Jurisdiction and Choice of Law Rules for Defamation Actions in Australia Following the *Gutnick* Case and the Uniform Defamation Legislation

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Abstract

This article considers the private international law rules applying to tort actions generally, and the tort of defamation in particular, within Australia, the United Kingdom, Canada and the United States. It identifies outstanding jurisdictional and choice of law issues which remain for defamation actions in Australia following *Dow Jones & Company Inc v Gutnick*[1] ('*Gutnick*') and the passage of the Uniform Defamation Legislation and, using an economic analysis, evaluates whether Australia's current private international law rules are meeting the policy objective of promoting certainty in the application of the law.

This article finds that the decision in the *Gutnick* case increases costs for publishers by requiring them to consider many legal standards in assessing the risk to which they are exposing themselves by publishing on the Internet. Further, while the Uniform Defamation Legislation ('UDL') has created greater certainty for publishers, by harmonising state and territory substantive defamation laws and mandating a single substantive law apply to all publications in Australia, it falls short by failing to address the high level of uncertainty regarding the ability of a plaintiff to recover damages from an Australian court for harm suffered as a result of an overseas publication.

This article concludes that uncertainty regarding the Australian choice of law rules for defamation could be addressed by extending the choice of law rules contained in the UDL to overseas publications. It also suggests that the expansive jurisdictional reach of Australian courts in relation to defamation could be addressed through the adoption of a less onerous *forum non conveniens* test.

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1 *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 ('*Gutnick*').

Introduction

In less than a decade, the application of Australian private international law to torts has undergone considerable transformation, especially in relation to defamation.

First, the choice of law rules for torts generally underwent substantial change as a result of *John Pfeiffer Pty Limited v Rogerson*[2] ('*Pfeiffer*') and *Regie Nationale des Usines Renault SA v Zhang*[3] ('*Zhang*'). As a result, choice of law rules in Australia for both interstate and international torts are generally governed by the law of the place of the tort (or *lex loci delicti*).

Second, the High Court's decision in *Gutnick*[4] provided the High Court of Australia with the opportunity to apply private international law rules in the context of defamation occurring on the Internet. The decision raises questions, from a policy point of view, regarding the extent to which a publisher can practically comply with the defamation laws of various countries in the case of multi-jurisdictional publications. This aspect of the case, more so than the principal finding (that the place of downloading is ordinarily the place where an Internet defamation occurs) attracted significant discussion and criticism.

Third, after nearly 30 years of calls for reforms, all Australian states and territories finally enacted substantially uniform defamation laws by the end of 2006. Relevantly, these laws prescribe choice of law rules for intranational publications. However, the common law, including its choice of law rules, has been left intact for cases involving publications occurring outside of Australia.

These various developments have extensively changed the private international law framework for defamation proceedings in Australia. The assessment of the evolving rules and consideration of unresolved issues forms the basis of this article.

1. The Australian Legal Framework

A. The Tort of Defamation

Defamation may be defined as the tort of publishing to persons, other than the person defamed, imputations the effect of which is to lower the reputation of the person defamed in the eyes of the public at large.[5] In Australia, a prima facie case for a defamation action is based on strict liability, hence a defendant may be liable even though no injury to reputation was intended and the defendant acted with reasonable care,[6] though there are a number of recognised defences. Australian defamation laws are primarily state and territory laws. Consequently, the law and its available defences largely differed within Australia prior to 2006.

2 *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 ('*Pfeiffer*').
3 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 ('*Zhang*').
4 *Gutnick* (2002) 210 CLR 575.
5 Peter Nygh & Peter Butt (eds), *Butterworths Australian Legal Dictionary* (1997) at 333.
6 *Gutnick* (2002) 210 CLR 575 at [25].

Defamation, by its nature, is likely to give rise to private international law issues. Parties involved in a defamation action may not be in the same place as where the action occurs – the tortious act, publication and injury can each occur in more than one jurisdiction.[7] Also, the nature of defamation is less jurisdictionally constrained than some other causes of action involving the publishing of information, due to its strong focus on damage suffered by the plaintiff rather than on the behaviour of the defendant.[8] Moreover, the advent of the Internet, and other forms of trans-boundary communication,[9] has increased the likelihood of defamation actions raising issues of choice of law and jurisdiction.[10]

B. *Jurisdiction and Forum Non Conveniens*

Subject to the principle of *forum non conveniens*,[11] Australian courts will exercise jurisdiction where the defendant has been served within the territorial jurisdiction of the court, where the defendant has voluntarily submitted to the jurisdiction of the court, or where service outside the jurisdiction is authorised by the rules of court.[12] In most Australian jurisdictions, service outside Australia is permitted by the rules of court in proceedings 'founded' or 'based' on a tort committed in the forum,[13] or brought for damage suffered wholly or partly within the jurisdiction caused by a tortious act or omission, wherever occurring.[14]

