

## JURISDICTIONAL PROBLEMS IN CYBERSPACE DEFAMATION

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### ABSTRACT

The impact of the internet use in traditional law matters such as commerce, contracts, taxes, criminal law, etc., has required the adaptation of these fields. These changes have had effects both within and outside of territorial borders. One of the first legal aspects that should be resolved in order to sue for damages is to find rules for establishing jurisdiction when the defamation is made across boundaries by the internet. Defamation disputes have increased, and will continue to increase due to the internet being able to deliver rapidly defamatory publications across boundaries.

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The author in this essay will draw a general background of jurisdictional issues in the cyberspace age regarding to the American common law approach. At the same time, an attempt will be made in this essay to present the topic in the light of Victorian law through the analysis of the case of *Gutnick v Dow Jones*, where the High Court accepted that the Victorian courts have jurisdiction over alleged defamatory cases that occur on the internet. The Australian High held that even though the defendant is an United States company, the case should be hear in Victoria Courts because the alleged cyber-publication was downloaded in Victoria and the action brought to the courts seeks recover damages suffered by a Victorian resident within the forum<sup>1</sup>.

*Keywords:* Internet, Cyberspace, Cyber tort, Torts, Defamation on the internet, Defamation, Slander, libel, Jurisdictional problems, Jurisdictional Problems in Cyberspace Defamation, Defamation in the cyberspace, Gutnick, Choice of Law, Personal jurisdiction, Minimum contact with the forum

#### *RESUMEN*

*El creciente auge de Internet como medio de comunicación masiva y transnacional ha obligado a la adaptación de las leyes tradicionales en temas como el comercio, contratos, impuesto, derecho penal, etc. En materia de derecho internacional los problemas de jurisdicción se agudizan con la presencia de Internet y presenta retos nuevos que demandan un análisis de los principios tradicionales. En los casos de publicaciones en Internet supuestamente difamatorias en el Common Law se plantea el problema de determinar el juez competente para determinar la indemnización de perjuicios en esos casos.*

*El autor en el artículo nos presenta el estado actual del problema tal y como ha sido abordado en el Common Law*

*partiendo del análisis del derecho norteamericano en donde se encuentra un mayor desarrollo jurisprudencial y del estudio del caso australiano Dow Jones & Company Inc v Gutnick (2002) 194 ALR 493 que ha causado controversia mundial por la decisión de la High Court de Australia al reconocer como juez competente para decidir el caso de difamación los tribunales del estado de Victoria —Australia— por el hecho de que la publicación de una página Web de la revista norteamericana Barron's Magazine publicada en Nueva York y cuyo contenido apareció también en la Web de la compañía supuestamente difamatoria había sido leída en Australia a través de Internet.*

*Palabras clave: internet, jurisdicción en internet, difamación, injuria, calumnia, difamación por internet, publicación en internet, responsabilidad civil.*

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## 1. INTRODUCCIÓN

Defamation disputes have increased, and will continue to increase due to the internet being able to deliver rapidly defamatory publications across boundaries. The rapid development of the internet and the forecast for the next years has brought new challenges for courts and lawyers. The impact of the internet use in traditional law matters such as commerce, contracts, taxes, criminal law, etc., has required the adaptation of these fields. These changes have had effects both within and outside of territorial borders. One of the first legal aspects that should be resolved in order to sue for damages is to find rules for establishing jurisdiction when the defamation is made across boundaries by the internet. There are a number of question that should be answered: Where does the defamation occur? Where does the publication of material on the internet take place? Does internet defamation constitute a new kind of tort? How and what kind of jurisdictional problems arise when defamation occurs in cyberspace? What solutions have been proposed and what are their limits?

This essay will examine these issues in two main parts. The first part is developed in two chapters. The second and third chapters will present a framework of the law of defamation and its jurisdictional problems. The second chapter will present the fundamental structure of the tort of defamation: definition, classes and elements of the cause of action, with particular attention on issues of publication. The third chapter will draw a general background of jurisdictional issues in the cyberspace age: firstly with a traditional approach to multi-jurisdictional problems, then how this matter has developed after the growth of the internet. The second part will analyze the features of defamation in cyberspace and its respective jurisdictional issues. At the same time, an attempt will be made in this essay to present the topic in the light of Victorian law through the analysis of the case of *Gutnick v Dow Jones*<sup>1</sup>, in order to illustrate the nature of the challenges that the courts have to

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1 (2001) VSC 305.

face in defamation on the internet. Finally, this paper will present a position on how to understand the concept of the place of publication when occurring in the internet.

## II. DEFAMATION

### A. DEFINITION

Defamation has a Latin origin in the word ‘diffamare’<sup>2</sup> and it commonly means to publish to malign against the person. Since *Parmiter v Coupland*<sup>3</sup>, a case in 1840, defamation was described as ‘calculated to bring the plaintiff into hatred, contempt or ridicule. Later, in *Sim v Stretch*, defamation was described as

‘the intention to lower the person in the estimation of right thinking members of the society generally’<sup>4</sup>.

Notwithstanding that, to construct a definition involves several difficulties, because the content and limits of defamation change across different laws<sup>5</sup>. In Australia for instance, there is no unified regulation<sup>6</sup>.

A more complete definition of defamation could be constructed by incorporating a joint definition from the *Defamation Act* (1889)

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2 D A Kidd MA, *COLLINS GEM Latin Dictionary* (1st ed 1957, 1995) 102.

3 (1840) 6 M&W 1, 108.

4 (1936) TLR 669).

5 The most relevant statutes of defamation in Australia are: *Defamation Act* 1901 (NSW), *Defamation (Amendment) Act* 1909 (NSW), *Defamation (Amendment) Act* 1994 (NSW), *Defamation Act* 1957 (Tas), *Defamation Act* 1938 (NT), *Defamation amendment Act* 1989 (NT), *Defamation Act* 1889 (Qld) and *Wrongs Act* 1958 (Vic) pt 1.

6 JOHN G FLEMING, *The law of Torts*, 7th ed, 1987, 502-503.

of Queensland<sup>7</sup>, and *Sim v Stretch*<sup>8</sup>. Therefore, someone would be defamed when ‘any person who, by spoken words or audible sounds, or by words intended to be read either by sign or touch, signals, gestures, or visible representations, publishes some imputation, concerning any person<sup>9</sup>, that lowers the person in the estimation of right thinking members of the society generally’<sup>10</sup>. This definition has several advantages, because it includes different classes of defamation and illustrates how defamatory statements can be published. Also it establishes with clarity the fundamental elements of the cause of action for defamation. Notwithstanding that, due to the complexity of the definition, it is necessary to explain it in more detail.

## B. CLASSES: SLANDER AND LIBEL

For many commentators, the most important difference between slander and libel lies in the traditional reasons. Since the middle ages slander and libel were distinguished by the means used to deliver the defamatory statement. If it is spoken words or audible sounds, it is slander; if in writing it is libel<sup>11</sup>. Later, the judges extended the concept of libel to certain expressions such as pictures, statues, or by words intended to be read either by sight or touch, or by signs, signals, cartoons, or visible representations, tombstones or other permanent form<sup>12</sup>. FLEMING describes libel as

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7 *Defamation Act* (1887) s 5.

8 FLEMING, above 5.

9 *Defamation Act* (1887) s 5.

10 See above 4.

11 Also is possible to distinguish between defamation and Injurious falsehood. That is ‘an action on the case for words that disparage the plaintiff’s goods.’ FRANCIS TRINDADE, *The Law of Torts in Australia*, 3rd ed., 1999 183.

12 FLEMING, Above 5, 519-521.

‘Communication addressed to the sense of sight, and perhaps, of touch as in the case of a blind person reading Braille, while slander is conveyed to the ear’<sup>13</sup>.

In this stage, the differentiation between slander and libel has been that if the defamatory publication was heard it was slander, but if it was seen or read, it was libel.

However, since the growth of the mass media such as radio and television, where images and sounds are combined, the criteria to distinguish both types of defamation have changed. When the offending material is permanent it is called libel, if it is temporary, it is slander. In this sense, *Broadcasting Services Act 1992* classified radio broadcasting as similar to libel when it established that:

‘For the purposes of the law of defamation, the broadcasting of matter is taken to be publication of the matter in a permanent form’<sup>14</sup>.

The distinction has significant consequences because libel is actionable *per se* in contrast to slander, which is only actionable when the plaintiff proves special damages. Notwithstanding, such classification is not very accurate, and has frequently been criticized and in some states of Australia has been abolished<sup>15</sup>.

## C. ELEMENTS: CAUSE OF ACTION

### 1. WHO IS THE DEFAMER?

The identification of the defamer sometimes brings several difficulties. Sometimes a defamatory publication involves a chain of persons:

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13 FLEMING, *Above* 5, 520.

14 *Broadcasting Services Act 1992* (Cth) s 206.

