Tolofson and Flames in Cyberspace: The Changing Landscape of Multistate Defmation

Craig Martin
I. INTRODUCTION

Canada has been involved in only two notable multistate defamation cases,\(^1\) despite being a federal state and sharing one of the longest borders in the world with another federal state. This is likely to change. Increasing numbers of Canadians are joining the 30 million people or more world-wide who are “on-line” users of the Internet.\(^2\) The Internet, along with commercial computer network services such as CompuServe, Prodigy, and American Online (AOL), radically increases the ability of people to become acquainted with and to carry on extended communication with other people beyond national borders. Moreover the computer is a medium of communication which increases immediacy while lowering inhibitions and reducing cues for interpretation, and therefore tends to facilitate acrimonious exchanges.\(^3\) Such outbursts, called “flames” in cyberbabble, are a regular event in “news groups” and “CB-chat” areas of the Internet and they usually develop into “flame wars” when instigators are “flamed” in return. As one writer puts it, “to

\(^{\dagger}\) Craig Martin, B.A. (Hons. History, R.M.C.), LL.M. (Osaka), LL.B (Toronto). I would like to thank Professor Rob Howse of the University of Toronto, for whose Conflict of Laws course I initially wrote this paper, for his encouraging me to submit it for publication, and for his comments and advice toward improving it.

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2 “The Economist Survey of the Internet” The Economist (1 July 1993). It estimated the number of users at 20 million then, and projected it to be at least half as big again within one year. The Internet has doubled in size every year since 1988. Indirect, only one of the larger Toronto Internet access servers, has over 8,000 subscribers. On the other hand, Statistics Canada recently reported that only 8,44,000 of Canada’s households, or 7.4% of all households, use the Internet from their home: A. Mitchell, “Few succumbing to Internet’s allure” The Globe & Mail (24 October 1996) At.

say that libel and slander are rampant on the Internet would be an understatement.  

4 But increasingly, Internet users are turning to more terrestrial and “real space” dispute resolution mechanisms such as litigation to fight the flames. There have already been several cases in the common law world arising from on-line libel. As one commentator quipped, “the golden age of cyberspace is drawing to a close, but the golden age for lawyers is just dawning.”  

5 As such, it is an area that should not escape the attention of the legal community.

Multistate defamation actions are cases in which the elements that constitute the tort of defamation—the creation of libellous or scandalous material, the publication of this material, and the resulting injury to the reputation of the plaintiff—arise or occur in more than one state or jurisdiction. Hence such cases raise issues about the conflict of laws. The initial question is whether the jurisdiction of the court in which the plaintiff has brought the action is the appropriate one to hear the case. If the court determines that it is the appropriate jurisdiction, the question arises as to which jurisdiction’s substantive law the court should apply in the case: its own, that of the defendant’s jurisdiction, or that of some other jurisdiction also connected to the case. This is the question of choice of law. Given the very different approaches to defamation even among different common law jurisdictions, the choice of law may be of crucial importance to the outcome of the litigation. Finally, issues may arise as to how a judgment of a court in one jurisdiction is to be enforced in another jurisdiction.

The two Canadian multistate defamation cases that have been reported involved jurisdictional issues. Because there are no Canadian cases on the choice of law in multistate defamation, it is unclear whether the Canadian courts would simply apply the general choice of law rule for tort. In a paper published in 1990, Professor J.-G. Castel, the renowned conflict of laws scholar, addressed the subject of multistate defamation and proposed a choice of law rule distinct from the normal tort rule. Since that time, however, the Supreme Court of Canada has

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6 See J.-G. Castel, “Multistate Defamation: Should the Place of Publication Rule be Abandoned for Jurisdiction and Choice of Law Purposes?” (1990) 28 Osgoode Hall L.J. 153. While my paper does not address enforcement issues, the U.S. case Bachchan v. India Abroad Trading Publications Inc., WL 89124 (N.Y. Sup. 1992), suggests the importance of the issue with respect to multistate defamation. In this case the U.S. court refused to enforce British defamation judgments which were against “public policy” in that they infringed the U.S. First Amendment.

7 Supra note 1.

8 Castel, supra note 6.
handed down its judgment in *Tolofson v. Jensen* which dramatically altered the choice of law rule for torts in Canadian conflicts law. Thus there is a need to revisit the analysis and conclusions of Professor Castel in light of the *Tolofson* decision, and to determine what impact that decision is likely to have on the Canadian courts’ approach to multistate defamation.