While a court may be able to assume jurisdiction this does not mean the court will necessarily exercise it. In Australia, a court will not exercise jurisdiction where it can be shown that the chosen state or territory is a 'clearly inappropriate forum'.[15] Factors that are relevant to this test include matters affecting convenience and expenses, the place of domicile of the parties, the place where relevant events occurred, the location of witnesses and any legitimate personal or juridical advantage available to the plaintiff in the forum, which would not be available in an alternative forum.[16]

C. *Choice of Law Rules for Torts –the Pfeiffer and Zhang Cases*

Choice of law rules are used to resolve the question of which laws should apply to proceedings that have connections with more than one state or country.[17] In 2000, the High Court in the *Pfeiffer*[18] case held that the *lex loci delicti* should apply without exception

7 The Law Reform Commission, *Choice of Law, Report No 58* (1992) at [6.22].

8 For example, trade mark infringement and the tort of passing off as discussed in *Ward Group Pty Ltd v Brodie & Stone Plc* [2005] FCA 471.

9 For example, international cable and satellite television networks.

10 Matthew Collins, *The Law of Defamation and the Internet* (2nd ed, 2005) at 334.

11 The doctrine that courts have a discretionary power to decline jurisdiction when convenience and justice require it.

12 Collins, above n10 at 340-4.

13 See, for example, *Supreme Court (General Civil Procedure) Rules* 1996 (Vic), r 7.01(1)(i).

14 Id at r 7.01(1)(j).

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

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

17 The Law Reform Commission, above n7 at [1.3].

as the governing law for an interstate tort[19]and limitation periods and damages should be considered as substantive matters for this purpose. Two years later, the High Court adopted the *lex loci delicti* in respect of torts committed abroad in *Zhang*[20] and concluded foreign limitation periods as substantive matters also.[21] However, in respect of foreign torts, the High Court reserved for future consideration the circumstances in which policy considerations might direct that an action not be maintained in Australia[22] and whether damages should be treated as procedural or substantive.[23]

D. The Gutnick Case

Also in 2002, the High Court of Australia was presented with the opportunity to consider issues of jurisdiction and the application of the new *lex loci delicti* choice of law rule to a defamation action concerning an Internet publication. The case involved an action against Dow Jones & Company Inc ('Dow Jones'), a US-based corporation, which published material on the Internet that was allegedly defamatory of Mr Gutnick. At the time of the defamatory statement, Mr Gutnick lived in Victoria and had his business headquarters there. Mr Gutnick brought an action in the Supreme Court of Victoria to recover damages for injury to his reputation sustained in Victoria only.[24]

The trial judge established jurisdiction on the basis that (a) the proceeding was founded on a tort committed within Victoria[25] and (b) the proceeding was brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act.[26] On the basis that the defamation of which Mr Gutnick complained occurred in the forum, Hedigan J concluded Victoria was not a clearly inappropriate forum. Dow Jones sought but was refused leave to appeal to the Court of Appeal of Victoria. Dow Jones then appealed to the High Court. All seven High Court judges dismissed the appeal, however Kirby J expressed dissatisfaction with the overall result in the case.[27]

(i) The Place Where the Tort of Defamation is Committed

In ascertaining where in substance the cause of action arose,[28] the High Court considered that, ordinarily, the tort of defamation is located at the place where damage to reputation occurs,[29] and damage to reputation occurs when a defamatory publication is comprehended by the reader, the listener or observer.[30] Applying these principles to the Internet, the court concluded that material is not in comprehensible form until it is

18 *Pfeiffer* (2000) 203 CLR 503.
19 *Pfeiffer* (2000) 203 CLR 503 at 544 (Callinan J dissenting).
20 *Zhang* (2002) 210 CLR 491.
21 *Zhang* (2002) 210 CLR 491 at [76].
22 *Zhang* (2002) 210 CLR 491 at [60] and [122].
23 *Zhang* (2002) 210 CLR 491 at [76].
24 *Gutnick v Dow Jones & Co Inc* (2001) VSC 305 at [1]-[4].
25 *Supreme Court (General Civil Procedure) Rules* 1996 (Vic), r 7.01(1)(i).
26 Id at r 7.01(1)(j).
27 *Gutnick* (2002) 210 CLR 575 at [164].
28 *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458.
29 *Gutnick* (2002) 210 CLR 575 at [44].
30 *Gutnick* (2002) 210 CLR 575 at [26].

downloaded, as it is only where a person downloads the material that damage to reputation may be done. Consequently, the place of downloading will ordinarily be the place where the tort of defamation is committed.[31]

(ii) Consideration of Widely Disseminated Publications – Endorsement of a Multiple Publication Rule in Respect of the Internet