15 Queensland, Australian Capital Territory, and Tasmania by *Defamation Act 1889* (Qld) s 5(1) and 7; *Defamation Act 1901* (NSW) s 3(2) and *Defamation Act 1957* (Tas) ss 6 and 9 (1) respectively. In Victoria South Australia and Western Australia the differentiation still.



journalists, distributors and owners of the news paper as well. Could it involve liability to all of these persons? In others words who is responsible for the publication? To answer the question it is necessary to distinguish tortfeasor from vicarious liability.

All participants in the tort of defamations are liable for such publications. This includes the editors who are also liable when they had authority and responsibility to supervise the contents<sup>16</sup>. Notwithstanding that, the person that merely furnished material to another person who publishes it is not a tortfeasor. Also libraries, books stores and news dealers are excluded from liability. There is an absolute privilege that confers immunity from liability to members of parliament and members of the court for their statements during the sessions or parliamentary debates. However, this privilege does not include publishers such as the media when they reproduce these interventions<sup>17</sup>.

Vicarious liability applies when the publication was made by an employee and such publication is reasonably foreseeable or was made under his or her instructions or control. The employer is liable even in the case that it was done without his or her knowledge<sup>18</sup>.

## 2. PERSON DEFAMED

Natural persons and corporations are capable to be defamed<sup>19</sup>. In almost all States of Australia —except Tasmania— death of the defamed person extinguishes the action<sup>20</sup>. The defamatory material has to refer to the plaintiff, though it is not necessary that the

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16 *Webb v Bloch* (1928) 41 CLR 331; 2 ALJ 282.

17 ARMSTRONG, MARK; DAVID LINDSAY and RAY WATTERSON, *Media Law in Australia*, 3rd ed, 2001, 32.

18 FLEMING, Above 5, 516.

19 KENNETH, CREECH, *Electronic Media Law and Regulation*, 3rd ed, 2000, 207.

20 GILLOOLY, MICHAEL, *The Law of Defamation in Australia and New Zealand* (1998) 25.

defamatory material published or statement spoken expressly named him or her. It is enough that the evidence shows that the defamation refers to the plaintiff. In defamation of groups and their members the general rule is that the attacks or vilification of large groups does not give rise to action for defamation. When publishing imputations about a group that allows identification of a particular individual separately from the group as a whole, he or she may sue for defamation<sup>21</sup>.

The aim of the tort of defamation as explained by the High Court in the case of *Carson v JOHN Fairfax & Sons Ltd* is the following:

‘(1) consolation for the personal distress and hurt caused to the appellant by the publication; (2) reparation for the harm done to the appellant’s personal and (if relevant) business reputation; (3) vindication of the appellant’s reputation’<sup>22</sup>.

### 3. PUBLICATION

The defamatory material must fulfill two conditions. First the defamatory material must be published. Publication is an intrinsic element of defamation. It is necessary that the material is known by a third person different to the person defamed. The tortious action of vilification is concerned only when the defamation is conveyed to someone else, but not when is said in private to another person. Second, the publication must be understood. The person defamed has to prove that third persons not only heard or saw the material, it is necessary that they have understood its defamatory content. The publication should be interpreted as a whole and not only on the basis of a few passages; the third person has to understand the context in which it has been produced. Finally, the tort of defamation occurs in the place where such publication has been heard, seen or read<sup>23</sup>.

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21 *David Syme & Co v Canavan* (1918) 25 CLR 234, 238.

22 (1993) 178 CLR 44, 60–61.

23 SALLY WALKER, *Media Law, Commentary and Material* (2000) [3.4.1].

Technically the distribution of each copy of a newspaper is a separate publication and theoretically the defamed person can sue for each publication. However, one action is usually sufficient to recover damages for all publications.

When the defamation occurs in different places or when the defamer is outside of the forum of the person that has been defamed, the place where the publication was made becomes crucial in order to establish jurisdiction. In these situations in principle the defamed person can present an action before the courts in each jurisdiction, even though, the Supreme Court of New South Wales held that this procedure constitutes an abuse of process by the plaintiff (*Maple v David Syme & Co Ltd*),<sup>24</sup>. The Supreme Court of Victoria in *Meckiff v Simpson*, held that

‘Fundamentally it appears to me that, unless there are compelling reasons to the contrary, it is highly desirable that there should be in relation to the publication of the book everywhere in the world one action only and one trial only’<sup>25</sup>.

### III. DILEMMAS ON CYBERSPACE’S JURISDICTIONS

#### A. NATURE OF CYBERSPACE AND ITS LEGAL IMPLICATIONS

In the last decade of the 20<sup>th</sup> century, the internet use exploded around the world. The exponential growth creates in some circles enthusiasm, in others skepticism. The legal implications of the World Wide Web generate many questions and doubts about the new phenomenon: Does the internet require a system of rules totally different from the laws that governs physical territories? Is the

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24 (1975) 1 NSWLR 97, 98.

25 (1968) VR 62, 65.

internet itself a point in real space or does it not have territorially based boundaries? How can the jurisdictional problems that will arise be solved?

The answers to these questions have generally been divided into two opposite positions. The first theory is held by those who believe that the internet is a 'cyber place' different to the real world, where the speed of communications and the nature of the transmission make the internet almost totally autonomous of physical location. This new jurisdictional territory, they argue, should have its own laws and institutions in order to solve the problems that the 'traditional' approach cannot resolve. Additionally any intention to regulate the internet by a nation would be illegitimate, because this local action would have multi-jurisdictional effects out of the power of the one country<sup>26</sup>. In contrast, against the cyber regulation, some scholars argue that cyberspace is not a special place that cannot be regulated by traditional principles. The internet communicates real people in real spaces<sup>27</sup>.

Notwithstanding, beyond the dilemma of the nature of cyberspace, the fact is that in the last decade, some disputes before the courts have had their origin in cyberspace issues. Phenomena such as e-business, consumer protection, domain property registration, copyright, cyber crimes, cyber torts, etc have increased and the forecast for the next years is that these kinds of disputes will arise and probably their complexity will intensify.

Besides other interesting legal issues that appear in the cyberspace era, in private international law the

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26 DAVID JOHN and DAVID POST, 'Symposium: Surveying law and Borders: Law and Borders, the Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* [1367] <[http://www.cli.org/X0025\\_LBFIN.html](http://www.cli.org/X0025_LBFIN.html)> at 9 November 2002.

27 GOLDSMITH, JACK L., (1998) 65 (199) *University of Chicago Law Review*; see also DAVID G. POST, *Against 'Against Cyberanarchy'* (2002).  
<<http://www.temple.edu/lawschool/dpost/Cyberanarchy.PDF>> at 9 November 2002.

‘[t]he first question which arises in litigation involving foreign elements is whether the court and will hear the case<sup>28</sup>.

Furthermore, other questions should be resolved, such as, what law should be applied and how the judgments can be enforced.

## B. MULTI JURISDICTIONS OUT OF THE INTERNET: TRADITIONAL APPROACH

Even before the boom of the internet the courts solved jurisdictional problems dealing with issues of boundaries of countries and the federal system. In principle courts have jurisdiction to hear cases that occur within their territory. However, at times they have to deal with matters that have foreign aspects to them. In these cases, specific rules govern this ‘*long-arm*’ jurisdiction of the court in order to respect state sovereignty.

In common law countries with federal systems the first step is to solve cases with interstate elements, and thereafter, by analogy, cases with international elements. In order to avoid anarchy among sovereign countries international treaties are entered into by states. The dynamic process of the European Union is a great example of the harmonization.

Australia has been mainly influenced by the United Kingdom and United States in jurisdiction issues. For that reason it is necessary to refer, in brief, to the developments in those countries. Even though, SYKES considered that the Anglo Australian solution, ‘has failed to create a consistent theory of jurisdiction<sup>29</sup>, there are several rules that constitute a general approach of the common law countries.

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28 SYKES, EDWARD I. and MICHEL C PRYLES, *Australian Private International Law* 2nd ed, 1987, 21.

29 *Ibid.*

## 1. UNITED STATES POSITION

a) *General jurisdiction*

In first place the American courts examine the facts in order to establish if they have general jurisdiction upon the case at hand. There is general jurisdiction when the defendant is physically present in the court's forum or at least conducts routine business in the forum. The federal system recognizes that all states maintain exclusive jurisdiction and sovereignty over persons and property and no state can exercise direct jurisdiction and authority over those persons or properties outside its territory. The Supreme Court, based on these principles, stated that in accordance with due process regulated by the 14<sup>th</sup> amendment to the Constitution, the jurisdictional power has its limits and can only start process when personal jurisdiction exists.

However, as it is not always possible to establish general jurisdiction; the courts seek specific jurisdiction when certain activities have occurred within the forum state. This includes torts committed outside of the court's forum which result in injuries within a court's forum<sup>30</sup>. This personal jurisdiction can be of two classes: First, *in personam*, that is, when the person is located in the forum. This action is brought to the court in order to compel a defendant to do a particular thing, usually when he or she is domiciled or has residence in the State. Second, *in rem*, that is, when the jurisdiction is exercised upon property located in the state<sup>31</sup>. This action seeks claim to property and the judgment is binding against the world<sup>32</sup>.

