 The location of the dispatch and the location of the taking of possession would often be within the same jurisdiction, but rarely at the same location in a more narrowly defined sense.

at many different locations, to an extent beyond the control of the defendant). Thus, step three appears unsuitable as a focal point for the jurisdictional and choice of law questions.

Step Four: Locus Delicti Perfecti - the place where the wrong is completed

Step four is where the defamatory material enters the mind of a third party, and reputation harm is suffered. As discussed above, it would seem clear that Australian common law places the focus on step four, and this approach is not rare. For example, Swedish law,⁶⁴ as well as that law of the PRC,⁶⁵ also partly places focus on step four.

Exercising jurisdiction based on step four rests on a sound logical basis; after all, until step four the defamed reputation cannot possibly have been affected, as the defamatory material has not yet entered the mind of any third party. In other words, the tort of defamation is not completed until step four occurs, and step four could be described as the *locus delicti perfecti* (i.e. the place where the wrong is completed). Furthermore, focusing on step four has the distinct advantage of being truly technologically neutral – whatever the means of communication, one can identify when and where the defamatory material enters the mind of a relevant person. The value of this quality should not be underestimated in a world where technological advances are made on an almost daily basis. Another advantage is found in that, normally, there is a close connection between the location where the material enters the mind of a third person and the location where injury is suffered. It can safely be assumed that, in all but the most unusual cases, the majority of people, whose mind the material enters, will remain within the state where the material entered their minds and the absolute majority of injury suffered due to defamatory material entering the minds of people in state A will be suffered in state A.⁶⁶ Thus, focusing on step four ensures that the plaintiff balances the inconvenience of suing in a particular forum and his/her interest (driven by a desire to obtain damages and/or to protect

64 Both Swedish law, and the relevant European Regulation - Brussels Regulation 44/2001 - that have become part of Swedish law, focus on where the damaging act took place and where the damage occurred, in determining jurisdiction. According to Nils Jareborg, the crime of defamation ('förtal') is completed only when the information has come to at least one third person's knowledge ('Brottet [förtal] är fullbordat när uppgiften kommit till åtminstone en tredje mans kännedom.') Nils Jareborg, *Brotten – Första Häftet: Grundbegrepp Brotten mot Person* 2nd ed (Stockholm: P A Norstedt & Söners Förlag), at 295.

65 Fu and Cullen state that '[a] defamatory statement must be published for defamation to have occurred. [...] A plaintiff can sue once a defamatory statement has been transmitted to a third party.' H L Fu and Richard Cullen, *Media Law in the PRC* (Hong Kong: Asia Law & Practice Publishing Ltd; 1996), at 195.

66 Also focusing on step three has this advantage.

his/her reputation) to sue in that particular forum. Presumably the plaintiff would only sue in those forums where he/she has a real reputation to defend and where actual injury has been suffered.

In light of this, step four seems like a reasonable focal point for the jurisdictional and choice of law inquiries. However, as mentioned above, it is clear that placing focus on step four also is associated with some difficulties. For example, focusing on step four is troubling in relation to the publishers' lack of notice. If the defendants' control over the location of step three is limited, their control over the location of step four is virtually non-existent. If A puts certain material on a website, he/she cannot control where the content enters the mind of a third person. Similarly, if A sells a newspaper to B, he/she cannot exercise any control over where B actually reads the newspaper (i.e. where step four takes place).

Step Five: Consequences

Focusing on the place of actual measurable damages suffered by the victim of the defamation is so far detached from the defendant's act it must be avoided.⁶⁷ The damaging consequences caused by the defamatory material entering the mind of a third person, such as the defamation victim being fired, may occur anywhere and at any time. Further, such damaging consequences may be multiple (e.g. the defamation victim being fired *and* subjected to ridicule). An example can illustrate my point: If person A reads or hears something defamatory about person B, while in Oslo, person A's views of person B will be affected wherever person A is. Thus, if person A travels to Shanghai, Brasilia and Ontario, person B will be suffering injury in Shanghai, Brasilia and Ontario – injury is ongoing until person A's views of person B have changed back to the same as they were before the defamatory material entered person A's mind. Viewing the ongoing nature of injury/damage suffered through defamation in light of the mobility associated with our modern society, it would seem clear that relying upon the place of injury/damage for determining jurisdiction or choice of law, however widespread this practice happens to be, is a seriously flawed approach. Focusing on the place of actual measurable injury/damage, for determining jurisdiction and/or choice of law, would provide the plaintiff with extraordinarily wide possibilities of forum shopping. From the above, it would appear obvious that step five is highly unsuitable as a focal point for the jurisdictional questions.