There is also a need to explore whether the increasing role and significance of the Internet requires the legal profession to apply new or unique principles and rules to the legal problems that will arise from its use. In other words, is cyberspace any different from the other forms of space that people interact in, or can the courts simply apply existing rules by analogy to conflicts that arise in cyberspace? There is considerable hyperbole about the novelty of cyberspace. One can get either carried away by it, or jaded by it to the point that real differences may be overlooked. In the context of multistate defamation, the legal community must look at the extent to which there are aspects of defamation in cyberspace that may, in fact, be unique and problematic for the existing conflict of laws rules.

Initially this paper identifies the values and interests that Canadians seek to protect and try to further through the law of defamation itself. The position taken on this question will inform the rest of the analysis. The paper then provides some of the background on multistate defamation and the conflicts rules relating to jurisdiction and choice of law that have been developed in Canada. Against this backdrop, the analysis turns to examine the decision in *Tolofson* to determine whether this judgment is likely to affect choice of law in multistate defamation cases. Finding that application of the general rule in *Tolofson* in such cases will be problematic, this paper examines what room is left by *Tolofson* for a narrowly defined exception relating to choice of law for multistate defamation cases and it articulates what such an exception might be. Finally, this paper looks at the nature of cyberspace and the extent to which it presents unique challenges to the application of conflict of laws rules to multistate defamation cases arising on-line. In essence, this paper explores whether there is a single choice of law rule that would be consistent with the parameters set by *Tolofson*, but would also meet the needs of multistate defamation in general and on-line libel in particular.

II. THE TORT OF DEFAMATION

Defamation is a complex area of tort law often criticized for its archaic notions and all the intricacies of the law cannot be discussed in this

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article.\textsuperscript{10} However, it may be useful to briefly review the elements of the tort. Fridman states: “The essence of defamation is that the defendant has said or done something which attacks the character and reputation of the plaintiff in such a way as would tend to lead reasonable people to think less of the plaintiff, to reduce his standing in society at large.”\textsuperscript{11}

Defamation can be verbal, written, electronic, a gesture or innuendo, or it can be in any form that “must of itself contain... a statement of fact or expression of opinion which would lower the plaintiff in the estimation of a reasonable recipient of the statement. . . .”\textsuperscript{12} The form is important in terms of the distinction between libel and slander. While no definitive description of the distinction between the two has been established,\textsuperscript{13} in broad terms libel involves the publication of statements in a more permanent form, such as the written word. Slander, on the other hand, refers to more transient modes of communication, such as verbal statements. The distinction is important in that there is an assumption that damage has been suffered by the plaintiff in the case of libel, whereas the plaintiff must prove actual injury in the case of slander. Defamatory television and radio broadcasts, as well as e-mail and computer transmissions, have been interpreted as being libellous.

For the statement or opinion to be defamatory it must identify and refer to the plaintiff and it must be published to a third party. Publication to, or by, the plaintiff is not sufficient ground for a claim in defamation. There are a number of defences to defamation, the most obvious being justification or truth of the statement. Falsity of the statement is crucial to establishing any liability and as Fridman puts it, “Whatever is true cannot be defamatory, however much it injures the plaintiff’s reputation.”\textsuperscript{14} Other defences include fair comment (where the statement was an expression of opinion on some matter of public interest, not fact) and privilege (where a particular public interest is served by making the statement, and the public interest outweighs the right of the plaintiff to protect his or her reputation).\textsuperscript{15}

\textsuperscript{10} For example Brown cites V. V. Veeder as writing: “It is, as a whole, absurd in theory, and very often mischievous in its practical operation.” See V. V. Veeder, “The History and Theory of the Law of Libel” (1905) 3 Colum. L.R. 546 at 546 cited in R. E. Brown, The Law of Libel in Canada, 2d ed. (Toronto: Carswell, 1996) at 1-3.

\textsuperscript{11} G. H. L. Fridman, The Law of Torts in Canada, vol. 2 (Toronto: Carswell, 1999) at 141. For the most detailed analysis of the law of defamation in Canada, see Brown, ibid.

\textsuperscript{12} Fridman, ibid. at 143.

\textsuperscript{13} Ibid. at 154.