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30 Allison Kimberly Hift,

<[http://www.becker-poliakoff.com/publications/article\\_archive/internet\\_jurisdiction.htm](http://www.becker-poliakoff.com/publications/article_archive/internet_jurisdiction.htm)> at 8 November 2002.

31 YAGURA, RYAN, Does the Cyberspace expand the boundaries of personal jurisdiction?

<[http://www.idea.piercelaw.edu/articles/38/38\\_2/9.Yagura.pdf](http://www.idea.piercelaw.edu/articles/38/38_2/9.Yagura.pdf)> at 8 November 2002.

32 *Ibid.*

In consequence, when the court finds that the litigation is totally foreign because the parties or the causes of the dispute are not connected with the forum, the court refuses to hear the case.

*b) Personal jurisdiction. Minimum contact with the forum*

The doctrine of the minimum contacts, in which the courts can find personal jurisdiction over a person who does not have a domicile or residence in the forum, was established by the US Supreme Court in 1945, in the famous case of *International Shoe v Washington*<sup>33</sup>. If the defendant has at least minimum contact with the forum, he or she can sue in the state with full constitutional guarantee of due process. The court expressed the new doctrine in the following statements:

“Historically the jurisdiction of courts to render judgment *in personam* is grounded on their de facto power over the defendant’s person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him. *Pennoyer v. Neff*, 95 U.S. 714, 733. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam*, *if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice’* (emphasis added)<sup>34</sup>.

This principle has been maintained for many decades. The courts have developed the notion of minimum contacts through many different cases<sup>35</sup>. Sometimes the concept was broadened; in other

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33 326 US 310 (1945).

34 *Ibid.*

35 See *Hansen v. Denckla*, 357 U.S. 235, 253 (1958); *Burger King v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen*, 444 U.S. at 295.

cases it was narrowed. Additionally a corpus of doctrine has been developed to determine how the corporations have presence in the forum or how partnerships can be sued in the forum. Presence within the forum has also been extended when the defendant who is not present, may submit to the jurisdiction of the court, for instance, when the defendants are represented by their solicitor in the court. This long arm jurisdiction of the courts which has enabled them to extend their jurisdictions beyond their territory has also been developed by statutes in some States. For example the *Federal Long-Arm Rule* (Rule 4(k)(2) of the Federal Rules of Civil Procedure and the *Lanham Act*<sup>36</sup>, that was created to protect consumers and competitors from misrepresentation of products and services in commerce. However just as the courts have power to exercise jurisdiction, they have a discretionary faculty to refuse its exercise based on the doctrine of *forum non conveniens*<sup>37</sup>. The courts can refused to hear the case, in spite of the fact that they have jurisdiction, because they consider that the plaintiff has brought the case before the court merely to harass and annoy the defendant, or is manifestly inconvenient or unjust or ineffective<sup>38</sup>.

## 2. JURISDICTION AUSTRALIAN APPROACH

Australia as a federal country, with six states and two territories has eight separate jurisdictions. In consequence there is no uniform regulation over all of Australia<sup>39</sup>. Personal jurisdiction is regulated by the common law and statutes<sup>40</sup>. In general terms this has followed

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36 *Lanham Act* 15 USC.

37 PRICE, DAVID, *Defamation, Law, Procedure & Practice* (1997) 240.

38 SYKES and MICHEL C PRYLES, above 28, 77-80.

39 The possibility of a global unification has been studied by American Bar Association who recommends the establishment of a multinational Global Standard Commission in order to construct uniform principles and global protocol standards. See COLLINS, MATTHEW, *The Law of Defamation and the Internet* (2002) [24.11].

40 P E N NYGH and MARTIN DAVIES, *Conflict of laws in Australia* (7th ed, 2002) [4.2].



the United States doctrines, although Australia has several common principles applicable to all jurisdictions<sup>41</sup>.

The service of the writ is the foundation of jurisdiction. Both Australia and England have jurisdiction upon a defendant when he or she has been validly served within the jurisdiction of the court<sup>42</sup>. In actions *in personam* the defendant must be physically present within jurisdiction at the moment of the service without consideration of the circumstances. This includes instances where the defendant's presence within the forum is merely temporary, except in cases where this presence has been fabricated by force or fraud<sup>43</sup>.

When the defendant is not in the forum substituted service applies when at least one the following cases occurs: a) the defendant knows the issue and departs the forum, and b) when the defendant does not know of the issue, but suspecting, goes away. This is regulated by the *Service Execution of Process Act*<sup>44</sup>.

When the plaintiff attempts to serve the writ outside of the territorial jurisdiction, he or she should satisfy two requirements: first, that this service outside of jurisdiction is within the rules of the court and second, the plaintiff has the burden to prove that the jurisdiction is not a clearly inappropriate forum<sup>45</sup>. This forum non convenient test in transnational cases was laid down by the High Court in the case of *Voth v Manildra*<sup>46</sup>. In this test, the plaintiff has to prove that there is a connection between the case of action and the forum and judicial advantages such as costs of the trial, domicile of witness, expenses of transportation, etc. The Australian *forum non conveniens*' test is significantly more onerous than in the United

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41 *Ibid* [4.20].

42 COLLINS, above 39 [24.13].

43 P E N NYGH above 40 [4.3].

44 1992 (Cth), s 15.

45 An interesting explanation and critic of this test is made by professor RICHARD GARNETT, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test', *Melbourne University Law Review* (1999) 2.

46 (1990)171 CLR 538.

Kingdom or United States. In these countries the courts can decline jurisdiction simply because some other place is considered a ‘more appropriate forum’<sup>47</sup>.

After satisfying these requirements the jurisdiction is exercised within the forum. Then, the court has to apply the principle of choice of law, in order to determine which substantial law governs the case. In Victoria, for instance, in respect of torts Order 7 establishes that:

‘[T]he proceeding is founded on a tort committed within Victoria and the proceeding is brought in respect of damage suffered wholly or partially in Victoria and caused by a tortious act or omission wherever occurring’<sup>48</sup>.

The choice of law has been regulated at common law by the High Court in two recent cases. The first established the criteria of choice of law within different Australian states. The second case extended the same solution to the transnational jurisdictions.

In the first case *John Pfeiffer v Rogerson*, (*Pfeiffer’s case*)<sup>49</sup> Mr. Rogerson, resident in Australian Capital Territory suffered personal injuries in New South Wales while working as employee of the Defendant and in fulfillment of his duties. John Pfeiffer Pty Ltd also had domicile in the Australia Capital Territory. Rogerson brought his action in tort before the Supreme Court of the Australian Capital Territory, notwithstanding that the place of the tort was New South Wales. A conflict of law arose in this case because the forum was the Australia Capital Territory and the place of the tort was New South Wales. The court held that the law governing all torts should be the place where the torts was committed, or *lex loci delicti*<sup>50</sup>.

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47 COLLINS Above 39 [24.32-36].

48 Order 7 of the Victorian Supreme Court Rules (SCR) (i), (j).

49 (2000) 172 ALR 625.

50 *Lex loci delicti commissi*: the law of the place where the tort was committed. See *The CCH Macquarie Concise Dictionary of Modern Law* (Sydney: Macquarie Library, 1988).

In the second recent case, *Regie National des Usines Renault SA v Zhang*, ('Zhang's case')<sup>51</sup> Mr Zhang, an Australian temporary resident suffered serious damages when driving a car in New Caledonia which was designed by Renault Company in France. Zhang brought the action against Renault in New South Wales, even though the defendant alleged that New South Wales was an inappropriate forum for the trial.

The Court in *Zhang's case* broke with 130 years of legal tradition which started in *Phillips v Eyre*<sup>52</sup>. The court in *Zhang* stated that 'the rule in *Phillips v Eyre*, as it came to be applied, now appears as a "breath from a bygone age"<sup>53</sup>. And since then, *Phillips v Eyre* no longer has application in any place in Australian law. The new rule is that the *lex loci delicti* will govern all cases involving torts committed outside Australia. Two year after *Pfeiffer's case*, the High court harmonized the rules of choice of law, intra and extra Australian boundaries<sup>54</sup>. In consequence, *Zhang's case* was heard in New South Wales applying New Caledonia Law (*lex loci delicti*). Additionally in *Pfeiffer's case* the Court held that the rule *lex loci delicti* for international torts has not any flexible exceptions in order to avoid uncertainty and difficulties in practice. The Australia High Court in this case, followed the United States trend<sup>55</sup>. The implications of *Pfeiffer* and *Zhang* in defamation law through the internet will have interesting consequences, because a tort would be committed in the place where the material was published, read, heard or seen.