⁶⁷ If, for example a person breaks his/her foot while trekking in the Andes injury may very well be suffered for an extensive period and in multiple locations, not just at the very time the foot breaks.

Step Six: Impact

Some states may focus on the domicile of the plaintiff in determining the jurisdictional question in a defamation proceeding.⁶⁸ Such an approach is not without merits. After all, it would seem likely that it often is in that state the plaintiff feels the consequences of the defamation the most. However, it is still submitted that unless the defamatory material has become part of the knowledge of at least some third person in that state, a court of that state should not claim jurisdiction. And if the defamatory material has entered the mind of some third person in that state, jurisdiction should be exercised, not on the basis that the plaintiff is domiciled there, but on the basis that the defamatory material has entered the mind of some third person in that state. The reason for this is simple. The occurrence of the plaintiff feeling the consequences of the defamatory material is so far disconnected from the defendant's act that the defendant may have little chance to know where step six will occur. In other words, the defendant's predictability is severely affected. Despite this, at least one learned commentator has suggested this approach as the better option in relation to defamation:

In that case [i.e. in cases involving defamation] the tort is directed at the plaintiff and is likely to cause most harm in his or her residence. But since reputation is intangible and may spread over many countries, as may the defamation, a rule allowing reference to the law of the place of habitual residence of the plaintiff at the time of conduct would be both fair and convenient.⁶⁹

A further problem with focusing on the plaintiff's location is that it may have little to do with where the plaintiff actually suffers injury. A person's reputation is perhaps ordinarily, but not necessarily, connected to his/her habitual residence. In a situation where a person, X, is habitually residing in state A, but has his/her reputation in state B (perhaps due to a previous career in that state), it would arguably be undesirable to have a publication solely to an audience in state B, by a publisher located in state B, concerning X's activities in B, come under the jurisdiction of state A (a forum with no

68 E.g. *Law of Civil Procedure of the People's Republic of China* (1991), Article 29. Note that although Article 29 primarily regulates domestic disputes, Part Four of the *Law of Civil Procedure of the People's Republic of China* supplies no exception from Article 29 in relation to *shewai* (i.e. foreign related) cases, and thus, Article 29 applies also in relation to *shewai* cases. This may be compared to Article 30 of *The Private International Law of the People's Republic of China* (Model Law) (Third Draft): 'With respect to an action in tort, a court of the People's Republic of China has jurisdiction if the place of tort or that of its consequences is within the boundaries of the People's Republic of China.'

69 Footnote omitted. Peter Nygh, *The Reasonable Expectation of the Parties as a Guide to the Choice of Law in Contract and in Tort*, 251 *Recueil des cours* (1995), at 373.

connection to the publication whatsoever, except the perhaps rather random fact that X has decided to become a habitual resident there).

Finally, while it could be avoided by focusing on the plaintiff's location at the time when step four occurs, there is of course also the problem of the plaintiff's mobility, and if focus is placed on the plaintiff's location at the time step four occurs, there is still the risk of that location having little relevance due to the fact that the plaintiff may have been at a place other than his/her habitual residence at that time.

In conclusion, as far as step six is determined to take place at the location where the plaintiff happens to be located at the time he/she feels the consequences of the defamation entering the mind of a third person, it is unsuitable as the focal point for the purpose of determining jurisdiction and choice of law. However, if step six is presumed to take place at the location of the plaintiff's habitual residence, and the focus on the habitual residence is accompanied by a flexible exception allowing focus to be shifted to the location with the most significant connection to the plaintiff's reputation, a workable solution may be found.

