'A result contrary to intuition': Defamation on the Internet and the High Court of Australia.

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'Activities that have effects beyond the jurisdiction in which they are done may properly be the concern of the legal systems in each place.'[2]

In the first case of its kind to reach a final court, the High Court of Australia considered the nature of defamation on the Internet. Dow Jones, a US company, allegedly defamed an Australian businessman in an article on the Internet. Dow Jones argued that the suit should be heard in the US, not Australia, because that is where the article was uploaded. They argued that the Internet, being such a revolutionary development in communications, deserved a new legal response; that the High Court should develop a global theory of defamation liability. The High Court declined to do so, holding that long-established principles of Anglo-Australian defamation law were applicable to online defamation. Defamation law is bilateral in character. The publisher makes information available and harm is done when that information is comprehended by a third party. The place where the information is comprehended is the central point of inquiry.

I. *Introduction*

In *Dow Jones & Company v. Gutnick* ('Gutnick'),[3] all seven members of Australia's highest court rejected an appeal by Dow Jones against a Victorian Supreme Court decision holding that a suit by Mr Joseph Gutnick against it for publishing a defamatory article on the Internet should be heard in Victoria rather than New Jersey. One of those judges, Michael Kirby, despite agreeing with the outcome nevertheless called it 'a result contrary to intuition',[4] and that is the view of many in the media industry who have said that what the High Court has done will hamper the development of the Internet, and free speech in particular.[5] A search on Nexis three days after the High Court judgment was handed down

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[2] *Gutnick*, [2002] HCA 56 at [24].

[3] *Ibid.*

[4] *Ibid* at 164.

[5] As the first case of this kind to reach a final court, it has aroused enormous interest. Some measure of that interest can be gauged by the organizations which were granted leave to intervene. They included, Amazon.com; CNN; Guardian Newspapers Ltd; The New York Times Company; News Limited; Time, Inc; The Washington Post Company; Yahoo! Inc and John Fairfax Holdings Ltd.

retrieved a total of one hundred and fifteen newspaper and wire service articles about the case. The general trend of these was negative and to greatly exaggerate the impact of the High Court judgment.[6]

A simple scan, let alone a complete reading of the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ (hereafter 'the joint judgment') or the highly readable and thoughtful judgment of Kirby J, is sufficient to indicate that, far from having this effect, what the Australian Court has done is to cut through the enormous amount of hyperbole surrounding the Internet and the World Wide Web, and to craft a commonsense outcome that adheres to long-established principles of Anglo-Australian defamation law. While a more radical approach may be desirable with respect to the long-term governance of the Internet in many areas, including defamation law, devising this is not the task of the Courts, but that of Governments.

II. *Background*

The facts of the case, and the proceedings before the Victorian Courts at lower level are explained in full in the joint judgment. Briefly, there is an Australian businessman by the name of Joseph Gutnick. He is a very high profile individual, well known in Australia, and particularly his home state of Victoria, for a range of reasons - his business and mining activities, his charitable activities, particularly through his involvement with his local religious community, and his sporting activities.[7] Dow Jones is an American owned and based company that publishes the *Wall Street Journal* and *Barron's* magazine, both in print

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[6] The following is an indicative selection: "Australia: The New World Censor?" *Australian Financial Review*, "Press freedom in Australia under threat" *AAP Newsfeed*, "When Global Reach Means Global Risk" *The Age*, "Ruling seen as threat to Net's global nature" *The Canberra Times*, "Net Loss Down Under" *The Christian Science Monitor*, "Borders a barrier to the truth" *The Daily Telegraph*, "Online Publishers Lose Cover Of The Legal System" *The Age*, "High Court threatens net's liberty" *The Australian*, "A dark day for the internet" *The Australian*, "Australia court sends shivers through Net publishing world" *Baltimore Sun*, "A Blow to Online Freedom" *The New York Times*.