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51 (2002) HCA 10.

52 (1870) LR 6 QB 1.

53 See Above 51, 132.

54 The predominant rule of choice of law in torts certainly it is no new. 'one analysis suggests that this principle was established in Europe as long ago as the thirteenth century'. Ibid Above 52, 132.

55 See Above 51, 79.

## C. PERSONAL JURISDICTION IN THE CYBERSPACE AGE

Since the first website was created in 1991 by a team of the European Center for Nuclear Research (CERN) the number of websites on the World Wide Web has grown dramatically. Simultaneously, the courts have had special problems with regard to traditional jurisdictional analysis. Websites are accessible around the world to any internet user with the necessary equipment<sup>56</sup>. These situations constituted a challenge for the courts in order to establish personal jurisdiction.

How can one determine whether one defendant has presence in the forum, in order to establish personal jurisdiction if he or she only had contact with the plaintiff through the internet (eg via websites or email)? Do these internet services satisfy the requirements to constitute enough minimum contact within the forum in order to establish personal jurisdiction? The American courts have developed a theory of personal jurisdiction in cases of cyberspace that can be summarized as follows:

Initially the courts held that Web accessibility is enough minimum contact in the forum to establish personal jurisdiction. In an early case of *Inset Systems Inc. v Instruction Set Inc.*, the court exercised jurisdiction on the ground that personal jurisdiction upon a nonresident defendant was established when the defendant merely used the web site to promote its computer products and technical support service worldwide. This broad approach is described by the court in the followings arguments:

“In the present case, Instruction has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states. The internet as well as toll-free numbers are designed to communicate with people and their businesses in every state. Advertisement on the internet can reach as many as 10,000 internet users within Connecticut alone. Further, once posted on the internet, unlike television and radio

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56 MARK A. WILLARD, *Personal Jurisdiction and the Internet* (1999)

<<http://www.escm.com/new/seminars/APR2399.html>> at 8 November 2002.

advertising, the advertisement is available continuously to any internet user. ISI has therefore, purposefully availed itself of the privilege of doing business within Connecticut<sup>57</sup>.

Afterwards the court applied a narrow approach in *Zippo Manufacturing Co. v Zippo Dot Com Inc*<sup>58</sup>. In this case the defendant was a California company with neither offices nor employees in Pennsylvania, the place of residence of the plaintiff. The defendant had only a website hosted in California which was also available to Pennsylvania residents. The website, at that time, was sophisticated because it included online service by credit card and passwords for customers, which permitted access to news groups. From these facts, the court held that, the defendant engaged through the website in active business with residents of the State, this event constituted presence in the forum. Presence in the forum was also made out when without business in the forum the website is classified as interactive because it gives information, email addresses, or requires passwords. In contrast with the early position in *Inset Systems Inc. v Instruction Set*, if the website is merely advertising or a passive home page there is no minimum contact with the forum. The test in *Zippo's* has been used by the courts in order to decide whether to exercise jurisdiction or not, in some cases the courts have declined to exercised jurisdiction based only on the website's advertising<sup>59</sup>.

Later the doctrine in *Zippo* was narrowed by the court in *Millenium Enterprises Inc v Millenium Music LP*<sup>60</sup>. The defendant,

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57 *Inset Systems, Inc. v Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996) 164.

58 952 F. Supp. 1119, 1123 (W.D. PENN, 1997).

59 *Patriot Systems, Inc.v. C-Cubed Corp.*, 21 F. Supp.2d 1318 (D. Utah 1998); *SF Hotel Company v Energy Investments*, 985 F. Supp.1032 (D.Kan.1997); *Weber v Jolly Hotels*, 977 F. Supp.327, 333 (D.N.J. 1997).

60 *Millenium Enterprises Inc v Millenium Music LP*, 33 F. Supp. 2d 907, 921 (D.Or.1999).

a Carolina company, was sued by an Oregon plaintiff for alleged trademark infringement when using the similar name of ‘Millenium Music,’ a trade mark of the defendant based on Oregon laws. Both companies sold their products through the website. The court found that even though the defendant’s website was interactive, the Carolina’s company had not had deliberate actions towards the forum state and for that reason the court decided that the minimum contact did not exist in the forum. The decision states the following:

“[T]he court finds that the middle interactive category or internet contacts as described in Zippo needs further refinement to include the fundamental requirement of personal jurisdiction: “deliberate action” within the forum state in the form of transactions between the defendant and residents of the forum or conduct of the defendant purposefully direct at residents of the forum state”<sup>61</sup>.

Following *Millenium*, in the case of *American Eyewear*<sup>62</sup>, the court held that interactive websites are not enough to constitute minimum contact and the plaintiff has to prove that the defendant solicited custom in the forum. Additionally the court clarified that the location of the software or the domain is irrelevant in order to define jurisdictional factors.

In the analysis of personal jurisdiction in torts committed over the internet, the courts have found that intentionality should be directed to the forum state in order to establish special jurisdiction. Following the precedents of minimum contact through the internet, the courts have applied these principles to tort cases.

*Panavision v Toeppen*<sup>63</sup>, was a case of domain name where the Illinois defendant, Toeppen, registered the domain name, [Panavision.com](http://Panavision.com) with the intention to sell the domain name to California Panavision, the plaintiff. The plaintiff refused to buy it

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61 *Ibid.*

62 106 F Supp 2d 895 (ND text 2000).

63 141 F.3d 1316 (9th Cir.1998).

and sued on the basis of infringement of trademark right. The court found that Toeppen had deliberately targeted his activity at Panavision, a California resident with the intent of causing harmful effect within California, and concluded that:

‘Jurisdiction is proper because Toeppen’s out of state conduct was intended to, and did, result in harmful effects in California’<sup>64</sup>.

In this case the court applied the ‘effects’ test’ doctrine that began in *Calder v Jones*<sup>65</sup> it establishes that in tort cases, personal jurisdiction arises if the defendant’s conduct is aimed at or has an effect in the state.

#### A) CIVIL SYSTEM COUNTRIES

Civil system countries like Colombia have a completely different approach from common law countries regarding personal jurisdiction. The procedure rules are in the statutes, the civil code of procedures. Problems to establish personal jurisdiction in civil law countries do not exist because civil procedure ordinarily determines that the plaintiff has the right to select the jurisdiction within some clear norms. Firstly, regard to the domicile of the defendant, if he or she does not have clear domicile, the plaintiff has the option to sue in the defendant’s residence. The civil procedure code of Colombia, for instance, regulates the territorial factor of jurisdiction with the following rules: first, the judge has jurisdiction (competence) upon the defendant when he or she is domiciled within the forum. When the defendant has several domiciles, the plaintiff has the right to chose any of them, except when the matters are linked exclusively with one of the domiciles. Second, if the defendant does not have a domicile, the judge of the place of residence has competence. When

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64 *Ibid.*

65 465 U.S. 783 (1984).

the defendant does not have domicile or residence within the country, the plaintiff can sue within her or his domicile. Third, in the processes for torts, the judge in the place where the facts occurred will have competence<sup>66</sup>. Moreover, in civil system countries the courts cannot refuse to hear the case or apply the principle *forum non conveniens*.

#### B) EUROPEAN UNION

The European Union through the Brussels and Lugano Conventions has established clarity in the applicable rules of jurisdiction among the States subscribers. The States members have jurisdiction upon a defendant domiciled within a Member of the European Union. Additionally the Convention establishes in article 5 (3) that

‘in matters relating to tort, *delict or quasi- delict*, in the courts for the place where the harmful event occurred’.

Furthermore, in contrast with American and Australian proceeding, the jurisdiction is not discretionary and consequently the court should not decline to exercise its jurisdiction on the grounds of *forum non conveniens* upon the defendant domiciled in the European Union<sup>67</sup>.

### IV. DEFAMATION IN CYBERSPACE

#### A. CYBER TORTS

The new term ‘cybertorts’ has been used equivocally by writers. Some times this refers to well known torts such as trespass, assault,

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66 Colombian Civil Procedure Code art 23.

67 COLLINS, Above 39 [24.33].



battery, negligence, products liability, and intentional infliction of emotional distress that have been committed by internet users. At other times, cybertorts means new forms of civil wrongs that have appeared on the internet and are not identical with traditional torts or their elements have to be adapted or extend in order to constitute a civil action for recovering damages. It is preferable to call them cybertorts when, because of their occurrence on the internet, the elements of traditional torts have to be changed.

Certainly through the internet it is possible to cause damages to other. Both intentional and negligent torts can be committed by a user against other users. In these cases, the person has a right to presents a civil action in which he or she seeks to obtain compensation or other relief for the harm suffered.