Summarising Observations

One of the most important observations that can be made through the six-step model outlined above is that, in the offline context, the publisher ordinarily has control over the locations of step one (creation), step two (dispatch) and step three (possession), while in the online context, he/she ordinarily only has control over step one (creation) and step two (dispatch).⁷⁰ As far as the WWW is concerned, there is a diminishing nexus, and sometimes proportionality, between action and effect(s) – the effect(s) of an action can occur virtually anywhere, and be totally out of proportion with the action giving rise to it. This result in a widening of the reach of effect based rules of jurisdiction and choice of law. Such widened reach is, of course, particularly serious in relation to jurisdictional, and choice of law, rules reaching outside the state that implemented them.

Turning to the individual steps, as is clear from the above, at least step two (dispatch), step four (completion), step six (impact) and possibly also step three (possession) all have some legitimacy even if they undeniably are far from ideal. In contrast, step one

70 It must, however, be noted that with the increased accuracy and use of so-called geo-location technologies, a web publisher might be able to exercise a reasonable degree of control over step three. See further, Dan Svantesson, 'Geo-location technologies and other means of placing borders on the "borderless" Internet', *John Marshall Journal of Computer & Information Law*, Vol XXIII, No 1, Fall 2004; 101 – 139.

(creation) and step five (consequences) seems completely inappropriate as focal points for the jurisdictional and choice of law questions. While suffering from many problems, focusing on step two (dispatch) can be justified as states have a right to regulate the conduct of the people within their sovereign territories.⁷¹ Further, as has become apparent from the discussion above, jurisdiction or choice of law based on the location of step three (possession), step four (completion) or step six (impact) is associated with great difficulties. In this context it is well worth observing M. Loder's dissenting opinion in the *Lotus* case:

It is clear that the place where an offence has been committed is necessarily that where the guilty person is when he commits the act. The assumption that the place where the effect is produced is the place where the act was committed is in every case a legal fiction. It is, however, justified where the act and its effect are indistinguishable, when there is a direct relation between them; for instance, a shot fired at a person on the other side of a frontier; a parcel containing an infernal machine intended to explode on being opened by the person to whom it is sent. The author of the crime intends in such cases to inflict injury at a place other than that where he himself is. But the case which the Court has to consider bears no resemblance to these instances. The officer of the *Lotus*, who had never set foot on board the *Boz-Kourt*, had no intention of injuring anyone, and no such intention is imputed to him. [...] In these circumstances, it seems to me that the legal fiction whereby the act is held to have been committed at the place where the effect is produced must be discarded.⁷²

It is submitted that M. Loder's point is of central importance to the issue of cross-border defamation; the legal fiction whereby a tort is considered to have been committed where it has its effect can only be upheld if there is a sufficient nexus between the act and the effect. Thus, it is submitted that while, for example, step four (completion) appears to be an acceptable, if not the best, focal point for the jurisdictional and choice of law inquiry, it is only acceptable where there is a sufficient nexus between the act of publishing and the effect in the state exercising jurisdiction and applying its laws. As I have argued elsewhere,⁷³ in the absence of intention to make the material available in that state or the material being available in that state being a probable consequence of the material being made available, no such nexus could be said to exist. In other words, without leaving room for flexibility in the form of exceptions, step four (completion) cannot be said to be a suitable focal point for the

71 Indeed, also focusing on step one could be motivated in the same manner, but with human rights in mind, focusing on step one is highly undesirable.

72 The *Lotus* case PCIJ Ser A, No 10 (1927), at 49.

73 Dan Svantesson, The 'Place of Action' Defence – A Model for Cross-Border Internet Defamation, *Australian International Law Journal* 172 (2003).

jurisdictional and choice of law inquiries. This line of reasoning could be said to be supported by Kirby J's separate, concurring judgment in the *Gutnick* case, but is contrary to the majority judgment in the same case.

Sufficient Notice: Intention and Probability v Foreseeability

In providing his separate, concurring opinion in the *Gutnick* case, Kirby J stated that it was a settled principle of defamation law 'that a publisher is liable for publication in a particular jurisdiction where that is the intended or natural and probable consequence of its acts'.⁷⁴ While this is a sensible approach, the statement is problematic as the supporting materials relied upon, do not quite warrant the width of the conclusion drawn.