\textsuperscript{14} Ibid. at 141. Fridman notes, though, that true but injurious statements may give rise to other forms of liability such as criminal charges of defamation.

\textsuperscript{15} Ibid. at 161, 167.
The more important question, however, is what are the values that the regime of defamation law seeks to protect and the interests it attempts to further? How this question is answered will inform the analysis of how to resolve the issues relating to choice of law within the framework of conflict of laws. The answer must also guide the inquiry into how such values may or may not be uniquely implicated by relations on the Internet.

The principal value defamation law seeks to protect is the reputation of the individual. The importance of this value was recently emphasized by the Supreme Court of Canada which viewed it as being implicit in the values that underlie the Canadian Charter of Rights and Freedoms.\textsuperscript{16} Cory J., writing for the Court in \textit{Hill v. Church of Scientology of Toronto},\textsuperscript{17} stated:

Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws.\textsuperscript{18}

Later in the judgment he went on to say:

Further, reputation is intimately related to the right to privacy which has been accorded constitutional protection. As La Forest J. wrote in \textit{R v. Dyment}, [1988] 2 S.C.R. 417, at p. 427, privacy, is “[g]rounded in man's physical and moral autonomy” and “is essential for the well-being of the individual.” . . . The protection of a person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression.\textsuperscript{19}

It is nonetheless important to note that there are those who think that Canadian courts in particular have been overly protective of this value of reputation at a cost to the freedom of expression. The American courts, for instance, place a higher priority on the protection of freedom of expression, not just in accordance with the First Amendment, but also as a result of the development of common law principles in the United States.\textsuperscript{20} Brown, in criticizing the Canadian position, suggests that reputation can in fact be seen as a flawed value to begin with, in that it is

\textsuperscript{17} [1995] 2 S.C.R. 1150 [hereinafter \textit{Church of Scientology}].
\textsuperscript{18} \textit{Ibid.} at 1174.
\textsuperscript{19} \textit{Ibid.} at 1179.
\textsuperscript{20} Brown, supra note 10 at 1-6, 1-7. The U.S. Supreme Court decision that has established this balance in common law terms is \textit{New York Times Co. v. Sullivan}, 376 U.S. 254 (1964). Cory J., in \textit{Church of Scientology} reviewed academic and judicial criticism of this case, \textit{Church of Scientology, supra} note 17 at 1180 \textit{et seq}. 
only a snapshot of the plaintiff’s character.21 Yet even Brown notes that defamation and freedom of expression are not necessarily incompatible, in that unbridled defamation can destroy the credibility of speakers and so undermine the public debate that freedom of expression is supposed to encourage.22

It is also interesting to note that in international law the reputation of the individual and the right to have this reputation protected have been enshrined in a number of human rights instruments. Canada is a state party of the *International Covenant on Civil and Political Rights*, which is a binding international agreement that provides that:

1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.23

It would seem, therefore, that the value the law of defamation seeks to protect is primarily the private value of the individual’s reputation. In Canada, the courts extend this protection rather far. That it might be in the interest of a free and democratic society to limit defamation in order to encourage open and credible debate, and facilitate the search for truth,24 would appear to be only secondary considerations. This being the case, the tension between the competing theories of tort law more generally would seem to have less significance when it comes to the tort of defamation because the controlling interests and values are private. In line with traditional corrective justice perspectives of tort law, the principles of defamation law seek to impose “on a person whose morally culpable behaviour . . . has violated the equal individual autonomy of another an obligation to restore the latter as nearly as possible to his or her pre-interaction status.”25

Compared to other areas of tort law, such as negligence as it relates to automobile accidents, where more efficient spreading of risk and effec-

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21 Brown, *ibid.* at 1-9. He quotes from Shakespeare’s *Othello*: “Reputation is an idle and most false imposition, oft got without merit and lost without deserving” (Oth. 2.3 247).