Many of the traditional torts can be committed through the internet. Though some kinds of torts are difficult or almost impossible to take place, such as a false imprisonment or trespass on land, others have increased the facility and incidence, such as defamation. However, other traditional torts such as trespass to chattels are different in their elements when they occur on the internet. Several recent cases in the United States' courts show how trespass to chattels has become a kind of cyber tort. In May 2000, the court in *Ebay Inc. v Bidder's Edge Inc.*<sup>68</sup> held that the defendant made a prohibited trespass to chattels by means of software accessed without permission on eBay's computer systems for the intention of obtaining information<sup>69</sup>.

Other case of traditional tort that changed its structure when it occurred on the internet was found in a case *Mark Ferguson v Friend finders Inc*<sup>70</sup>, in January 2002. Ferguson, a Californian resident, claimed that the Washington defendant sent spam or unsolicited e-

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68 100 F. Supp. 2d 1058 (N.D. Cal., May 24, 2000).

69 MARTIN H Samson, <<http://www.phillipsnizer.com/int-trespass.htm>> at 8 November 2002.

70 94 Cal. App. 4th 1255, (2002).

mail advertisements in violation the statute. The court found that ‘respondents sent him and others unsolicited e-mail advertisements that did not comply with the requirement set forth in section 17538. 4 and

‘Clearly this spam according to several precedents, constitutes an impermissible trespass to chattels’<sup>71</sup>.

Even though *Kremen v Cohen*<sup>72</sup> questioned whether domain names could be subject to common law conversion, a tort typically reserved for tangible property, on the grounds that the domain name is an intangible property<sup>73</sup>. In two cases the courts have recognized trespass to chattels as a cause of action in intangible property, though physical contact with the property is an essential element of the trespass. However, the courts held that this contact may be determined by electronic signal such as telephone or computers.

Internet phenomena, such as hyperlink, spam and framing can be involved in production of damages. In first place, hyperlink is a method to connect a webpage with another website that has related information. This popular system to ‘navigate’ in the internet may involve legal issues such as copyright and trademark infringement<sup>74</sup>, unfair competition and defamation when the page links to websites that carries defamatory material<sup>75</sup>. Secondly, spam, which began to be used in the early 1990s as a means of advertising on the internet, has become popular<sup>76</sup>. Spam can be defined as

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71 *Ibid*.

72 *Kremen v Cohen*, 99 F. Supp. 2d 1168, 1173 (N.D. Ca. 2000).

73 See *Thrifty-Tel, Inc. v Bezenek*, 54 Cal. Rptr. 2d 468, 473 (Cal. App. Ct. 4th Dist. 1996); *eBay, Inc v Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1069 (N.D. Ca. 2000).

74 See *Digital Equipment Corporation v Altavista Technology, Inc.* 960 F. Supp. 456 (D. Mass. March 12, 1997).

75 Lloyd L. Rich Legal Issues: Linking <<http://www.publaw.com/linking.html>> at 8 November 2002.

76 Maureen A. O’Rourke, Legal Issues on the Internet Hyperlinking and Framing (1998) <<http://www.dlib.org/dlib/april98/04orourke.html>> at 8 November 2002.

‘unwanted or “junk” e-mail messages, usually in large quantities. Often spamming is done deliberately, but it can be accidental<sup>77</sup>,

such as when the user replies to a message to all people in an email unintentionally, but probably with negligence. In some cases, spam constitutes tortious conduct. In some states such as California, Virginia and Washington, the use of spam has been limited by legislation.

On third place, framing. This technique allows the user to link to other home pages but with the advantage that the user is still on the same webpage. Through this method (created by Netscape version 2) the content of the webpage is extracted and appears on the other webpage, in the same format. The user may be unaware that the content that appears in the webpage actually comes from another website. This kind of link could present the same legal issues as hyperlink use<sup>78</sup>.

Finally, other internet phenomena such as email, viruses, bulletin boards and group news, that are available on the internet can be instruments to produce damages across boundaries. These new ways to produce wrongs on the internet, suggest that in some cases, the structure of traditional torts in the light of the new technology should be reconsider, not only for their jurisdictional effects.

## B. CHARACTERISTICS OF DEFAMATION ON INTERNET

When defamation occurs on the internet does it constitute a cybertort? Can the traditional rules be applied? To solve these questions it is necessary to analyze the main features of defamation occurring through the internet.

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77 Glossary of Auburn University Technology Terminology  
<<http://www.auburn.edu/helpdesk/glossary/spam.html>> at 8 November 2002.

78 See above 76.

### 1. CAN A DEFAMATORY PUBLICATION ON THE INTERNET CONSTITUTE A SLANDER OR LIBEL?

In some Australian states, like others countries, still differentiate between slander and libel and the respective consequences<sup>79</sup>. The majority of cases of defamation on the internet are libel, because the publication has permanent character and consequently actionable *per se*<sup>80</sup>. However, the differentiation between libel and slander on the internet is not always clear.

In a chat session on the internet speech could constitute slander because the words can be heard by a third person. However, when a chat room only enables written communications, and defamatory material is transmitted, it is not certain whether it is slander or libel. Following the early criterion to distinguish both types of defamation, whether it is read or heard, the answer is that it was libel, but if the rationale is the permanent or temporal character, it should be concluded that this writing, due to its fleeting nature, constitutes slander. Vilification written in a chat room session is more similar to speech defamation than a letter.

‘It has been claimed that libel endures longer than slander, that more significance is attached to the written than the spoken word by the recipient, that libel conveys the impression of deliberate calculation to injure reputation while slander is usually born of sudden irritability’<sup>81</sup>.

Even though speech defamation occurs in the mass media such as radio and television, it has been classified as libel<sup>82</sup>. Additionally, the convergence of the internet with other mass media will create

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79 COLLINS, above 39, 41.

80 Except in United States, where is actionable *per se* only when the defamatory publication is defamatory on its face. COLLINS above 39 [4.03].

81 FLEMING, Above 5, 519.

82 JAMES A HENDERSON, RICHARD N PEARSON and JOHN A SICILIANO, *The Tort Process* (5th ed, 1999) 824.

more practical difficulties<sup>83</sup>. Those kinds of difficulties and contradictions reinforce the theory that the distinction of both types of defamation should disappear.

## 2. PUBLICATION ON THE INTERNET

Publication is without doubt an essential element of defamation and is becoming more problematic when such activity is done on the internet. The particular characteristics and technological procedures of publication of the internet present two main issues. First, when and where was the material published; second, does hyper-linking and framing constitute a publication. Should internet publication be different from other forms of publication?

*Some commentators believe that there seems to be no reason for treating a cyberspace publication any differently from other forms of publication<sup>84</sup>. However in fact this is currently one of the core issues before the courts.*

### A) Place and time of publication

In order to start a cause of action in defamation it is necessary that the defendant published or was legally responsible for the defamatory publication<sup>85</sup>. Where and when the publication was made constitutes

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83 ROGER S MAGNUSON, 'Freedom of speech in Australian Defamation Law: Ridicule, satire and other challenges' *Torts Law Journal* (2000) 9, 274.

84 See TIMOTHY ARNOLD-MOORE, Legal Pitfalls in Cyberspace: Defamation on Computer Networks(1994) 5(2) *Journal of Law and Information Science* 165, <http://www.mds.rmit.edu.au/law/defame.html> at 20 October 2002. He argued that should be treated equal. See also JULIE EISENBERG, *Cyberspace & Beyond: Defamation (& Free Speech) in the New Technology Environment*. *Defamation Alert, Seminar Paper n° 4* (1997) 3; Contra COLLINS, above 39 [24.52].

85 GILLOOLY, above 20, 73.

a core issue on internet defamation. The answer to that question holds many legal consequences.

Traditional notions of publication establish that publication occurs in the place and in the time when the defamatory statement was heard, seen or read by a third person other than the person defamed<sup>86</sup>. This implies that the tort was committed in each place or jurisdiction where the publication was read, seen or heard. Obviously, the publication has to fulfill other elements, such as, it is capable of being understood and to constitute a defamatory statement, which tends to injure a person's reputation and or lead to his or her social ostracism<sup>87</sup>.

However a problem remains with internet publications because a publication that is placed on the internet in principle is also available to users around the world. A publication can be downloaded and saved in a personal computer or simply read or seen. Is the place of publication where the computer server is located or it is the place where the user has seen or read the web page? This question will be analyzed in detail further<sup>88</sup>.

Cyber defamation in United States has oscillated from a broad to a narrow position. In early cases, such as *Telco Communications v An Apple A Day*<sup>89</sup>, by the mere fact that the defamatory material was placed on a site accessible in the forum the court exercised jurisdiction upon the case. The rationale behind this approach is that the place of publication is where the material was received not where it was posted or the servers were located.

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86 Defamation Act 1889 (Qld) s 5 (2); Defamation Act 1957 (Tas) s 7.

87 GILLOOLY, Above 20, 2.

88 Professor RICHARD GARNETT suggested that there are three proposals to choose applicable law in internet cases: nationality of the defamer, place of origin of the offending material, or place where the material has received. RICHARD GARNETT. Regulating Foreign-Based internet Content: A jurisdictional Perspective' *University of NSW Law Journal* (61) 1.