The first source relied upon, *Voth v Manildra Flour Mills Pty Ltd*,⁷⁵ is a negligent misstatement case and did not concern defamation. Although similar concerns arise, the differences should warrant some care. Consequently, it is doubtful that the following, highly interesting, statement can be relied upon for the present purpose:

If a statement is directed from one place to another place where it is known or even anticipated that it will be received by the plaintiff, there is no difficulty in saying that the statement was, in substance, made at the place to which it was directed, whether or not it is there acted upon. And the same would seem to be true if the statement is directed to a place from where it ought reasonably to be expected that it will be brought to the attention of the plaintiff, even if it is brought to attention in some third place.⁷⁶

The second source relied upon, *The Place of Wrong: A Study in the Method of Case Law*,⁷⁷ is a 60 year old article written by a US-based professor. Even disregarding the fact that the article referred to is rather dated and relates mainly to the US,⁷⁸ the opinions expressed in that article (i.e. 'Where the actor could not foresee that his conduct would cause harm in the state where it did occur, the application of the law of that latter state is always inappropriate',⁷⁹ which presumably is the passage referred to by Kirby J)

74 *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, paragraph 124.

75 *Voth v Manildra Flour Mills Pty Ltd* [1990] 171 CLR 538.

76 *Ibid*, at 568.

77 Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 *Tul L Rev* 4 (1944).

78 The article is partly comparative in nature, but the discussion is mainly focused on the US.

79 Max Rheinstein, *The Place of Wrong: A Study in the Method of Case Law*, 19 *Tul L Rev* 4, 28 (1944).

merely represents the view of one individual⁸⁰ (be as it may, a very well respected and learned individual).

The third source relied upon, *Sims v Wran*⁸¹, a case relating to an original publisher's responsibility for republication by a third person, cannot be viewed as a strong authority for Kirby J's proposition regarding the original publisher's liability for his/her own publication. In cases concerning republication, it is necessary to determine whether the re-publisher's act constitute a *novus actus interveniens*.⁸² Cases involving a publisher's liability for his/her own publication do not ordinarily involve any such considerations. Indeed, a fairly recent decision by the Supreme Court of South Australia appears to draw a distinction between an original publisher's responsibility for republication by a third person and a publisher's liability for his/her own publication in stating that:

[On the one hand,] [t]he writer of defamatory material is liable only if publication is *intended* or results from his *negligence* [...] As Professor JG Fleming expresses it, the unintentional publisher escapes responsibility only if he can clear himself of negligence [...] [on the other hand,] [i]f the publication results from the act of a third person, the defendant is liable only if he could *reasonably have anticipated* the action of the third party.⁸³

Finally, the last sources Kirby J relied upon, *Pullman v Walter Hill & Co Ltd*⁸⁴ and *Sadgrove v Hole*,⁸⁵ do not at all relate to jurisdictional limitations. In *Pullman v Walter Hill & Co Ltd*⁸⁶ it was held that publication occurred when a clerk transcribed a letter on a 'type-writing machine'. In this context, the most relevant part⁸⁷ of the judgment was probably Lord Esher's statement that 'if the writer of a letter locks it up in his own desk, and a thief comes and breaks open the desk and takes the letter and makes

80 Indeed, Professor Rheinstein does not provide any supporting references for the relevant view, in his article. However, it is submitted that the view expressed by Professor Rheinstein certainly make a lot of sense.

81 *Sims v Wran* [1984] 1 NSWLR 317.

82 It is an undisputed rule of tort law that there ordinarily must be causation between the defendant's act or omission, and the damages caused, for the plaintiff to have a cause of action against the defendant. (See further: Anthony M. Dugdale et al. eds *Clerk & Lindsell on Torts* 8th ed (London: Sweet & Maxwell Ltd., 2000), at 45-84.

83 Emphasis added. *Coulthard and Others v State of South Australia* (1995) 63 SASR 531, at 555.

84 *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524.

85 *Sadgrove v Hole* (1901) 2 KB 1.

86 *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524, at 527.