The court noted the long-established common law rule that every communication of a defamatory matter founds a separate cause of action.[32] As a consequence, it may be possible for a plaintiff to bring action for injury to reputation which has resulted from publications of defamatory material in several places.[33] It is this aspect of the judgment that is particularly worrying for Internet publishers, since it envisages a plaintiff bringing action in respect of a defamatory publication made over the Internet in each and every jurisdiction it is downloaded. This necessarily requires Internet publishers to consider every article they publish against the defamation laws of each country from Afghanistan to Zimbabwe (the 'Zimbabwe factor').[34] However, the judges in the majority judgment generally considered the Zimbabwe factor to be overstated on the basis of adequate mechanisms existing within Australian law to prevent inappropriate proceedings and there being little incentive for a plaintiff to bring an action in a jurisdiction where they do not have a reputation, as little or no damages would be recoverable.[35] However, Kirby J seemed more troubled by the Zimbabwe factor.

(iii) Concern Expressed by Kirby J Regarding the Zimbabwe Factor

In a separate judgment, Kirby J considered a rule which renders an Internet publisher potentially liable to proceedings in courts of every legal jurisdiction, where the subject enjoys a reputation, may have undesirable consequences.[36] Furthermore, Kirby J considered a persuasive criticism of the law of defamation, as applying to publications on the Internet, had been made[37] and a single global publication rule, if it became internationally accepted, could help reduce the risks of legal uncertainty and the excessive assertion of national laws.[38] However, Kirby J considered changes in this area would exceed the judicial function,[39] instead suggesting national legislative attention and international discussion was required '[i]n a forum as global as the Internet itself'.[40]

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31 *Gutnick* (2002) 210 CLR 575 at [44].
32 *Gutnick* (2002) 210 CLR 575 at [27] and [197].
33 *Gutnick* (2002) 210 CLR 575 at [49] and [202].
34 *Gutnick* (2002) 210 CLR 575 at [54].
35 *Gutnick* (2002) 210 CLR 575 at [36] and [50]-[54].
36 *Gutnick* (2002) 210 CLR 575 at [118].
37 *Gutnick* (2002) 210 CLR 575 at [136]-[137].
38 *Gutnick* (2002) 210 CLR 575 at [120].
39 *Gutnick* (2002) 210 CLR 575 at [137]-[138].
40 *Gutnick* (2002) 210 CLR 575 at [166].

E. The Uniform Defamation Legislation ('UDL')

In 2005 and 2006 all Australian states and territories adopted substantially identical laws for defamation.[41] Importantly, the UDL addresses choice of law issues for publications, including those communicated over the Internet.[42] The UDL also contains, amongst other things, a rule restraining further proceedings in respect of the same defamatory matter.[43]

F. Choice of Law Rules for Multi-Jurisdictional Publications

(i) Interstate Publications

For multiple publications in more than one jurisdictional area, the substantive law to be applied is the law of the jurisdictional area with which the harm occasioned by the publication as a whole has its closest connection.[44] For these purposes, the substantive law applicable does not include any law prescribing choice of law rules that differ from the rules prescribed by the UDL.[45] Consequently, *renvoi*[46] cannot be invoked to avoid the single Australian jurisdiction policy underlying the choice of law rules in the UDL. The result is only one system of law is to be applied by an Australian court to an interstate publication of substantially the same matter.[47] Previously there were eight systems of law to apply in a proceeding for publication occurring Australia-wide.

In establishing which substantive laws should be applied, the UDL permits a court to consider:

(a) the place at the time of publication where the plaintiff was ordinarily resident;

(b) the extent of publication in each relevant Australian jurisdictional area;

(c) the extent of harm sustained by the plaintiff in each relevant Australian jurisdictional area; and

(d) any other matter that the court considers relevant.[48]

Hence the choice of law rule is the jurisdiction most connected with harm suffered by the plaintiff. However, the primary rule may, in effect, be displaced by any other matter of concern to the court. This ability to displace the primary rule is significant as it is an expression of the states and territories' preference for providing courts with greater flexibility in return for less certainty, which is in clear contrast to the preference for certainty expressed by the High Court in *Pfeiffer*.[49] It also represents the approach advocated by the Law Reform Commission in 1992.[50]

41 See, for example, *Defamation Act* 2005 (Vic).
42 Id at s 11.
43 Id at s 23.
44 Id at s 11(2).
45 Id at s 11(4).
46 The conflict of laws problem that occurs when a forum court is directed by its choice of law rules to the laws of another jurisdiction whose rules in turn direct the matter back to the forum court.
47 Justice Steven Rares, 'Defamation: Where the Reforms have taken Us – Uniform National Laws and the Federal Court of Australia' (2006) Federal Court at <http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_raresj3.html> accessed 30 April 2007.
48 *Defamation Act* 2005 (Vic), s 11(3).
49 *Pfeiffer* (2000) 203 CLR 503 at [532].