89 USD C. E.D.Va. 24 September 1997.

However, in *Blumenthal v Drudge*<sup>90</sup> the plaintiff, who was a resident of Columbia sued a Californian defendant in the District of Columbia for defamatory publications on the web. The court held that the Californian defendant had enough minimum contact with the forum because he had targeted the District of Columbia in his publication and his web site was accessible in the forum of Columbia. The court exercised jurisdiction upon the case notwithstanding the server and defendant had domicile in California. The often quoted judgment stated that the mere accessibility of the home page did not constitute minimum contact with the forum in order to establish personal jurisdiction. It was necessary, in addition, to prove certain conduct that shows that the defendant had the intention to contact the forum. This narrow trend was followed in the most recent cases and has general support. Applying this doctrine the Minnesota Supreme Court in *Griffis v Luban*<sup>91</sup> refused to enforce an Alabama judgment against the defendant who repeatedly posted defamatory messages on an internet newsgroup on the grounds that the Alabama Court could only have exercised jurisdiction if

“The defendant expressly aimed the tortious conduct at the forum state such that the forum state was the focal point of the tortious activity”<sup>92</sup>.

The most important point is that the court held that knowledge that the plaintiff lived in the forum did not constitutes enough contact with the forum. With reference to this the Court held:

“In sum, we conclude that the record does not demonstrate that Luban expressly aimed her allegedly tortious conduct at the Alabama forum so as to satisfy the third prong of the *Imo Industries* analysis. The mere fact that Luban knew that Griffis resided and worked in Alabama is not sufficient to extend personal jurisdiction over Luban in Alabama, because that knowledge

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90 992 F Supp 44(DDC 1998).

91 N° C3-01-296 (Minn. 2002).

92 *Ibid.*

does not demonstrate targeting of Alabama as the focal point of the allegedly defamatory statements<sup>93</sup>.

On the same grounds a Pennsylvania court in *English Sports Betting Inc. v Tostigan* refused to exercise jurisdiction upon a defendant in New York who posted defamatory articles on the web, because the

‘defendant’s tortious conduct was not specifically directed at Pennsylvania’<sup>94</sup>.

*b) Publication by Hyperlink and Framing*

There are precedents establishing that the use of hyperlinks and framing clearly has been sufficient to commit trademark infringements<sup>95</sup>. However, the question is whether the use of hyperlinks and framing in a webpage connecting it with other pages that contain defamatory statements constitute a defamatory publication. These cases will be analyzed separately below.

Links allow a web user access that particular page to other, which the creator of the first one considers of use or interest to its users. Through hyperlinks users can move within innumerable pages and not surprisingly this popular practice to link web pages has generated legal disputes. There are cases where the linking process has been made without obtaining permission from the owner of the linked page. In several occasions this behavior has been found by courts to be an infringement of the copyrights or trade marks of that page. This includes cases where the linking page uses copyright or trade mark material in the form of text or images of the linked page. This linking method has been also a source of legal conflict when the

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93 *Ibid.*

94 C.A. No. 01-2202 (E.D. Pa. 2002).

95 A case of hyperlink see *Ticketmaster Corp. v Microsoft Corp* No. 97 Civ. 3055 (C.D. Cal. filed Apr. 28, 1997); A case for framing see *Washington Post Co. v Total News, Inc.*, No. 97 Civ. 1190 (PKL) (S.D.N.Y. 1997).



page does not link into the ‘home page,’ but instead links to an internal page within the web site<sup>96</sup>.

Can the practice of linking constitute defamation? COLLINS thinks that

‘[i]t seems likely that people who link defamatory content to or frame defamatory content on their web pages would be treated as “publisher” of that material for the purposes of defamation law generally where and to the extent that publication occurs by reason of people following the link or viewing the content through the frame’<sup>97</sup>.

Notwithstanding COLLINS’ statement that usually the practice of linking could constitute defamation, there are some cases where his theory does not apply. For instance, if a search engine like yahoo.com has a link to a famous newspaper website that published an article containing a defamatory statement; does this make yahoo.com liable for the defamation caused by its hyperlink? These kinds of links should not be considered as a publication therefore yahoo.com should not be liable for the defamation. Yahoo.com would be liable if the link in its website contained a summary or explanation of the defamatory contents of the linked page. The reason is because the person who made this link knew or at least should have known that the content in the linked page was defamatory. However, COLLINS considers that usually

‘linking cases do not involve repetition or republication of material: the link is merely the route by which the internet user comes to visit the web page in the first place’<sup>98</sup>.

Even though framing tools are considered as links they should not be treated in the same way. Framing allows the user to display the entire content of the linked web page. Metaphorically, the content

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96 See above 75.

97 COLLINS, above 39 [5.30].

98 COLLINS, above 39 [5.34].

is stolen from its original page and displayed on the linking page. In these cases it is clear that the defamatory material has been reproduced by the author of the frame, making him or her liable for the defamation.

### 3. WHO IS LIABLE FOR CYBER DEFAMATION?

The publication process is complex and sometimes involves an undetermined number of people. Defamation tortfeasors include all people who with intentional or negligent acts have played a role in the publication process, although, there is a clear exception when their function was as mere distributors, such as libraries<sup>99</sup>. On the internet the chain of intermediaries is more complex<sup>100</sup>: What is the responsibility of the internet service providers (ISPs)? An ISP is defined as that who ‘supplies, or proposes to supply, an internet carriage service to the public’<sup>101</sup>.

To clarify the ISP’s responsibility, the United States, England and Australia have agreed on similar regulatory schemes, with certain differences. Generally speaking ISPs are not considered publishers and enjoy of certain immunity.

In an early case in the United States, *Cubby v Compuserve*<sup>102</sup>, in 1991, the court held that the ISP’s are mere distributors rather

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99 FLEMING Above 5, 516.

100 In Canada a study of the issues of liability on the internet showed that the following persons are potentially tortfeasor in internet: publisher, broadcaster, re-broadcaster, librarian, bookstore or newsstand, re-transmitter, space owner and common carrier. HERBERT KRONE, *Internet, Which Court Decides? ‘Applicable Law in Torts and Contracts in Cyberspace* (1998) 67.

101 *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) Part 2, s 1.

102 776 F sup 135 (SDNY 1991). See also *Zeran v America Online* (1997) 129 F3d 327; and *Blumenthal v Drudge* (US District Court, District of Columbia, Case Number, 97 CV-1968).

than publishers of the contents. However, when an ISP has control upon the contents it should be treated as a primary publisher<sup>103</sup>. Later, the *Communications Decency Act* 1996, s 230, established certain immunity for ISP's operations:

'No provider or user of an interactive computer service shall be treated as publisher or speaker of any information provided by another information content provider'.

England adopted a similar trend in 1996, when by statute ruled that a person shall not be considered the author, editor or publisher of a statement if he or she is only

'the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control'<sup>104</sup>.

In Australia the *Broadcasting Services Act* 1999 (Cth)s 91, regulated the scope of liability of the ISP's and Internet Content Hosts (ICHS). The Act established that they have no *strict liability* for civil or criminal actions for hosting or carrying content when they are not aware of its nature. Additionally they do not have to monitor or classify the contents<sup>105</sup>.

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103 JULIE EISENBERG, Safely Out of Sight: The Impact of the New Online Content Legislation on Defamation Law' (2000) 6 (1) *University of NSW Law Journal* <<http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/UNSWLJ/2000/7.html?query=%7e+defamation+internet>> at 9/6/2002.

104 *Defamation Act* (England) 1996 s 1.

105 RICHARD ALSTON, 'The Government's Regulatory Framework for Internet', *University of NSW Law Journal* (1999) 61 1.

## C. JURISDICTION AND CHOICE OF LAW IN CYBER DEFAMATION.

### 1. CHALLENGES IN SEARCHING A TEST FOR JURISDICTION

In the first place, the courts have the challenge to find a framework on whether they can exercise jurisdiction over a non resident defendant that is suspected to have posted defamatory material on the internet. Secondly which law is applicable in the case at hand? In short, the courts have to find the relevant *forum*—the jurisdictional problem— and the choice of law for cyber defamation.

The way Australian courts have dealt with these topics can be explained better by analyzing the case of *Gutnick v Dow Jones & Co Inc*<sup>106</sup> (*Gutnick*) a case which was granted special leave to appeal by the Australian High Court. By analyzing *Gutnick* it is possible to better understand the nature of the challenges courts have to face when dealing with defamation over the internet.

### 2. A DEFAMATION IN THE CYBERSPACE, GUTNICK CASE

#### a) *Facts*

The plaintiff, Joseph Gutnick is an Australian businessman, Mr Gutnick is particularly notorious in Victoria where he was born and lives with his wife and children. He has also substantial connections with the United States. Mr Gutnick enjoys a favorable reputation inside various philanthropic, sport and religious circles<sup>107</sup>.