87 And indeed, the part of the page referred to by Kirby J that has been cited in case law on this topic. See, e.g., *Coulthard and Others v State of South Australia* (1995) 63 SASR 531, at 556.

it content known, I should say that would not be a publication'.⁸⁸ This passage certainly supports the requirement for the publication to be an intended, or natural and probable, consequence of the defendant's act, but it is an obvious example of *obiter dicta* and must consequently be treated with some care. Similarly, only limited conclusions can be drawn from *Sadgrove v Hole*.⁸⁹ There, it was held that no publication took place since the plaintiff was not sufficiently identifiable in a post-card containing defamatory material making only limited reference to the plaintiff. The relevant part here is presumably the statement made by A L Smith LJ: 'It is certainly my opinion that if a man writes a libel on the back of a post-card and then sends it through the post there is evidence of publication, as in the case of a telegram'.⁹⁰ This passage could be viewed as an expression of the requirement for the publication to be a 'natural and probable consequence' of the defendant's act. Also other cases, not relied upon by Kirby J, do support the requirement for publication to be an intended or natural and probable consequence of the publisher's actions. For example, *Theaker v Richardson*⁹¹ discuss whether the writer of a letter anticipated that someone other than the plaintiff would open and read the letter addressed to the plaintiff, and whether it was a natural and probable consequence of the defendant's actions that the plaintiff's husband would read the letter. Furthermore, it has been said that '[i]t would be a publication if the defendant intended the letter to be opened by a clerk or some third person not the plaintiff, or if to the defendant's knowledge it would be opened by a clerk'.⁹² The relevance of the defendant's intention was also discussed in *Tompson v Dashwood*.⁹³ These cases, however, all relate to one-to-one communication. As such, they represent a rather 'shaky' foundation for conclusions concerning mass media-like communication, such as World Wide Web publications.

Assuming that the authorities discussed above do, indeed, make valid Kirby J's proposition 'that a publisher is liable for publication in a particular jurisdiction where that is the intended or natural and probable consequence of its acts', at least one important clarification is required. Should Kirby J's statement be interpreted to mean that a publisher is liable *only* for publications in those particular jurisdictions where publication was the intended or natural and probable consequence of his/her acts? Or should the outlined 'principle of defamation law' be more loosely interpreted simply to indicate that a publisher *is* liable for publications in those particular jurisdictions where publication was the intended or natural and probable consequence of his/her

88 *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524, at 527.

89 *Sadgrove v Hole* (1901) 2 KB 1, at 4-5.

90 *Ibid*, at 4-5.

91 *Theaker v Richardson* [1962] 1 All ER 229.

92 *Sharp v Skues* (1909) 25 TLR 336, at 337. See, also, *Huth v Huth* [1915] 3 KB 32, at 43-44.

93 *Tompson v Dashwood* (1883) 11 QBD 43, at 46.

acts, but *may* also be liable for publication in other jurisdictions, in which 'publication' was not the intended or natural and probable consequence of his/her acts? It is submitted that, since Kirby J's statement would be all but pointless if it was given the latter interpretation, it must necessarily be given the former, more restrictive interpretation.

The majority judgment of the High Court of Australia in *Gutnick* did not expressly address the issue of 'foreseeability'. However, it can certainly be said that they indirectly relied on foreseeability in 'defending' their conclusion. It is very troubling to see the majority of the High Court conclude:

However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.⁹⁴

Similarly, Chicago-based professor Jack Goldsmith states:

A manufacturer that pollutes in one state is not immune from the antipollution laws of other states where the pollution causes harm just because it cannot predict which way the wind blows. Similarly, a cyberspace content provider cannot necessarily claim ignorance about the geographical flow of information as a defense to the application of the law of the place where the information appears.⁹⁵

It is respectfully submitted that this line of reasoning is a little too simplistic. What the Court and Goldsmith are saying is undeniably true, but their observations represents an antiquated view of Internet use, and seems to overlook completely the widespread use of the Internet for domestic, or even local, spread of information. In today's society a website is not only, or indeed always, aimed at attracting distant attention. People rely on the Internet in searching for local information (e.g. searching for a local restaurant or finding out the opening hours of the local library), and websites are often aimed at a local market. Thus, even if people know that everything they put on the 'net' *can* be accessed from virtually anywhere in the world, that does not necessarily mean that they *intended* to publish in every jurisdiction on the planet, or

94 *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, para 39.