[7] See D.Berstein, *Diamonds and Demons*, (Lothian, 2000), a recently published biography of Mr. Gutnick. A description of the book on Amazon.com provides the following information: "A story of tenacity, luck, toughness - and controversy. Joseph Gutnick - known variously as Diamond Joe for his mining exploits, Demon Joe for his presidency of the AFL Melbourne Demons, and the Lubavitcher Rebbe's Special Emissary for the Integrity of the Land of Israel - is a fantastic mix of contradictions. One of Australia's wealthiest and most successful goldminers, Gutnick's involvement in Israel has earned him widespread condemnation, while he is also acknowledged as among the world's greatest Jewish philanthropists. This edition contains an entirely new chapter covering Gutnick's foray into Canada's mining industry, the 2001 Israeli election and the Demons startling successful season in 2000."

and online.[8] In October 2000, in *Barron's Online*, they published an article called "Unholy Gains". It made references to Mr Gutnick implying that he had been involved in money laundering. Mr Gutnick said that he was defamed and took action in the Supreme Court of Victoria to recover damages to vindicate his reputation in that, his home State. He specifically declined to seek damages elsewhere.

Dow Jones objected to the trial of Mr Gutnick's action in Australia. They argued that it should instead be heard in New Jersey - the place where, they said, publication of the allegedly offending material occurred. They said it took place there because that is where it was written and uploaded to the Internet via their servers. The Supreme Court of Victoria, the Court of Appeal of the Supreme Court of Victoria and the High Court of Australia (ten judges in all, not a single dissenter) disagreed.[9] It is this issue, that of place of publication, and in consequence the likely place of trial of any defamation action and the law to be applied that is at the heart of the controversy.

In the lower courts Dow Jones placed a great deal of emphasis on the passive nature of uploading material to their web server (passive that is comparative to publication of newspapers with large circulation and television broadcasts with a wide audience) and the active role necessarily played by someone who wanted to download it, however they apparently dropped this line of argument in the High Court in favour of a policy based approach.[10] Dow Jones argued against the action being held in Victoria, and the application of Victorian law, on the grounds that if publication was deemed to have occurred there, Internet publishers stood to be potentially sued in any and all jurisdictions in which an offended applicant chose to do so.[11] Arguments of principle and policy aside there were, of course, practical advantages to each party in being able to proceed in their home jurisdictions. In the US, jurisprudence with regard to the First Amendment to the Constitution and freedom of speech would have favoured Dow Jones.[12]

Dow Jones argued that the Internet was a new thing in the world. Such a new thing, like nothing ever before, that new legal responses should be developed in respect of it.[13] With respect to defamation law, Dow Jones argued that 'it was preferable that the publisher of material on the World Wide Web be able to govern its conduct according only to the

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[8] At WSJ.com. The *Barron's Online* edition of 28 October 2000 reproduced the article and pictures from the print edition of October 2000.

[9] *Gutnick v. Down Jones & Company Inc*, [2001] VSC 305; leave to appeal refused, *Dow Jones & Company Inc v. Gutnick*, [2001] VSCA 249.

[10] *Ibid.* at 19.

[11] *Ibid.* at 20.

[12] *Ibid.* at 74, per Kirby J.

[13] *Ibid.*, the discussion by Kirby J at 78 et seq.

law of the place where it maintained its web servers, unless that place was merely adventitious or opportunistic.'[14] The alternative, as noted above, would be that a publisher would be bound to take account of the law of every country on Earth because, on the Internet, no boundaries could be drawn, and anyone anywhere could download information.[15]

In line with its argument that New Jersey was the place of publication of the allegedly defamatory material, Dow Jones asked the Court to dismiss the Australian action.[16] Under Australian law as developed by the High Court, the Court would dismiss on *forum non conveniens* grounds if it found Victoria to be a 'clearly inappropriate forum' for the trial of the action.[17]

III. *The Internet*

The most interesting aspect of the decision, and the one with which many will no doubt take issue, is the allegedly new and special nature of the Internet, so different from any communications dissemination technology hitherto developed, and the argument that because of this the High Court should have developed a new response. Dow Jones wanted the High Court to re-express the common law to treat defamation as 'one global tort (rather than a multiple wrong committed by every single publication and every internet hit).'[18] And thence to find that 'publication had occurred and the tort had been completed in New Jersey.'[19] Persuading Australian courts of this was the main task before Dow Jones.