22 Brown, *ibid.* at 1-7.


24 It will be recalled that these are two of the three values or core purposes underlying freedom of expression that were articulated by the Supreme Court of Canada in *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927.

tive compensation of victims are considerations, the concerns advanced by communitarian or distributive justice theorists are not really implicated in defamation law. On the other hand, other approaches such as deterrence theory or economic analysis of law are concerned with tort law as a deterrent and they favour the creation of incentives to shape future behaviour. Such perspectives might have something to say about the effectiveness of defamation law as it stands now and might be able to suggest improvements. However, the law as it stands already has some deterrent value, and this deterrence is really only of greater importance to the secondary "public" value-compensation. With respect to compensation, the deterrence approach does not appear to be at cross purposes with the objectives of corrective justice. Linden, for instance, writes:

A defamation action, though certainly cumbersome and expensive, may offer the best blend of deterrence and compensation, without unduly inhibiting free speech... Just like other areas of tort law, it just happens to serve our society and therefore is worthy of preservation until something better can be found.26

The extent to which we accept that the purpose of defamation law is to primarily protect private values, and only secondarily to protect public interests, becomes important in the context of the question of choice of law.

III. MULTISTATE DEFAMATION: THE REAL SPACE, PRE-TOLOFSON WORLD

A. JURISDICTION

The first issue that is likely to arise in a court in which an action for defamation is filed against someone from another province or state, is whether the court can take jurisdiction. The Ontario Rules of Civil Procedure provide that:

A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,
(g) in respect of a tort committed in Ontario;
(h) in respect of damage sustained in Ontario arising from a tort or breach of contract, wherever committed;27

Underlying this rule is the idea that once a party is properly served, the court's jurisdiction over the party and the action have been estab-

27 Ontario, Rules of Civil Procedure, r. 17.02 [hereinafter "Rules of Civil Procedure"].
lished. The party so served may bring a motion to have service set aside or stay the proceeding on the basis that the service ex juris does not meet the conditions of the Rules of Civil Procedure. Failing that, the party may also bring an application to have service set aside under the principle of forum non conveniens, on the basis that the jurisdiction is not the convenient or appropriate one for the action to be heard.  

This raises questions then of whether defamation originating in some other province or state can be held either to, first, constitute a tort committed in Ontario or, secondly, be the source of damage sustained in Ontario arising from a tort committed elsewhere. The leading case on this issue is Jenner v. Sun Oil, a 1952 Ontario decision involving an action brought by an Ontario resident against defendants in New York State for defamatory material broadcast by radio in New York but picked up in Ontario. It is significant that the Rules of Civil Procedure at the time only stipulated that service ex juris was allowed wherever “the action is founded on a tort committed in Ontario.” The defendants argued that the action was not wholly committed in Ontario. McRuer C.J.H.C. began with the comment, one most pertinent to our analysis of cyberspace, that it was a case “where it is necessary for Judges and lawyers to realize that statements in judgments written before modern methods of communication were developed or even thought of must be read in the light of the known circumstances under which they were written.”  

He then focused on what he took to be the material point: “Was there publication in Ontario of the alleged defamatory material, or at least is there such evidence of publication as to warrant the exercise of discretion in favour of the plaintiff?”  

Citing Bata v. Bata,  

McRuer C.J.H.C. held publication to be the very essence of actionability in

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28 Again all this is covered in more detail, and more eloquently, in Castel, supra note 6 at 154–61. Somewhat oddly, however, he seems to merge forum non conveniens and non-compliance with the rules as grounds for a motion to set aside: ibid. at 155. It is my understanding that these should be kept distinct, and may impact on the onus of proof. For if the defendant is successful in showing that the service is not in compliance with the rules, service would be set aside and the plaintiff would be required to apply for leave of the court to serve the defendant, and the onus is on the plaintiff to demonstrate why service ex juris should be allowed. In forum non conveniens, under the collapsed rules laid out by Sopinka J. in Anchem Products Inc. v. British Columbia (Workers Compensation Board) (1993), 102 D.L.R. (4th) 96 (S.C.C.), there will be a simultaneous analysis in which the defendant must show why it is inconvenient to proceed in that forum. See J. Swan, “Choice of Forum and Choice of Law: The Implications of the New Criteria for Judicial Control” (1996) 18 Adv. Q. 1 at 5, fn. 16 for a discussion of the more precise translation of conveniens being “appropriate” rather than “convenient.”