95 Jack L Goldsmith, *Against Cyberanarchy*, 65 *University of Chicago Law Review* (1998), at 1244.

indeed, that publication all over the world was a *natural and probable consequence* (see Kirby J's reasoning discussed above).⁹⁶

Knowledge of the sometimes very theoretical potential spread of web-publications does not equate intention to reach a worldwide audience, or that worldwide publication is a natural and probable consequence. For example, *Norra Skåne* is a local newspaper serving a small community in the area Göinge in the southern parts of Sweden. In recent years, some of their main news is also presented on their website, www.nsk.se, but it would be fair to say that the news reported on the website, just as the news reported in the actual newspaper, is of largely local interest. However, like people from many other parts of the world, the people of Göinge occasionally travel to other jurisdictions. While doing so, they may access *Norra Skåne's* website. Consequently, knowing of the potential worldwide reach of web-publications, it could be suggested that the editor knew and could foresee⁹⁷ that the news reported on www.nsk.se would be published in, for example, Sydney, New York or Kathmandu. However, it can hardly be said that publication in Sydney, New York and Kathmandu were intended, and certainly not be said that publication in Sydney, New York and Kathmandu were natural and probable consequences, simply because the news were being reported on the 'web'.

The question of intention or natural and probable consequence could, of course, also be relevant in relation to more traditional media such as newspapers. During the High Court hearing of the *Gutnick* case, Mr Robertson QC stated:

If I buy a book at Tullamarine, a book with 300 hundred pages where there is a libel on page 100 and I do not comprehend that libel until I read it at home in Sydney, say, at 8 o'clock at night, having bought it at 5 o'clock, but, sensibly, it has been published, to me – the act of publishing is that of the bookseller who publishes it in Victoria at 5 o'clock.⁹⁸

However, he did not provide reference to any authority supporting this view. Perhaps the lack of intention or natural and probable consequence could be said to exclude the

96 A very similar, but more limited, reasoning can be found in: *Young v New Haven Advocate* 315 F 3d 256 No 01-2340 (13th of December 2002), at 6. It is interesting to note that not even the plaintiff, in that case, presented as wide claims, in this regard, as the majority judgment of the High Court did in the *Gutnick* case (see, *Young v New Haven Advocate* 315 F 3d 256 No 01-2340 (13th of December 2002), at 5).

97 For an extensive discussion of the meaning of 'foreseeable' refer to: *Wyong Shire Council v Shirt* (1980) 146 CLR 40.

98 Transcript of High Court hearing of *Dow Jones & Company Inc v Gutnick*, 28th of May 2002, points 3088-3092.

publisher's liability in such a situation. Placing too much emphasis on step three (possession), the location where the third person takes possession of the material (e.g. the location of sale) is, as noted, problematic. In addition to the problems outlined above, one must ask some additional questions. What if a newspaper paper is sold on a train whilst it is in NSW, and then read as the train enters Victoria? In such a situation it could, of course, be said that the publisher intended publication in both NSW and Victoria. Taking the example one step further, what if the paper is sold in the 'passengers only' section of an international airport? Did the publisher then intend to 'publish' the paper only in the state of sale? Indeed, it could be argued that the sale of books and newspapers in the 'passengers only' section of an international and domestic airport is an, as good as any, analogy to Internet publication. The publisher (or seller) must know that there is a chance/risk that sold newspapers or books will be read anywhere in the world, while at then same time publication in a certain forum, when looked at in isolation, may be highly unlikely.

To summarise, it is submitted that while Kirby J's approach is not necessarily settled law, it certainly represents a sensible approach *de lege ferenda*, and is much more appropriate in today's society than the approach taken by the majority of the Court in the *Gutnick* case.

Final remarks and some thoughts about the future

From the six-step model above, it would seem beyond intelligent dispute that, no location represents an ideal focal point when determining the questions of jurisdiction and choice of law. Concerns for the protection of human rights would seem to exclude step one (creation) as a possibility. Step two (dispatch), while clearly associated with severe difficulties, may be one reasonable focal point in the absence of international instruments dealing with cross-border defamation, as long as it is not exclusive. Finally, as they are all detached from the defendant's action, steps three (possession), four (completion), five (consequences) and six (impact) are all unsuitable unless the defendant had sufficient notice of the effect of his/her action.