(ii) Choice of Law Rules Applicable to Publications Occurring Both Within Australia and Overseas

The UDL choice of law rules do not require a court to weigh up the closest connection between the harm occasioned by the publication globally but within Australia only. Consequently, a plaintiff with a global reputation may still be able to sue in Australia even if there was a far smaller readership in Australia than overseas. In addition, it may be possible for a defendant to apply for a stay of proceedings on the basis of Australia being a 'clearly inappropriate forum'.[51]

(iii) Choice of Law Rules for Publications Occurring Wholly Outside Australia

The UDL appears to have left the common law choice of law rules unchanged for cases involving publications occurring outside Australia. As a result, the *lex loci delicti*, as adopted by *Zhang*, applies. Nevertheless, the ability of a plaintiff to recover damages for publications occurring wholly outside Australia may be limited by a court's ability to assume jurisdiction and subject to *forum non conveniens*.

2. International Comparisons

A. Jurisdiction and Forum Non Conveniens

Courts in the United Kingdom (UK) and Canada are provided with jurisdiction over foreign defendants on the basis of a tort committed in the forum or damage sustained in the forum arising from a tort, wherever committed.[52] While in Canada it is also required that the case have a 'real and substantial connection' to one of the provinces of Canada, this is generally satisfied if a tort is committed there.[53] In the UK and Canada, the tort of defamation occurs where the defamatory words are published, that is, received and understood by a third person.[54] Hence jurisdiction may be exercised where the defendant has no other connection to the forum apart from having published material which may be accessed there. The UK and Canadian courts apply a less onerous *forum non conveniens* test ('more appropriate' forum)[55] than Australian courts.

As in Australia, the UK and Canada do not recognise a single publication doctrine,[56] so defendants may find themselves vulnerable to the Zimbabwe factor. However, a plaintiff seeking leave to serve outside the UK in respect of a publication within the jurisdiction is guilty of an abuse of process if he or she seeks to include in the same action matters occurring elsewhere.[57]

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50 The Law Reform Commission, above n7 at [6.57].

51 *Voth* (1990) 171 CLR 538.

52 See the UK's *Civil Procedure Rules*, r 6.20(8); and see for example Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, 17.02(g)-(h).

53 *Jordan v Schatz* (2000) 189 DLR (4th) 62 (B.C.C.A).

54 *Duke of Brunswick v Harmer* (1849) 14 QB 185; *Newson (Chief Provincial Firearms Officer Jenner) v Kexco Publishing Co* [1995] BCJ No. 2666.

55 *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460; *Anchem Products Inc v British Columbia (Workers' Compensation Board)* (1993) 102 DLR (4th) 96 at [111] (S.C.C).

56 *King v Lewis* [2005] EMLR 4; *Lambert v Roberts Drug Stores Ltd* [1933] 2 WWR 508 (Man.C.A).

In contrast to Australia, the UK and Canada, questions of jurisdiction in the United States ('US') largely concern connections between the defendant and the forum and are influenced by the Fourteenth Amendment to the US Constitution, which provides guarantees regarding due process.[58] As a result, American courts will generally decline to exercise jurisdiction over a non-resident defendant unless the defendant's contacts with the forum state are extensive,[59] the defendant's publication interacts in a substantial way with the forum state,[60] or the defendant's publication was particularly targeted towards the forum state.[61] Furthermore, in most American states, a 'single publication' rule applies to prevent a multiplicity of suits arising out of the widespread publication of the same material.[62] As a result, only one action for damages can be maintained for a publication, all damages suffered in all jurisdictions can be recovered in the one action and a judgment for or against the plaintiff on the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.[63]

Hence it may be observed that Australia, the UK and Canada have a more expansive approach towards the circumstances in which jurisdiction may be exercised over defamatory publications. This is particularly the case in respect of passive websites,[64] as in the US as it would be difficult to argue these websites deliberately and knowingly target the forum.[65] In contrast the intentions of the defendant in the UK, Canada and Australia are not relevant as defamation is a tort of strict liability. The other key difference is the US's single-publication rule, which does not lend itself to the Zimbabwe factor.

B. *Choice of Law*

Canada's general common law choice of law rule for foreign torts is the *lex loci delicti*,[66] with a flexible exception for international torts only.[67] This is similar to Australia's common law choice of law rule for foreign torts generally which, following the UDL, remains applicable to defamatory publications occurring outside Australia. The UK's common law choice of law rules for torts have generally been replaced by legislation, which has abolished the double actionability test[68] and provides the general rule that '[t]he applicable law is the law of the country in which the events constituting the tort or delict in question occur,'[69] which is subject to a rule of displacement.[70] However, the

57 *Berezovsky v Michaels* [2000] 2 All ER 986 at [994]. This is the rule in *Diamond v Sutton* discussed in Part 4 below.

58 *United States Constitution*, amend XIV, § 1.

59 *Mansour v Superior Court,* 38 Cal App 4th 1750 (1995).