All members of the High Court rejected this argument, although Kirby J indicated his sympathy with the position. The four joint judgment participants, although noting the convenience to the publisher of the certainty gained by knowing that the law governing any action would likely be the law of their 'home' jurisdiction, stated that this ignores the fact that there is another party to the matter. They said that, 'the law of defamation seeks to strike a balance between, on the one hand, society's interest in freedom of speech and the free exchange of information and ideas ... And, on the other hand, an individual's interest in maintaining his or her reputation in society free from unwanted slur or damage.'[20]

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[14] *Ibid.* at 20.

[15] *Ibid.*

[16] *Ibid.* at 9.

[17] The High Court developed this test in *Voth* (1990), 171 CLR 538, preferring it to the *forum non conveniens* test developed by the House of Lords in *Spiliada*. The Australian test has been criticized (including by Kirby J in the decision under review), however it is considered that it will lead to the same outcome as the *Spiliada* test in the majority of cases. See R.Garnett, "Stay of proceedings in Australia: a "clearly inappropriate" test?" (1999) 23 *Melbourne University Law Review 30.*

[18] *Gutnick*, *supra* note 9 at 72 per Kirby J.

[19] *Ibid.* at 73.

Implicitly rejecting the notion of a borderless cyberspace and re-affirming the principle that each publication of a libel is a separate publication, they said that, 'Activities that have effects beyond the jurisdiction in which they are done may properly be the concern of the legal systems in each place.'[21]

The joint judgment states that the law has had to deal with problems of widely disseminated communications for many years before the advent of the Internet, referring to newspapers, radio and television, and particularly to the wide coverage now provided by satellite television. The latter form of communication was seen as particularly relevant because, unlike standard television or radio broadcasts, it is subject to much less control by the broadcaster. Satellite signals may be accessed by persons in a much wider 'footprint'. The Court was not inclined to make special rules for new forms of communication technology. Rather they preferred to place the responsibility for dissemination of information on the Internet on the publishers of that information:

> In the end, pointing to the breadth or depth of reach of particular forms of communication may tend to obscure one basic fact. However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach 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 geographic restriction.[22]

Callinan J was more forthright in his dismissal of Dow Jones' claims with respect to the Internet, and direct in his observations about the profit motivations behind them.[23] His impatience with the attempts made to assign special characteristics to the Internet, and therefore special consideration by the High Court is obvious from the tenor of his remarks. He concluded, 'Publishers are not obliged to publish on the Internet. If the potential reach is uncontrollable then the greater the need to exercise care in publication.'[24]

Kirby J was more open to the argument of the publishers, not surprising given his reputation as a reformer,[25] acknowledging that courts had responded in the past to advances in technology.[26] He dwelt at length

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[20] *Ibid.* at 23.

[21] *Ibid.* at 24.

[22] *Ibid.* at 39.

[23] *Ibid.* at 182.

[24] *Ibid.*

[25] He was in fact foundation Chairman of the Australian Law Reform Commission from 1974 to 1985. Kirby J acknowledged his own inclination towards reform, particularly with respect to the Internet B *Gutnick*, *supra* note 9 at 91.

[26] *Ibid.* at 123.

in his reasons on the advantages and potential of the Internet[27] and said, 'When a radically new situation is presented to the law it is sometimes necessary to think outside the square.'[28] But Kirby J was also loathe to express a legal rule that related specifically to the Internet, noting the swift advances in technology, the likelihood that the Internet had not achieved its full potential and that such a rule could therefore soon be outdated. He said that a technology-neutral approach to the problem should be preferred.[29]

IV. *Defamation Law*

The joint judgment gives short shrift to Dow Jones' argument that the place of uploading should be deemed the place of publication for the purposes of defamation law except where that place was chosen 'adventitiously', or 'opportunisticly'. The judgment holds that such terms would be very difficult to define and give rise to much debate.[30] Their Honours ask how a court would categorise a publisher's decision to set up a server in a particular jurisdiction B which might have been chosen because of favourable law, reasons of geography or labour costs. Does location for such a reason fall within the meaning of these terms? 'Or is it simply a prudent business decision to provide security and continuity of service?'[31]