In the end it certainly seems that, while associated with serious difficulties, focusing on step four (completion) – the place of comprehension by a third party – represents the best option. However, to make this option as appealing as possible, flexibility needs to be introduced to ensure that Australian courts do not claim jurisdiction, and Australian law is not applied, where the defendant did not have sufficient notice of the effect of his/her action. This could be achieved in a number of ways.

International cooperation

It is often said that the best way forward, in relation to the jurisdictional difficulties associated with the Internet, is through international cooperation. I have myself frequently called for such cooperation,⁹⁹ and for a while, it seemed as if the previously proposed *Hague Convention on Jurisdiction in Civil and Commercial Matters* would be the answer. However, that convention proved to be too ambitious, and in fact, the jurisdictional rules proposed to regulate defamation were problematic. So while it seems undisputed that the path forward, in the long run, is through international cooperation, currently there are no immediate answers to be found in international cooperation. Thus, each state has a responsibility to examine the application of their domestic rules of jurisdiction and choice of law, in light of the effect these rules may have on online activities.

Furthermore, while it is undeniably true that dealing with these problems effectively requires international cooperation, the structuring of such international cooperation is faced with much the same problems as are facing each individual state. For example, a treaty prescribing the recognition and enforcement of foreign judgments based on jurisdiction and based on step four (completion) of the conceptual model outlined above, would be associated with the same problems as the application of domestic rules based on step four (completion). Indeed, in the event of such a treaty, the problems would be even more severe, as currently the difficulties of having a foreign judgment recognised and enforced have the effect of discouraging forum shopping.

Forum non conveniens

Some have suggested that the doctrine of *forum non conveniens* will work to minimise the problems associated with focusing on the location of comprehension (i.e. step four (completion)). For example Kirby J made the following prophecy during the High Court hearing of the *Gutnick* case:

It seems to me [...] that that [the issue of *forum non conveniens*] is the place in which the Internet problem is going to be solved in the world. Countries are going to say, "Of course we've got jurisdiction. The damage happened here or

99 See e.g. Dan Svantesson, Submission in relation to the European Commission, Directorate-General Justice and Home Affairs, Draft Convention on Exclusive Choice of Court Agreements, November 2004.

some other - we can serve here but it is much more convenient that this matter be litigated in another place".¹⁰⁰

As far as Australia is concerned, the first obstacle to this scenario becoming a reality is the current Australian application of the doctrine of *forum non conveniens*. While most common law states look for the more appropriate forum, Australian courts have taken the rather parochial approach that all that needs to be considered is whether the Australian court is a clearly inappropriate forum. If an Australian court did not exercise jurisdiction where there is a more appropriate forum, the choice of law problem would work out by itself. While Australian law still may come into question in proceedings held in a foreign court, there would be no risk of Australian law being applied as a consequence of Australian choice of law rules.

Unfortunately, even leaving aside the problems associated with the Australian application of the doctrine of *forum non conveniens*, it is doubtful that the solution is going to be found in this doctrine. A valid reason for scepticism can be found in the plaintiffs' behaviour in a range of relevant cases. The courts in three different Internet defamation cases, the *Gutnick*¹⁰¹ case, the *Harrods*¹⁰² case and the *Investasia*¹⁰³ case, found no reason to decline jurisdiction since the plaintiffs' actions related only to harm suffered within the respective states, and which court could be more suitable to determine a dispute relating exclusively to damages suffered within state X, than the court of state X? As long as the plaintiff sues only in relation to damages suffered in an Australian state, due to publications occurring in that state, it is difficult to see that the court ever will decline jurisdiction in finding itself to be a clearly inappropriate forum.¹⁰⁴ Indeed, it is difficult to picture such an example where a court possibly would find that there is any other forum that is more appropriate.

100 Transcript of High Court hearing of *Dow Jones & Company Inc v Gutnick*, 28th of May 2002, points 1484 – 1487.

101 *Dow Jones & Company Inc v Gutnick* [2002] HCA 56.