60 *Blumenthal v Drudge,* 992 F Supp 44 (D DC, 1998).

61 *Blakey v Continental Airlines, Inc,* 751 A 2d 538 (AD NJ 2000).

62 American Law Institute's *Uniform Single Publication Act*.

63 Collins, above n10, 171–2.

64 A website that is a mere repository of information, permitting little or no interaction with Internet users who visit the site. See Collins, above n10 at 472.

65 Collins, above n10 at 463.

66 *Tolofson v Jensen* [1994] 3 SCR 1022; *Lucas (Litigation Guardian of) v Gagnon* [1994] 3 SCR 1022.

67 See *Wong v Wei* (1999) 65 BCLR (3d) 222.

68 This is also known as the rule in *Phillips v Eyre*. This rule requires reference to the laws of two places before action could be taken – the law of the forum (the *lex fori*) and the law of the place of the tort (the *lex locus delicti*). This rule applied in Australia prior to the *Pfeiffer* and *Zhang* decisions.

legislative rules do not extend to defamation actions[71] so a double actionability test subject to a flexible exception still applies. This means plaintiffs can generally only succeed in respect of a foreign tort to the extent that the defendant is liable under both the law of the forum and the law of the place of the tort.[72]

Most US jurisdictions have a 'proper law of the tort' approach towards choice of law for multi-state tort actions. Under this approach, rights and liabilities in defamation law are determined by the local law of the state '[w]hich, with respect to the particular issue, has the most significant relationship to the occurrence and the parties'.[73] The proper law approach results in all cases being governed by a single substantive standard. This is similar to the UDL reforms which establish a single substantive law for publications within Australia. In contrast, the use of the *lex loci delicti* in Canada and Australia for publications outside the jurisdiction and the UK's double actionability test require courts to have regard to and potentially apply the defamation laws of each place where the material is published.

3. Unresolved Issues for Multi-jurisdictional Defamation

A. Questions following the Gutnick Case and UDL regarding Damage to Reputation Sustained Overseas

In the *Gutnick* case, the plaintiff confined his claim to damage to his reputation within the State of Victoria, notwithstanding that the relevant material was extensively published in other jurisdictions. Hence, the issue of whether plaintiffs could claim for damage to their reputations occurring outside Australia was not directly in issue. However, the High Court seemed to envisage proceedings being commenced in Australia for injury to reputation alleged to have occurred outside Australia, either with or without publication within Australia.[74] Similarly, in developing the content of the UDL, the state and territory governments contemplated that a plaintiff may attempt to sue in Australia for damage suffered in other countries.[75]

While the High Court seemed to envisage a situation where proceedings are commenced in Australia for injury to reputation alleged to have occurred outside Australia and raised various possible restraints that may apply, it is surprising that the High Court did not specifically mention the English principle in the case of *Diamond v Sutton*[76] — that a plaintiff who seeks to serve out of the jurisdiction in respect of a publication within the jurisdiction is guilty of an abuse if he or she seeks to include in the same action matters occurring elsewhere.[77] Clearly, such a rule has not operated in

69 See *Private International Law (Miscellaneous Provisions) Act* 1995(UK), s 11.
70 Id at s 12.
71 Id at s 13.
72 *Boys v Chaplin* [1971] AC 356.
73 American Law Institute, *Restatement of the Law, Second, Conflict of Laws 2d* (1971) § 150.
74 *Gutnick* (2002) 210 CLR 575 at [49].
75 SCAG Working Group of State and Territory Officers, *Proposal for Uniform Defamation Laws* (July 2004) at 31–32.
76 (1866) LR 1 Ex 130 at [132].

respect of publications occurring outside a state but still within Australia, since at common law the plaintiff is permitted to claim damages for all publications arising from the same defamatory statement in one proceeding, notwithstanding multiple publications,[78] a rule which remains unchanged by the UDL. Nevertheless, given that the principle in *Diamond v Sutton* was followed by the House of Lords recently,[79] it would still seem to be persuasive (although not binding) for an Australian court to follow.

If the rule in *Diamond v Sutton* applies in Australia, it would be necessary for a plaintiff to initiate proceedings overseas to seek redress. Alternatively, if recovery for damage to overseas reputation is permitted, this raises further complications regarding the choice of law rule which applies, since the UDL has left intact the operation of the common law in cases involving publications occurring outside Australia. Following *Zhang*, it is unclear whether the kind and the amount of damage recoverable in respect of the commission of a foreign tort are to be regarded as:

(a) matters of substance to be determined by the law of the place of the tort; or

(b) matters of procedure to be governed by the law of the forum; or

(c) a combination of matters of substance and procedure in Australia.[80]

If damages are regarded as a substantive matter, and thus determined by the law of the place of the tort, then it would seem to follow that a court, in calculating damage sustained by the plaintiff overseas, would need to consider the substantive laws of each and every country to determine the amount recoverable. Alternatively, if damages are regarded as matters of procedure then the law of the Australian forum applies.