On the other hand, the defendant, Dow Jones & Company Inc, is an American company with headquarters in New York. It is the publisher of the *Wall Street Journal* and *Barrons Magazine*. *Barrons*

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<sup>106</sup> See above 1.

<sup>107</sup> See above 1 [2].

*Magazine* is a weekly publication aimed to money investors in the United States<sup>108</sup>. The circulation of the magazine is of approximately 300.000 copies per week. Simultaneously, the magazine customarily places the same articles on its web site, which is hosted in New Jersey. The website has approximately 1700 Australian subscribers 300 of whom reside in the state of Victoria<sup>109</sup>.

The *Barrons Magazine* in its Monday 30<sup>th</sup> October 2000 edition, published an article about Mr Gutnick, with the title '*Unholy Gains*' and sub-titled

'When stock promoters cross paths with religious charities, investors had better be on guard'<sup>110</sup>.

It was written by a journalist of Dow Jones and was also placed on the magazine's online edition on the 28<sup>th</sup> October 2000. The 7000-word article which included photographs, stated that the plaintiff

'was the biggest customer of the goaled money-launderer and tax evader Nachum Goldberg and that the words relied on imputed that Gutnick was masqueraded as a reputable citizen when he was a tax evader who had laundered large amounts of money through Goldberg, and bought his silence'<sup>111</sup>.

*Barrons Magazine* affirmed that Mr. Nachum Goldberg, who was convicted for money laundering and tax evasion, said in a conversation by phone, that Mr. Gutnick was a 'big customer' of him<sup>112</sup>. Such classes of statements moved Mr Gutnick to sue the Dow Jones for defamation in Victoria.

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108 See above 1 [1].

109 See above 1 [1], [32]. In hard copy in Australia the number of Magazines was only 14.

110 See above 1 [2].

111 See above 1 [3].

112 See above 1 [12].

*b) Bases of the Suit. Question of Jurisdiction*

In the Australian High Court, the plaintiff summarized his arguments in four points: First, the place of publication of the defamatory material was Victoria, where the article was downloaded; Second, Mr Gutnick seeks to re-establish his Victorian reputation, which was attacked by the defendant. He lives in Victoria with his family and has his business and social life in Victoria. Third, He confined his complaint only in respect of his reputation in Victoria as an alleged money-launder<sup>113</sup>. And fourth, the plaintiff has not undertaken to sue in any other jurisdiction<sup>114</sup>.

On the other hand, Dow Jones sustained that the supposed defamatory material was published in New Jersey, where the servers are located, and therefore, no defamation occurred in Victoria. Additionally it argued that Victoria is a clearly inappropriate forum to decide the matter because of

*'prima facie* appearance of New York/New Jersey as the forum with which this proceeding is more substantially connected'<sup>115</sup>.

*c) Legal issues and their implications analysis*

The first issue that a court has to examine is the question of jurisdiction given that the dispute involved a United States company that through the online version of *Barrons Magazine* uploaded alleged defamatory material in the State of New Jersey, where Dow

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113 Exactly Mr Gutnick presented his complain for 'the paragraphs 31 to 36, in the middle of that article. That is the Internet article that was obtained online. It was first published in the appellant's business journal, Barrons, on Saturday, 28 October. *Dow Jones & Company, Inc v Gutnick* (High Court of Australia, Robertson 28 May 2002).

114 *Dow Jones & Company, Inc v Gutnick* (High Court of Australia, Sher, 14 December 2002).

115 See above 1 [ 105].

Jones has its computer servers. However, its headquarters are in New York whereas the plaintiff is domiciled in Victoria. The question of the place of publication arose: In New York where the journalist prepared the article? In New Jersey where it was placed on the internet? Or was it published in Victoria, Australia, where the Magazine was read or seen, at least by 300 Victorian Subscribers?<sup>116</sup> The second issue, and intimately connected with the first, is choice of law. Thirdly, the Court has to examine the issue of *forum non conveniens*<sup>117</sup>. However, before untying these problematic questions, the court has to answer the question of the place of publication. As this paper is being written the High Court of Australia faces the challenge of establishing a precedent regarding internet publication for the purposes of the tort of defamation.

### (1) Jurisdiction and choice of law issues

Even though *prima facie* the case before the Australian courts looks like as a jurisdictional problem, in reality is a case of choice of law. In the light of rules of court of the Victorian Supreme Court, it is clear that under Order 7(j) the Court has jurisdiction upon the case, Given that at least some of the alleged damages to the reputation of Mr Gutnick have occurred within Victorian territory. However the plaintiff has not based his complaint under this cause of action. He argues that the court should find that the tort was committed within the State of Victoria and thus apply the common law rule of *lex loci delicti*<sup>118</sup>. He did not bring the case before American Courts, since the principle of freedom of speech would not grant him an opportunity of success<sup>119</sup>.

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116 See above 1 [6].

117 See above 1 [8].

118 See above 51.

119 The topic was discussed during the session of the High Court Dow Jones & Company, Inc v Gutnick (High Court of Australia, Robertson 28 May 2002)

## **(2) Where was the online edition of *Barrons' Magazine* published?**

To answer this question it is necessary to go over the technological process that was involved. *Barrons' Magazine* was typed in the headquarters of Dow Jones in New York City, and then sent to New Jersey where it was copied from a local computer to a host or server of Dow Jones. This is done with the use of an FTP program<sup>120</sup>. After Dow Jones uploaded unto the server, the information became available via the internet. Through the Usenet customers of *Barrons' Magazine* accessed the relevant material. To access the material, which was stored in servers in New Jersey, customers had to use a secret personal password, and then download the content of the article into their personal computers. The file remains at least in the temporal memory of the computers and its content, text and images, was substantially identical with the printed version. Customers could also save a copy in their own hard disk. This technological method can be seen as a new system of delivery of information<sup>121</sup>.

If the concept that publication occurs whenever something is read or seen, consequently the answer would be that the alleged defamatory material was published in each place where it was downloaded or delivered through the Usenet method. The situation is similar with the case out side of the internet. If a publisher has printed defamatory material and delivered copies within the forum, publication occurs both in the place of printing and where it was distributed. Could the analysis of the technological process provide an answer to the question of publication? This approach was undertaken by the Victoria Supreme Court<sup>122</sup>. The judge held:

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120 FTP means file transfer protocol, the standard method for send upload the information into the server.

121 See above 1 [14].

122 See above 1 [14-18].



“I therefore conclude that delivery without comprehension is insufficient and has not been the law. On this basis, then, I uphold the plaintiff’s contention that *the article “Unholy Gains” was published in the State of Victoria when downloaded by Dow Jones subscribers who had met Dow Jones’ payment and performance conditions and by the use of their passwords.* It is also absolutely clear that Dow Jones intended that only those subscribers in various States of Australia who met their requirements would be able to access them, and they intended that they should”<sup>123</sup> (emphasis added).

The Court refused to change the old law that publication takes place where and when the contents of the libelous material are seen or read. Additionally the Court held that the role played by the Dow Jones’ website was definitive for a finding for Mr Gutnick. The judge found that the website required the use of a password in order to access the file<sup>124</sup>. This implies that mere accessibility is not enough for a finding that the material was published in Victoria. Certainly, the material was not accessible indiscriminately around the whole world. The material was accessible only from the places where Dow Jones’ customers reside. There was not unrestricted access to it through the World Wide Web.

Gutnick’s case delimited the meaning of internet publication for the purposes of defamation giving it a narrower scope than the mere reading or seeing via a website. The Court found that the publication occurred in Victoria because the article was downloaded by Victorian subscribers who using their private and secret passwords received or were delivered the defamatory material in the forum. The foregoing can be inferred from the following statement:

‘This is a subscription Website. The information on the New Jersey Web servers handling *Barrons OnLine* does not go on to the World Wide Web from that server’<sup>125</sup>.

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123 See above 1 [60].

124 See above 1 [66].

125 See above 1 [14].

Therefore, *'Unholy Gains'* was published in Victoria and if published in Victoria the tort was committed within the forum and thus Victorian law would apply pursuant to the *lex loci delicti* rule.

The consequences of the Victorian decision have frightened some American publishers, because they believe that this interpretation has put them in an 'unfair' position. Given that the strict application of this ruling would force them to face legal process in some 190 countries around the world with different defamation laws. This has been labelled by some the publishers as the 'Chilly effect', however; commentators believe this fear is purely theoretical<sup>126</sup>.

### (3) Victoria solution compares with usa position

The Court's decision might have been inspired by the United States position where specific jurisdiction is exercised by the Courts when the defendant's conduct targets the forum. Even though the US and the Victorian position differ in approach both may lead to similar conclusions. Gutnick's case in the light of the United States approach may generally have the same result that was found by the Victoria Court. It is possible to argue that Dow Jones had targetted Victoria because Barrons Online was distributed in Victoria to more than 300 subscribers, thus doing business within the forum.