102 *Harrods Ltd. v Dow Jones & Company Inc.* [2003] EWHC 1162 (QB).

103 *Investasia Ltd v Kodansha Co Ltd* HKCFI 499 (18 May 1999).

104 Choosing to sue only in relation to publications occurring in a particular jurisdiction comes at the expense of only being awarded damages for harm done within the state where the court is located. Consequently, even though the doctrine of *forum non conveniens* might not protect a foreign defendant from being sued in a certain forum, it might have the effect of preventing the plaintiff from seeking world-wide damages when suing in that forum.

A new defamation defence

The majority judgment in the *Gutnick* case hinted at an approach, not involving conflict of laws rules, which would work to limit the burden on, for example, web publishers:

[A] case in which it is alleged that the publisher's conduct has all occurred outside the jurisdiction of the forum may invite attention to whether the reasonableness of the publisher's conduct should be given any significance in deciding whether it has a defence to the claim made. In particular, it may invite attention to whether the reasonableness of the publisher's conduct should be judged according to all the circumstances relevant to its conduct, including where that conduct took place, and what rules about defamation applied in that place or those places.¹⁰⁵

This way of thinking – taking account of the law of the place where the defendant acted – share certain features with the so-called 'double actionability test' which was the choice of law rule in Australia not so long ago, and that still is the rule applied in some other common law jurisdictions, such as, the UK¹⁰⁶ and Hong Kong SAR. Elsewhere I have presented a model for how such a defamation defence could be structured.¹⁰⁷ That model will not be repeated here, but it is highly relevant to observe that the High Court has indicated the possibility of Australian law taking such a direction *de lege ferenda*.

Wait for the problem to go away: The impact of geo-location

Ordinarily, it is rather bad practice to simply sit back and wait for a legal problem to go away by itself; the reason being that legal problems rarely go away by themselves. However, the problems associated with making the place of comprehension the focal

105 *Dow Jones & Company Inc v Gutnick* [2002] HCA 56, para 51. Gaudron J expressed similar thoughts during the High Court hearing (Transcript of High Court hearing, points 808-822. (transcript of the hearing is available at: <http://www.austlii.edu.au/au/other/hca/transcripts/2002/M3/2.html>).

106 The double actionability test has been kept in relation to actions in defamation, although it was abandoned in relation to other matters through the *Private International law (Miscellaneous Provisions) Act 1995* (U.K).

107 Dan Svantesson, The 'Place of Action' Defence – A Model for Cross-Border Internet Defamation, *Australian International Law Journal* 172 (2003) and Dan Svantesson, *The Place of Action Defence – A Defamation Defence for the globalised world of the 21 st Century*, Australasian Law Teachers Association Conference (July 2004), Darwin Australia (<http://www.svantesson.org/pubALTA2004.doc>).

point for rules regulating jurisdiction and choice of law, in defamation proceedings, may be an exception to this general rule. There are increasingly accurate so-called geo-location technologies.¹⁰⁸ Relying on databases that match IP addresses with likely geographical locations, these technologies allows a website operator to distinguish between access-seekers based on their geographical location. Indeed, as the provided content can be adjusted depending on the access-seekers geographical location, geo-identification has the advantage of providing the website operator with the means to comply with multiple, varying, and even contradictory, local regulations. In light of such a development, current 'effect-focused' private international law rules may make sense. In other words, from the perspective of Internet regulation, geo-location technologies may, to a large extent, eliminate the regulatory difficulties associated with the Internet's 'borderlessness'. If it can be assumed that web content being available in a particular state is an indication of the web publisher's intention to make the content available in that particular state, then there certainly is a sufficient nexus between the act of publishing and the place of the effect and the application of effect-focused private international law rules make sense. While we must remain alert to their less than perfect accuracy, geo-location technologies have the potential of making such assumptions valid *prima facie*.

108 See further: Dan Svantesson, 'Geo-location technologies and other means of placing borders on the "borderless" Internet', *John Marshall Journal of Computer & Information Law*, Vol XXIII, No 1, Fall 2004; 101 – 139.