Further clarity regarding the applicable jurisdictional and choice of law rules is required as currently it is unclear to what extent damages may be recovered in an Australian court for damage to reputation sustained overseas.

4. Evaluation of Current Australian Rules

A. The Policy Role of Defamation Law

In *Gutnick*, the High Court observed that the law of defamation seeks to strike a delicate balance between society's interest in freedom of speech and the free exchange of information and ideas against an individual's interest in maintaining his or her reputation in society.[81] These ideas are similarly expressed in the objects clause of the UDL.[82]

77 As applied by the House of Lords in the decision of *Berezovsky v Michaels* [2000] 2 All ER 986 at [994] ('*Berezovsky*').

78 See *McLean v David Syme & Co Ltd* (1970) 72 SR (NSW) 513.

79 *Berezovsky* [2000] 2 All ER 986.

80 See *Stevens v Head* (1993) 176 CLR 433 per Brennan, Dawson, Toohey, and McHugh JJ, who held that statutory limitations affecting the measure of damages recoverable by a plaintiff were procedural in character, whereas limitations affecting recoverable heads of liability were substantive.

81 *Gutnick* (2002) 210 CLR 575 at [23].

82 See subsections 3(b)-(c) of the *Defamation Act* 2005 (Vic).

If the application of a jurisdiction's defamation laws is too strict, the media industry will be reluctant to engage in journalism to the detriment of free speech. Conversely, if the application of a jurisdiction's defamation laws is too lenient, practices which needlessly damage the reputations of individuals and organisations in society will fail to be sanctioned adequately and society will ultimately be made worse off.

B. The Role of Private International Law Rules

Jurisdictional and choice of law rules are applied as part of the process of adjudicating a defamation or other tortious dispute. While they may be viewed as conceptually distinct from the substantive rules of defamation, they nevertheless combine with the substantive rules to affect the result in a particular case.[83] Hence private international law rules form part of the process of achieving a just balance between the plaintiff and the defendant by either enhancing or inhibiting the application and administration of the substantive defamation laws.

Private international law may fulfil a number of purposes, including the need to promote certainty/predictability, fulfil the expectations of the parties to a dispute, respect the interests of countries and states, facilitate international and interstate co-operation and provide justice in particular cases.[84] The High Court has, in recent times, particularly emphasised certainty as the central objective of private international law rules.[85]

Indeed, it is important that the courts interpret the law in a way that provides a degree of clarity which is sufficient to enable any potential defendant to know how the law will be applied to their activities before they embark on a particular course of conduct.

C. Economics as a Standard for Evaluating Policy

Economics can predict the effects that particular legal rules and outcomes may have upon behaviour and efficiency. This is useful to policy making since it is better to achieve any given policy at a lower cost than a higher cost.[86] To an economist, the essence of tort law is to induce injurers and victims to take account of the costs of harm that can occur from failing to take precaution. In this way, tort law can be used to minimise the costs of harmful activities to society. In the case of torts that are subject to a rule of strict liability, including defamation, it is only the defendant who is provided with the economic incentive to take precaution. Accordingly, the effect of the law upon publisher behaviour is decisive.

D. A Simple Model of Publisher Behaviour

An Internet publisher knows that it will sometimes defame plaintiffs whom they will be required to compensate when this occurs. The probability of defamatory material being

83 Peter Kincaid, 'Justice in Tort Choice of Law' (1996) 18 Adel LR 191–212 at 195.

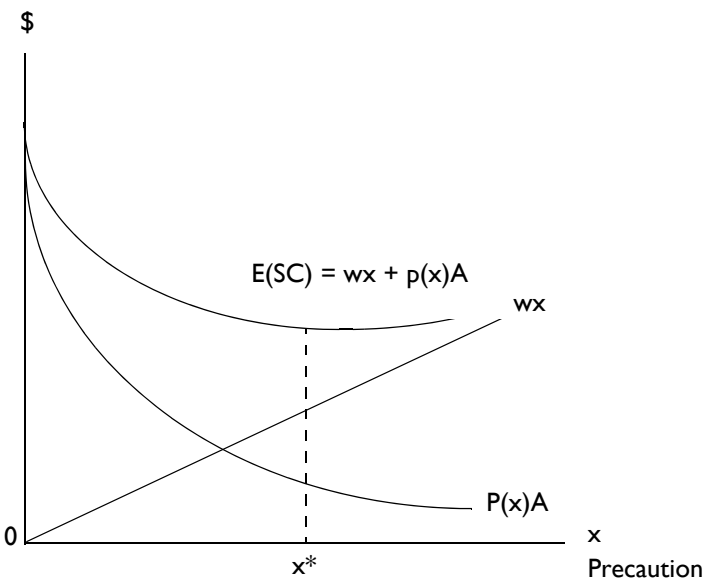
84 Reid Mortensen, *Private International Law in Australia* (2006) at 17.