All members of the High Court made it clear that they would not or could not depart from principles of defamation law long accepted in Australia and England. Those principles hold that defamation law is bilateral in character.[32] The publisher makes material *available* to be comprehended by a third party. Harm to reputation is then done when a defamatory publication is *comprehended* by the reader, listener or observer. This principle underpins the idea that each communication of defamatory material founds a separate cause of action.[33] The joint judgment does indicate that, possibly, the law of defamation might have been better developed had it placed primacy on the place of insult rather than where harm was done and cites Pollock who said in 1887 that the law went 'wrong from the beginning.'[34] 'But', they said, 'it is now too late to deny that damage by publication is the focus of the law.'[35] Kirby J also indicated his discomfort at placing reliance on a case more than one

[27] *Ibid.* at 78 et seq.
[28] *Ibid.* at 112.
[29] *Ibid.* at 125.
[30] *Ibid.* at 21.
[31] *Ibid.*
[32] *Ibid.* at 27.
[33] *Ibid.*
[34] *Ibid.* at 30.
[35] *Ibid.* at 25.

hundred and fifty years old: 'The idea that this Court should solve the present problem by reference to judicial remarks made in England in a case...involving the conduct of the manservant of a Duke, despatched to procure a back issue of a newspaper of miniscule circulation, is not immediately appealing to me.'[36]

The joint judgment reviews the US single publication rule, adopted by many US States to prevent multiple suits.[37] Essentially this rule provides that although a book or newspaper may be widely published, there is only one publication and only one action may be maintained in respect of it.[38] Over time, however, this rule has apparently come to equate place of publication with the place where the person publishing the words has acted.[39] This was the rule that Dow Jones would prefer the High Court to have adopted.

The Court declined to consider adoption of such a rule and adhered to long-established principles of Anglo-Australian defamation law which hold that the tort is concerned with *damage* to reputation and it is the damage which founds the cause of action.[40] In line with more than a century of earlier decisions holding that it is the *publication* of the libel, not the composition, which is the actionable wrong, they looked to where the damage had been suffered (or allegedly suffered) by Mr Gutnick. There was no doubt that this was Victoria, where he sought reparation for the damage done to his reputation there. Although, as has been stated, he may have suffered damage to reputation elsewhere, Mr Gutnick specifically waived his rights to proceed except in Victoria. Under Australian law, the choice of law rule to be applied in a tort action where one or more of the parties or events are connected with a place outside of Australia, is that matters of substance are governed by the law of the place of commission of the tort. This was Victoria and therefore Victorian law would be applied.[41] Victoria was therefore not a clearly inappropriate forum.

V. *Publication in Multiple Jurisdictions*

Mr Gutnick confined his action for defamation to seeking damages for the harm allegedly suffered by him in his home State, Victoria. The High Court recognized however that not all defamation actions involving publications on the Internet would be so neatly confined. There would be cases where someone sought to take action in more than one jurisdiction.

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[36] *Ibid.* at 92 citing to *Duke of Brunswick v. Harmer* (1849), 14 QB 185 [117 ER 75].

[37] *Ibid.* at 29 et seq.

[38] *Ibid.*

[39] *Ibid.* at 34.

[40] *Ibid.* at 42.

[41] *Regie National des Usines Renault SA v. Zhang* (2002), 76 ALJR 551.