29 Supra note 1.

30 Ibid. at 530.

31 Ibid.

32 Ibid. at 536.

defamation.\textsuperscript{34} He then went on with what is the often-cited ratio of the case:

I think it a “startling proposition” to say that one may, while standing south of the border or cruising in an aeroplane south of the border, through the medium of modern sound amplification, utter defamatory matter which is heard in a Province in Canada north of the border, and not be said to have published a slander in the Province in which it is heard and understood. I cannot see what difference it makes whether the person is made to understand by means of the written word, sound-waves or ether-waves in so far as the matter of proof of publication is concerned. The tort consists in making a third person understand actionable defamatory matter.\textsuperscript{35}

In addressing the question of forum non conveniens, the second issue raised by the defendants, McRuer C.J.H.C. indicated that a crucial factor to be considered was whether the plaintiff was a resident of the jurisdiction or carried on business there, or more specifically, had a reputation that he sought to clear in that locality. For this he relied on the English case of Kroch v. Rosell et Compagnie Societe des Personnes a Responsibilite Ltee,\textsuperscript{36} a case brought by a non-English plaintiff against defendants for defamation in magazines that had large circulations in France and Belgium, but with a circulation of only a handful in England. While finding that England was not a convenient forum, since there was no evidence that the plaintiff enjoyed any reputation there at all, the Court nonetheless said that “[t]he mere fact by itself of a very small circulation, even in a foreign tongue, would not necessarily preclude him from saying that among the people of that nation who read that paper in this country, he would suffer grievously in reputation.”\textsuperscript{37}

\textsuperscript{34} Jenner v. Sun Oil, supra note 1 at 536.

\textsuperscript{35} Ibid. at 537.

\textsuperscript{36} [1937] 1 All E.R. 725 (C.A.).

\textsuperscript{37} Ibid. cited in Jenner v. Sun Oil, supra note 1 at 538. See also Packard v. Andriopoulos, cited and criticized in C. Douzinas et al., “It’s all Greek to Me: Libel Law and the Freedom of the Press” (1987) 137 New L.J. 609, in which the English court took jurisdiction and the plaintiff was awarded £450,000 for defamation found in a Greek language newspaper with only 50 copies “published” in England. See however, Packard’s response to Douzinas in M. Packard, “Freedom of the Press” New L.J. (21 August 1987) available in Lexis, Ukjnl library, Nj file, in which he argues that the damage award was justified by the seriousness of the libel, despite the minimal circulation of the magazine. In “Jury Awards $350,000 Damages to Elton John” The Times (5 November 1993) available in Lexis, World library, Txtnle file, this case was cited as being the sixth highest damage award for libel in British history. Also, in Keeton v. Hustler Magazine, 104 S. Ct. 1473 (1984), a New Hampshire court, the only jurisdiction in which the limitation period had not run out, held the forum to be convenient despite the fact that the plaintiff was not a resident, and that sales of the magazine in that market were only one percent of the magazine’s total sales. But contrast this with Pillai v. Sarkar, [1994] T.L.R. 411(Q.B.) in which the court not only set aside service on a defendant for libel contained in an Indian magazine with a circulation of only 15 subscribers in England on the basis that India was clearly a more
The essential feature then is the extent to which the plaintiff can show damage to reputation in a community within the jurisdiction. This will become important to the later analysis of both choice of law rules and libel in cyberspace itself.

The Rules of Court of British Columbia, while narrower, were nonetheless revised in 1977 to allow for service _ex juris_ for torts committed within British Columbia:

Service of an originating process or other document on a person outside British Columbia may be effected without order if the proceeding is founded on a tort committed in British Columbia.\(^{38}\)

In _Chinese Cultural Centre of Vancouver v. Hole_\(^{39}\) the Supreme Court of British Columbia followed _Jenner v. Sun Oil_ in applying the new rule. The case involved an action for defamation against the Ontario-based _Toronto Sun_, which was distributed regularly in Vancouver, regarding a story that appeared in the _Toronto Sun_ and had been republished by a local Chinese newspaper in Vancouver as well. The defendants brought an application to have service set aside. The court, however, citing _Jenner v. Sun Oil_ for the proposition that publication within the jurisdiction constituted a tort within the jurisdiction, held that the publication of the story in British Columbia, or republication as a natural and probable consequence thereof, was sufficient for the purposes of satisfying the condition for service _ex juris_ in the British Columbia Rules of Court.\(^{40}\)

The Ontario courts revisited the issue some thirty years after _Jenner v. Sun Oil_ in the case of _Pindling_.\(^{41}\) In this case, the plaintiff was the former Prime Minister of the Bahamas, who brought an action against the NBC television network for a broadcast which alleged that he was linked to drug money. Pindling had brought an action in the Bahamas, but NBC had not defended the action and enforcement of the Bahamian judgment in the United States was likely to be difficult. Pindling brought an action in Ontario and served NBC _ex juris_ under Rule 25 (now Rule 17.02)\(^{42}\) on the basis that several affiliates of NBC had broadcast the programme such that it could be received in Ontario, and Canadian

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\(^{38}\) British Columbia, Rules of Court, r. 13(3)(h).