85 *Pfeiffer* (2000) 203 CLR 503 at [532]. But see *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 221 ALR 213.

86 Robert Cooter and Thomas Ulen, *Law and Economics* (4th Ed, 2000) at 3–4.

published and causing harm to reputation, denoted as p, decreases with the level of precaution exercised by publishers, denoted as x. Thus, $p = p(x)$ is a decreasing function of x. The level of precaution exercised by publishers is determined by two costs they face. The first is the cost of taking precautions to make material less defamatory, denoted as w. For example, taking precautions may involve more extensive research of material, which may delay publication in an industry where timeliness is crucial, or involve publishing less sensational articles, which may reduce sales. For simplicity, it is assumed w is constant and does not change with the amount of precaution, x. Therefore, wx is the graph of the total amount that can be spent on precaution. The second cost is the cost of harm, denoted as A. This represents the cost of paying damages to compensate a plaintiff for harm to reputation. A multiplied by p equals the expected cost of harm in dollars. Once the publisher has both sets of costs it will use this information to calculate the overall level of costs it faces, $SC = wx + p(x)A$,[87] and will adjust its level of precaution until the cost of taking precautions equals the resulting reduction in the expected cost of harm. This is the point where the marginal benefit = marginal cost (of taking precautions) and is depicted at point x^* in Figure 1 below, which represents the lowest point on its combined cost curve and the socially efficient level of precaution.

Figure 1 — The Expected Costs of Defamation Shown as the Sum of Precaution Costs and the Costs of Expected Harm[88]



87 This is obtained by adding together the two cost equations faced by the publisher.

88 Adapted from Cooter and Ulen, above n86 at 321–324.

(i) The Effect of the Gutnick Case on Publishers

In the case of defamation, a jurisdictional rule based on a tort being committed in the forum coupled with a 'clearly inappropriate forum' test for declining to exercise jurisdiction means a foreign defendant faces a very difficult task in seeking a stay of proceedings. As observed in Part 2, it was this result in *Gutnick* which led to concern regarding the Zimbabwe factor where plaintiffs would be able to bring an action in respect of a defamatory publication in each and every jurisdiction where the material is downloaded and the plaintiff has a reputation. Hence, the place of the tort is no longer a sufficient localising factor for the action. If a defamatory statement can be sued upon in any jurisdiction in which it is published, it is logical that plaintiffs will bring an action in the jurisdiction whose law is most favourable to their case. The High Court suggested these jurisdictional rules would not have an undue burden upon defendants because of safeguards within Australian law.[89] However, the decision has a tendency to require publishers to consider a multitude of legal standards when calculating the cost of harm, since different countries strike a different balance between free speech and the protection of reputation.[90]

Moreover, the costs of calculating liability for damage suffered by a plaintiff who has a substantial reputation in more than one legal jurisdiction may have a chilling effect on free speech because one of those jurisdictions has more restrictive defamation laws than the others.[91] Hence publishers in attempting to comply with several countries' laws may be reduced to the lowest common denominator and are likely to spend increasing amounts of money on exercising precaution above the socially efficient level.

(ii) The Effect of the UDL

The harmonisation of state and territory laws means that, in effect, there is only one substantive law applying to publications within Australia. This reduces the cost to publishers of calculating the expected cost of harm. Having a single substantive law also means publishers will not be reduced to the lowest common denominator, and forum shopping is eliminated.[92] Similarly, a choice of law rule that applies a single legal system rather than potentially eight legal systems would ordinarily reduce costs, although this is less important in light of the substantial uniformity of defamation laws. Furthermore, a choice of law rule that selects the jurisdiction most connected with the harm suffered by the plaintiff has the advantage of being easy to observe and verify, hence enabling publishers to better predict the law that will apply[93] and thus better estimate the expected cost of harm. However, the rule of displacement does reduce certainty of the applicable legal standard should divergences emerge in the substantive laws over time.

(iii) The Effect of Uncertainty Regarding Damage to Reputation Sustained Overseas

As discussed in Part 4 above, there is considerable uncertainty regarding whether a plaintiff can recover damages in Australia from a foreign publisher for damage to

89 *Gutnick* (2002) 210 CLR 575 at [53].
90 *Gutnick* (2002) 210 CLR 575 at [117] (Kirby J).
91 *Gutnick* (2002) 210 CLR 575 at [152].
92 The Law Reform Commission, above n7 at [6.54].
93 Id at [6.55].

reputation sustained overseas. In addition, there is uncertainty regarding which substantive laws would apply to such an action. This uncertainty makes it more difficult to predict the cost of harm to plaintiffs and makes it more likely that a publisher will make an error in predicting the cost of harm. In cases of strict liability, an error made by a defendant in predicting the cost of harm will distort the level of precaution exercised by it in the same direction as the error. Hence, where the level of damage is overestimated, publishers will exercise excessive precaution and vice versa. This will lead to a publisher exercising a level of precaution which is either higher or lower than the socially efficient level.