Most members of the Court did not seem unduly troubled by this possibility. The joint judgment states that the matter could be handled in a variety of ways. It would be necessary to consider, for instance, whether, in cases where there was multiple publication outside of Australia, the Australian forum was 'clearly inappropriate' and, if so, the matter might be dismissed on *forum non conveniens* grounds.[42] Or if more than one action was brought this might be considered vexatious and 'be litigated either by application for stay of proceedings or application for an anti-suit injunction'.[43] And the Justices pointed out that the common law provides various remedies that may be utilized to prevent multiple proceedings, including the principles of issue estoppel and res judicata.[44] Within Australia there are also various statutory remedies that 'reduce the inconvenience of the multiple publication rule.'[45] 'Conversely', they said, 'where a plaintiff brings one action, account can properly be taken of the fact that there have been publications outside the jurisdiction and it would be open to the defendant to raise, and rely on any benefit it may seek to say flows from applicable foreign law.'[46]

The joint judgment also states that, where the conduct of the publisher has all occurred outside of the jurisdiction it might be appropriate to have regard to the 'reasonableness' of that conduct with respect to the law of defamation in the place or places where the conduct had occurred, and all of the relevant circumstances. That it might be appropriate to develop common law defences to recognise that the publisher may have acted reasonably before publishing. The Justices equated this with the common law defence of innocent dissemination in respect of newspaper vendors and circulating libraries.[47] The reasoning here is somewhat difficult to follow. All of Dow Jones' conduct had taken place outside of the jurisdiction but this approach was not applied in the instant case. The reference to newspaper vendors and circulating libraries would seem to indicate that they had not 'first publishers' in mind but rather onsellers, or 'stockists' of information or someone in a secondary capacity at any rate. In Internet terms this might equate with Web-sites that 're-published' materials - a news Web-site for instance that 're-posted' a story originally published elsewhere - or perhaps even just provided a hyper-text link to it. One of the planks of liability in defamation law is that 'a publisher is liable for publication in a particular jurisdiction where that is the intended or natural and probable consequence of its acts.'[48] This might explain why the suggested

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[42] *Gutnick*, *supra* note 9 at 50.

[43] *Ibid.*

[44] *Ibid.* at 36.

[45] *Ibid.*, the discussion by Kirby J. at 127.

[46] *Ibid.*

[47] *Ibid.* at 51.

[48] *Ibid.* at 124 per Kirby J.

principle was not further developed in the instant case: publication in Victoria, even if not intended, was certainly a natural and probable consequence.

A pertinent point made in the joint judgment is that the claim for damage to reputation involved in a defamation action can only result in substantial damages if the plaintiff has a reputation in the particular place where action is taken. There is no point in taking suit in Jamaica for instance if one has no reputation to lose there in the first place. Further, if there is little or no chance of enforcing a judgment in the particular jurisdiction, there is also little likelihood of action being taken there. It remains to be seen of course whether, if Mr Gutnick is ultimately successful in his Victorian action, he will be able to enforce a judgment in a US court should that be necessary.[49]

Finally, the joint judgment states, if these points failed to persuade, 'The spectre which Dow Jones sought to conjure up...of a publisher forced to consider every article it publishes on the World Wide Web against the defamation laws of every country from Afghanistan to Zimbabwe is seen to be unreal when it is recalled that in all except the most unusual cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person may resort.'[50] Callinan J writes to like effect: 'A "publisher", whether on the Internet or otherwise, will be likely to sustain only nominal, or no damages at all for publication of defamatory matter in a jurisdiction in which a person defamed neither lives, has any interests, nor in which he or she has no reputation to vindicate.'[51]

Kirby J also tackled this issue in his separate judgment. From the tenor of his remarks it is obviously the aspect of the problem that troubled him most and he was clearly concerned with the potential 'chilling' effect on freedom of speech on the Internet. In language reflective of the arguments made by Dow Jones, he calls for a rule that will govern such conduct according to pre-established norms, saying,

> To tell a person uploading potentially defamatory material onto a website that such conduct will render that person potentially liable to proceedings in courts of every legal jurisdiction where the subject enjoys a reputation, may have undesirable consequences. Depending on the publisher and the place of its assets, it might freeze publication or censor it or try to restrict access to it in certain countries so as to comply with the most

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[49] Cf. *Bachnan v. India Abroad Publications Inc*, 154 Misc 2d 228 (N.Y.S.C. 1992) - declining to enforce British libel judgment because of its >chilling effect' on the First Amendment, and *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F Supp 2d 1181 (N.D.Cal., 2001) - declining to enforce French order that a US Internet company cease advertising Nazi memorabilia on its Web-site. Dow Jones apparently has no presence in Australia or assets there B *Gutnick, supra* note 9 per Kirby J. at 108.