\(^{39}\) (1978), 7 B.C.L.R. 81 (S.C.).

\(^{40}\) _Ibid._ at 84.

\(^{41}\) _Supra_ note 1.

\(^{42}\) _Supra_ note 27.
cable networks had also broadcast the episode. NBC in turn applied to set aside service and to obtain a declaration of *forum non conveniens* for much the same reasons as the defendants had in *Jenner v. Sun Oil*.

By this time, the Ontario Rules of Civil Procedure had been revised to include Rule 25(t)(i) in addition the narrower Rule 25(t)(g). Rule 25(t)(i)(h) was virtually identical to the new Rule 17.02 (h) cited above, which says: “[I]n respect of damage sustained in Ontario arising from a tort or breach of contract, wherever committed.” Nonetheless, the Court held that “in my view the plaintiff’s claim is proper under Rule 25(t)(g) for the reasons enunciated by Mr. G. H.C. in *Jenner.*” In other words, for the purposes of jurisdiction, the “publication” of the defamatory material in Ontario was comprised of receipt of the television signal and was sufficient to constitute a tort committed in Ontario.

With respect to the issue of *forum non conveniens*, the Court upheld the plaintiff’s right to commence an action in Ontario. The Court asserted that the continuance of the trial in Ontario had not been shown to be oppressive, vexatious or abusive. Further, the defendants had been unable to meet the burden of showing that a stay would not deprive the plaintiff of a legitimate personal or juridical advantage available to him in Ontario, the advantage being that in bringing the action in Ontario it would not be necessary to establish “actual malice.” Under the *forum non conveniens* analysis in *Spilada Maritime Corp. v. Canulex Ltd.*, adopted by the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia (Worker’s Compensation Board)*, the onus would be on the plaintiff to show that an injustice would result if the case were moved to another forum. Thus that aspect of the *Pindling* decision is clearly no longer good law. Nevertheless, this case has two important points for the purposes of our argument: first, the Court was ready to take jurisdiction where a plaintiff was not a resident and had little, if any, connection with the jurisdiction; and second, the American First Amendment jurisprudence relating to defamation law was sufficient to ground an argument for significant juridical disadvantage.

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44 *Pindling, supra* note 1 at 396.


46 Defamation law in the United States is heavily influenced by the First Amendment and so leans significantly toward freedom of expression over the right to privacy. *New York Times Co. v. Sullivan, supra* note 20 established that a public official must prove “actual malice” on the part of the defendant; that is, a public official must prove that the defendant published the material knowing it was false or with reckless disregard as to whether it was true or not.


48 *Supra* note 28.
Castel concludes that for the purposes of service ex juris, the tort is indeed committed where the defamatory matter is published. However, he goes on to question whether the test of publication should be the only relevant one. He looks to the case of Moran v. Pyle National (Canada) Ltd., which involved a man who was killed in Saskatchewan by a light fixture manufactured by an Ontario company in Ontario. For the purposes of determining jurisdiction the court considered where the tort had been committed. Dickson J. (as he then was) focused on where the harm had occurred and settled on a “real and substantial connection” test. After reviewing the various theories, he wrote:

Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the Distillers’ case and again in the Cordova case a real and substantial connection test was hinted at. Cheshire, 8th ed. 1970, p. 281, has suggested a test very similar to this; the author says that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant’s activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties.

Castel notes that in Petersen v. A. B. Bahco Ventilation, the Supreme Court of British Columbia relied on Moran to apply a “real and substantial connection” test for determining the situs of the tort of fraudulent misrepresentation (again, for the purposes of jurisdiction, not for the choice of law). He argues that “[i]f this test were adopted in the case of defamation for the purposes of jurisdiction, the place of tort would be the state or province most substantially affected by the defendant’s alleged publication of defamatory matter or its consequences.” Indeed, Castel argues strongly that there is a need for flexibility in determining jurisdiction, suggesting that rather than artificially defining the place of the tort, jurisdiction could be taken either where the defendant acted, or where the plaintiff suffered injury to his or her reputation. That is, as opposed to the narrower analysis necessary for choice of law, for the purposes of jurisdiction “a tort may be recognized as having been committed in several different places.”