5. Concluding Comments and Suggested Solutions

The *Gutnick* case demonstrates that jurisdiction in an Australian court may be readily exercised over a foreign defendant in respect of an Internet publication. It shows that once a publication is downloaded within the forum it is difficult for a foreign defendant to show Australia to be a 'clearly inappropriate forum'. As a result of these jurisdictional rules, publishers are required to consider many legal standards in assessing the risk to which they are exposing themselves by publishing on the Internet. As demonstrated in Part 5, this, in turn, has the effect of increasing costs for publishers. Indeed, it was in recognition of legal uncertainty and the excessive assertion of national laws that Kirby J suggested national and international measures were needed.[94]

The UDL, as a national legislative measure, has, undoubtedly, created greater certainty for publishers by harmonising state and territory substantive defamation laws and mandating a single substantive law apply to all publications in Australia. This is a welcome change from the previous system in which publishers were required to know and apply eight separate defamation laws for publications circulating throughout Australia.[95] In addition, the choice of law rule applied by the UDL, namely, the law of the jurisdiction most closely connected to the harm suffered by the plaintiff, has limited scope for manipulation and will better enable plaintiffs to predict the applicable law.[96]

Nevertheless, despite its beneficial effect in reducing costs for publishers, the UDL falls short in two key areas.

First, the UDL does not address the jurisdictional issues raised by *Gutnick*. The state and territory Working Group responsible for developing the UDL briefly entertained the need to curb the ability of Australian courts to assume jurisdiction in relation to the Internet. However, the Working Group declined to place limits on the ability of an Australian court to take jurisdiction on the basis that any limitation may have the effect of denying '[o]rdinary Australians' a remedy for damage they suffer, since litigating in a foreign country is likely to be beyond their ability.[97]

Second, the choice of law rules contained in the UDL do not apply to overseas publications. Consequently, the question raised by the High Court in *Gutnick*, concerning

94 *Gutnick* (2002) 210 CLR 575 at [120].

95 The Law Reform Commission, above n7 at [6.54].

96 Ibid.

97 SCAG Working Group of State and Territory Officers, above n75 at 31–32.

the extent that a plaintiff can recover damages for harm suffered to their reputation overseas, remains unresolved. As a result, there is considerable uncertainty regarding the ability of the plaintiff to recover in such a case and the substantive law that may apply to calculate damages following *Zhang*.

One logical option, which would seem to address both outstanding concerns, would be to extend the choice of law rules contained in the UDL to include overseas publications. This would make the applicable choice of law rule much clearer. In addition, the application of the substantive law of the country most closely connected with the damage suffered by the plaintiff would discourage plaintiffs from forum shopping in Australia where the damage suffered was far less than elsewhere. Furthermore, the rule of displacement contained in the UDL's choice of law rules would ensure that an Australian court had the ability to apply Australian laws in special cases where justice to Australian plaintiffs required this. Hence, Australians would retain the ability to bring an action locally but incidental and minor claims would be discouraged by the application of another country's substantive laws to the action. This would ensure consistency between Australian's choice of law rules as between intranational and international defamation.

Another, though far less potent, option, which would go some way towards addressing the jurisdictional reach of Australian courts, is the adoption of a less onerous *forum non conveniens* test in Australia. One drawback is that this initiative would not target defamation actions specifically but would apply to all actions. Nevertheless, this may be an appropriate reform in any event as it would align Australia's jurisdictional rules with that of the UK, Canada and other Commonwealth countries.

Undoubtedly, convergence between countries' substantive and/or procedural rules for defamation would also be of great benefit in reducing costs faced by publishers. However, it is almost certain that the harmonisation of substantive defamation laws will not occur for some time, owing to the nature of the different value judgments that underpin the balance struck by various nations between freedom of speech and protection of reputation. Indeed, it took many years and the threat of overriding Commonwealth legislation to achieve substantive harmonisation of defamation laws within Australia.[98]

Also, there is a clear divergence in procedural approaches, particularly as between the US and Commonwealth countries, which will be difficult to reconcile. The US is likely to insist on a single publication rule and the exercise of jurisdiction only in cases where the defendant has targeted the jurisdiction of the forum. This differs markedly with Australian, UK and Canadian approaches to defamation. Consequently, it would appear, at least for the foreseeable future, publishers will need to rely upon unilateral efforts to address remaining uncertainty regarding multi-jurisdictional publication of defamatory material communicated via the Internet.

98 See Australian Government Attorney-General's Department, *Outline of Possible National Defamation Law* (March 2004), at 1–2.