[50] *Ibid.* at 54.

[51] *Ibid.* at 184.

> restrictive defamation laws that could apply. Or it could result in the adoption of locational stratagems in an attempt to avoid liability.[52]

At one point in his reasons Kirby J appears to favour adoption of a US-type single publication rule, 'expressed in terms of the place of uploading of material on the Internet.'[53] This in contrast to the approach of the joint judgment and in sharp contrast to Callinan J who clearly considered that such a rule would overwhelmingly favour the United States. According to Callinan J, if the argument of Dow Jones had been accepted, and a single publication rule adopted, this would mean that there would, in effect, be an American hegemony over Internet defamation law.[54] Kirby J acknowledged that that would be so in the instant case, but observed that it would not always be the case.[55] He held that 'respect for the single global publication rule if it became universally accepted, could help reduce the risks of legal uncertainty and the excessive assertion of national laws.'[56] He obviously had mixed feelings on this point however. Later he seems more in accord with Callinan J and expresses concern that most defamation actions would end up in US courts, saying, 'Because the purpose of the tort of defamation...is to provide vindication to redress the injury done to a person's reputation, it would be small comfort to the person wronged to subject him or her to the law (and possibly the jurisdiction of the courts) of a place of uploading, when any decision so made would depend upon a law reflecting different values and applied in courts unable to afford vindication in the place where it matters most.'[57] Like those who participated in the joint judgment, Kirby J adverted to the difficulties involved in adopting a single publication rule, particularly in respect of the ways in which it might be circumvented by publishers seeking to take advantage of 'Net-friendly' jurisdictions to base their activities.[58]

In Kirby J's review of possible alternative solutions, it is apparent that he is attracted to a single publication rule, but sees it fraught with too many difficulties to implement.[59] As a more workable solution he considered place of habitual residence as a determinant: 'At least in the case of the publication of materials potentially damaging to the reputation and honour of an individual, it does not seem unreasonable, in principle, to oblige a publisher to consider the law of the jurisdiction of that person's habitual residence.'[60] The Australian Law Reform Commission had made recommendations along such lines as had Australian courts.

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[52] *Ibid.* at 117.
[53] *Ibid.* at 120.
[54] *Ibid.* at 200.
[55] *Ibid.* at 120.
[56] *Ibid.*
[57] *Ibid.* at 133.
[58] *Ibid.* at 129-132.
[59] *Ibid.*
[60] *Ibid.* at 134.

Kirby J referred to *Australian Broadcasting Corporation v. Waterhouse*[61] where Samuels JA said 'that the criterion of the habitual residence of the subject of the publication would present an objective criterion. It would discourage forum shopping. It would also give "effect to the expectations of the parties" on the basis that the place of residence would be where "[a] plaintiff will generally suffer most harm".[62]

Although the idea of restricting claims to place of habitual residence initially seems attractive, it would place unacceptable limitations on the remedies available to persons with substantial reputations in places other than their habitual residence. The recent decision of the House of Lords in *Berezovsky v. Michaels*[63] provides a good example of this. Mr Berezovsky is a Russian businessman who alleged that he was defamed by an article published in *Forbes* magazine (a US publication). He took action in England where he was often resident, where he had a substantial reputation and where the magazine was widely circulated. The magazine had only had a miniscule circulation in Russia - his place of habitual residence. If Mr Berezovsky had been restricted to litigating in that jurisdiction he would likely have gained no redress - certainly none to redress the harm to his reputation in England.

A better approach, or refinement, is suggested by Kirby J's reference to an Australian Law Reform Commission report which had recommended residence as the best option for a choice of law rule for defamation, but stated that it was 'unnecessary to qualify residence as "usual" or "habitual" for the purposes of this rule since to do so might take the rule further away from the place of loss of reputation.'[64] This would address the problem by providing a fair degree of certainty for publishers but also still allow for circumstances such as those presented by Mr Berezovsky.