Gutnick's case and other precedents mentioned below allow me to suggest that web pages can be classified in two classes in order to establish rules of jurisdiction upon defamation in cyberspace. Firstly, 'open' or unrestricted access web pages such as those where either any cyber user may access the contents *anonymously* from any place round the world, or those who may have to complete any relevant forms and select a nickname and password but without the control

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126 DAMIEN VAN DER TOORN and KAELENE MCLENNAN, '[Internet - Defamation - cyberspace publication before the High Court of Australia](http://www.findlaw.com.au/articles/default.asp?task=read&id=6576&site=LE)' (October 2002) *Technology & Media Law* <<http://www.findlaw.com.au/articles/default.asp?task=read&id=6576&site=LE>> at 20 October 2002.

of the owner of the webpage. Secondly, ‘close’ or restricted access web pages, where users are fully identified by the owner of the cyber place. This control may be done through a credit card or in cases when access to the cyber place is free of charge the owner requires extensive identification of the users including names, place of residence, etc.

When the web page is of restricted access or ‘close’ the intention to target the forum is clear and it may be concluded that the tort was committed within the forum, with its legal consequences (jurisdiction and choice of law). On other hand, when the web page is ‘open’ the courts should follow the American approach that requires clear targeting within the forum.

### **(a) Australia high court position**

The High Court of Australia in the well known *Gutnick* case, defined that publication over the WWW occurs when and where the publication is downloaded:

“In the case of material on the World Wide Web, it is *not available in comprehensible form until downloaded* on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed”<sup>127</sup>.

In other words, even though the documents were uploaded on the internet and were available, they are not considered published until the user has downloaded the content on the computer and it is in comprehensible form. As a consequence of this, the tort of defamation is committed

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127 *Dow Jones & Company Inc v Gutnick* [2002] HCA 56 [44 ].

‘each time and at each place where defamatory material is downloaded in comprehensible form, provided that the defamed person has a reputation in that place which is thereby damaged’<sup>128</sup>.

Finally, the Court rejected uploading as a criterion for establishing publication on the internet, because this would create a gate whereby the publisher could avoid liability for defamation by means of the simple location of the servers in a law free zone. The Court stated:

“Publishers could easily locate the uploading of harmful data in a chosen place in an attempt to insulate themselves from defamation liability. They might choose places with defamation laws favorable to publishing interests. Just as books are now frequently printed in developing countries, the place of uploading of materials onto the internet might bear little or no relationship to the place where the communication was composed, edited or had its major impact”<sup>129</sup>.

The issue at stake in *Gutnick* concerned the nature of the internet. Whether or not internet publications should be treated different in order to establish the place where the tort was committed when defamatory material was posted on the web.

The majority of the Court held that the nature of cyber publication was not worthy of special treatment under Australian law for establishing the *place* of publication. However, it could be argued that for *other* purposes it should be treated differently. The Court stated that the architecture of the internet does not differ substantially from radio and television in terms of capacity of wide dissemination of information and no new rule for a unique technology should be created<sup>130</sup>. The Court affirmed:

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128 COLLINS, *Defamation and the Internet after Dow Jones & Company Inc v Gutnick* <http://www.matcollins.com.au/Defamation%20and%20the%20Internet%20after%20Dow%20Jones%20&%20Company%20Inc%20v%20Gutnick.pdf> at 17 April 29, 2003.

129 Dow Jones & Company Inc v Gutnick [2002] HCA 56 [130].

130 *Ibid* [38].

‘But the problem of widely disseminated communications is much older than the internet and the World Wide Web’<sup>131</sup>.

Then, the Court concluded that:

“It must be recognized, however, that satellite broadcasting now permits very wide dissemination of radio and television and it may, therefore, be doubted that it is right to say that the World Wide Web has a uniquely broad reach. It is no more or less ubiquitous than some television services”<sup>132</sup>.

Additionally, Justice Callinan, who was of the same view, declared:

‘the internet, which is no more than a means of communication by a set of interconnected computers, was described, not very convincingly, as a communications system entirely different from pre-existing technology’<sup>133</sup>.

Does the judgment of the High Court mean that the nature of cyber publication for defamation law purposes should not be treated differently from traditional publications?

Generally speaking the answer is in the affirmative for establishing the place of publication. However, analysis of the judgment shows that the answer should be circumscribed to locating the place where the tort was committed and its legal effects. With respect to the nature of internet publications for other aspects of defamation law the jury is still out.

Thus, Justice Kirby who was in agreement with the rest of the Court, did not completely reject the argument that the nature of the internet is dissimilar to the traditional mass media.

“The dismissal of the appeal does not represent a wholly satisfactory outcome. Intuition suggests that the *remarkable features of the internet* (which is still changing and expanding) *makes it more than simply another*

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131 *Ibid.*

132 *Ibid* [39].

133 *Ibid* [180].

*medium of human communication*. It is indeed a revolutionary leap in the distribution of information, including about the reputation of individuals. It is a medium that overwhelmingly benefits humanity, advancing as it does the human right of access to information and to free expression. But the human right to protection by law for the reputation and honour of individuals must also be defended to the extent that the law provides<sup>134</sup>.

He was of the opinion that the rules of the common law should be technological neutral and that it was undesirable to express them in terms of a particular technology<sup>135</sup>. This new technological phenomenon could be regulated by updating the common law by analogy to the traditional rules<sup>136</sup>.

The High Court foreshadowed that a new defence could be developed where a publisher's conduct has occurred wholly outside the jurisdiction. In COLLINS' words

“Consideration of those issues may suggest that some development of the common law defences in defamation is necessary or appropriate to recognise that the publisher may have acted reasonably before publishing the material of which complaint is made”<sup>137</sup>.

Although, the High Court's arguments are strong, it is necessary to draw attention to the fact that some times the downloading process does not imply *ipso facto* that the content of the material has been read, seen or listened to by the user. It is possible to access a web page, find the title of the document, without knowledge of its content, and save it in the computer. In this case in spite of the fact that the document has been downloaded, its contents have not been published or communicated in a comprehensible form. Sometimes files are in specially compressed formats<sup>138</sup>, which require

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134 *Ibid* [164].

135 *Ibid* [125].

136 *Ibid* [119].

137 *Ibid* [51].

138 Compression a technique for reducing the size of files, commonly used to speed transmission and download times. The most common formats are ZIP (the commonest form on PCs), ARC and TAR. Geer above 67, 60.

conversion before acquiring comprehensible form. Also, a whole web site may be downloaded automatically without knowledge of its specific content. At least in these cases the *moment* of publication is not the moment of downloading. Arguably, the process of downloading may not be contemporaneous with the process whereby content acquires comprehensible form, as held by the High Court in *Gutnick*<sup>139</sup>.

## V. CONCLUSIONS

It is suggested that the traditional approach to the tort of defamation cannot be applied strictly in the context of cyberspace, this is independent from any discussion on the nature of the internet. The nature of publication on the internet obliges us to re-define the concept of publication in its application to the tort of defamation. This new definition of internet publication has particular importance in establishing whether a tort was committed within a particular forum, with its legal implications.

Once defamatory material is placed on the internet, where does the defamation occur? After analysing precedents from the United States, United Kingdom, European Union and Australia, I would suggest that the traditional approach is appropriate but needs a qualification or re-interpretation in its application to cyber defamation. In these cases publication should be defined as cyberpublication for the effects of defamation; it should fall within the following parameters:

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139 “In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.” *Dow Jones & Company Inc v Gutnick* [2002] HCA 56 [44].

In respect of ‘close web pages’ the place of publication of the material is any place where the subscribers download the material. The owner of the website knows, or at least can foreseeably know that the material will be published—delivered—in each place where their customers are resident. The owner of a web page has targeted a particular forum when he or she has accepted users from that particular forum.

Additionally when the plaintiff seeks only damages that have occurred within the forum and expressly refrains from bringing an action for theoretical damages suffered in other multiple places, the courts should not decline to exercise jurisdiction on the grounds of the doctrine of *forum non conveniens*.

In the case of ‘open web pages’ publication should be understood in the same way it is applied in the United States; that is, when the defendant has a clear intention to target the forum through the web page or for other means.

Defamation in internet should be classified as a cybertort and not simply as defamation through the internet. The first reason is because the concept of publication needs to be adapted or re-defined when the material is placed on internet. Secondly, because publication is an essential element of tort of defamation and by redefining it, a substantial element of the tort is being changed. A defamatory publication in cyberspace that has no special target within the forum does not constitute defamation, as there is no ‘cyberpublication’, in spite of the fact that within the forum several users might have accessed and read or seen the defamatory statement.

Courts have been facing a multitude of challenges that have been brought about by internet advances, advances which will undoubtedly continue. This has caused academics and the judiciary alike to explore different approaches before establishing definitive solutions to the problems that the cyberspace era has brought.



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