Although obviously sympathetic to the notion, and favouring reform, Kirby J declined, or felt unable to take that step in the instant case because of the long-standing, indeed entrenched status of defamation law already referred to. Alteration at this stage would, he said, 'risk taking the judge beyond the proper limits of the judicial function.'[65] His Honour referred to the fact that recommendations had been put forward by the Australian Law Reform Commission for reform of defamation law, but not implemented, stating that, in a parliamentary democracy such as Australia, judges should exercise caution in changing long-standing principles of common law where parliaments have not chosen to do so.[66]

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[61] (1991), 25 NSWLR 519.

[62] *Ibid.* at 539, cited at 135.

[63] [2000] 1 WLR 1004.

[64] Australian Law Reform Commission, *Choice of Law*, Report No. 58 (1992) at 58 [6.55].

[65] *Gutnick, supra* note 9 at 124.

His Honour also noted that the House of Lords was recently invited to adopt a global theory of defamation liability, but declined to do so.[67]

VI. *Conclusion*

The decision of the High Court of Australia in *Dow Jones v. Gutnick* is a straightforward and practical one. It applies the law of defamation as it has been formulated in Australia, England and other common law jurisdictions for well over a century. Under that law place of publication is the principle determining factor and that place is where the material is comprehended and where the person allegedly defamed has a reputation that is harmed. The fact that, in this instance, the allegedly defamatory article was uploaded to a World Wide Web server in New Jersey was not relevant to the outcome. Victoria, among others, is the place where it was downloaded and comprehended and the place where, Mr Gutnick alleges, his reputation was damaged. He might have taken action in another or other jurisdictions if he had suffered damage to his reputation there also. He chose not to but that choice was and is open to others in like circumstances under Australian law, subject to the limitations on multiple suits that the common law imposes, and as described in the joint judgment.

The Internet is a wonderful advance in human communications, likely the greatest ever, or at least since the invention of the printing press. Its reach is universal. Its potential is enormous and still probably largely unrealised. However we have a person who has suffered harm - allegedly been defamed - because of the actions of a publisher. He resides in a different country from that publisher. This is where he has a reputation and will suffer most. Why should the publisher be able to say, 'You must come to my home to sue me'? Why should that publisher be able to say, 'Your law is not relevant'?

It may be that a universal rule ought to be adopted, one that does indeed provide greater certainty for all concerned, but this is not something that Australia can do on its own. It will take a concerted effort at the international level - and the will to do so. As Kirby J said,

> "In default of local legislation and international agreement, there are limits on the extent to which national courts can provide radical solutions that would oblige a major overhaul of longstanding legal doctrine in the field of defamation law. Where large changes to settled law are involved, in an areas as sensitive as the law of defamation, it should come as no surprise when the courts decline the invitation to solve problems that others, in a much better position to devise solutions, have neglected to repair."[68]

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[66] *Ibid.* at 128. And see Kirby J's discussion of the role of the Courts in effecting change to longstanding common law principles at 76-77, noting that the High Court has effected such change in a number of cases.

[67] *Ibid.* at 128, referring to *Berezovsky v. Michaels*.

Failing a detailed international agreement on this issue, the best approach, one that would overcome the main fear of Internet publishers, that they might have to fight actions in multiple jurisdictions, is for the legislature to take up the solution put forward by the Australian Law Reform Commission, and seemingly advocated by Kirby J: that a plaintiff be restricted to seeking remedies in his or her place or places of residence. It is hard to argue that this would not bring certainty to publishers who need look only to the law of one or possibly, in the case of a prominent person, a few jurisdictions, or that it would not be fair to the plaintiff who would in any case only be able to proceed in jurisdictions where he or she had suffered loss of reputation and where damages might be recovered. In the words of the joint judgment, 'What is important is that publishers can act with confidence, not that they be able to act according to a single legal system...'[69]

[68] *Ibid.* at 166.

[69] *Ibid.* at 24.