49 Castel, supra note 6 at 158 [emphasis in original].
50 (1973), 43 D.L.R. (3d) 239 (S.C.C.) [hereinafter Moran].
51 Ibid. at 250.
53 Castel, supra note 6 at 159.
54 Ibid. at 160-61.
is consistent with the Supreme Court of Canada’s recent position on jurisdiction more generally in *Amchem Products Inc. v. British Columbia (Worker’s Compensation Board)*. We now turn to the more central question of choice of law rules.

**B. CHOICE OF LAW**

Until *Tolofson*, choice of law in tort was governed in Canada by the traditional common law rule in *Phillips v. Eyre* as modified in *Machado v. Fontes*. The assertion in *Phillips v. Eyre* which had come to be the test was:

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . Secondly, the act must not have been justifiable by the law of the place where it was done.

Both branches of the test were interpreted, both here and in England, as relating to choice of substantive law rather than to jurisdiction. Thus a plaintiff would have to show that the tort was actionable under the *lex fori* and that it was not justifiable under the law of the jurisdiction in which the tort occurred, the *lex loci*. In *Machado*, an action was brought in England for defamatory material published in Brazil, and it was held that non-justifiable meant not legally innocent. Specifically, even without a civil cause of action, if the act complained of attracted any potential statutory or criminal liability, this was sufficient to satisfy the second condition of the test. This interpretation was criticized for not taking sufficient account of the law of the place where the tort occurred, and for not providing enough flexibility. Canada essentially followed the *Machado* interpretation of the *Phillips v. Eyre* test in the case of

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55 Supra note 28.
56 (1870), L.R. 6 Q.B. 1.
58 Supra note 56 at 28-29.
60 *Machado*, supra note 57 at 235.
61 Castel, *Canadian Conflict*, supra note 59 at 54.
McLean v. Pettigrew.\textsuperscript{62} McLean remained the leading case in Canada until Toloson.\textsuperscript{63}

The second branch of the Phillips v. Eyre test, as applied to multistate defamation, raised the question of where the tort had occurred for it required that “the act must not have been justifiable by the law of the place where it was done.”\textsuperscript{64} This question generated considerable analysis of where exactly the tort of defamation can actually be said to have occurred, and the discussion went beyond that required for the mere purposes of the second branch of the Phillips v. Eyre test to address broader questions of what would be the ideal choice of law rule in defamation cases. A brief review of these may be useful before turning to Toloson, because they inform the later discussion of the need for an exception.

Castel posed the question of whether Canadian courts should adopt the place of publication as the place of the tort of defamation for choice of law purposes, as they had done for jurisdiction.\textsuperscript{65} Dickson J. in Moran had commented that “[t]he rules for determining situs for jurisdictional purposes need not be those which are used to identify the legal system under which the rights and liabilities of the parties fall to be determined,”\textsuperscript{66} and in fact argued that the failure to distinguish between the separate elements of jurisdiction and choice of law had compounded the confused state of the law determining the situs of a tort.\textsuperscript{67} Castel echoes these comments, emphasizing that while the convenience of the parties should be an element of the analysis for jurisdictional purposes, such considerations should not be an element of the analysis for choice of law.\textsuperscript{68} For choice of law, in Castel’s view, “one must determine

\textsuperscript{62} [1945] S.C.R. 62 [hereinafter McLean]. Machado was overruled by the House of Lords, however, in Boys v. Chaplin, [1971] A.C. 356 (H.L.), creating an interpretation of Phillips v. Eyre that required that the act also be civilly actionable under the lex loci delicti, rather than it simply being “not justifiable,” and stipulated that the rule was to be applied flexibly. The Supreme Court of Canada never adopted the “double actionability” test of Boys v. Chaplin.

\textsuperscript{63} Given the departure from British law, and categorical rejection of the Boys v. Chaplain approach in Toloson, I will not enter into the lengthy analysis of Boys v. Chaplain engaged in by Castel. Furthermore, Boys v. Chaplin has since been overruled in Britain itself by the International Private Law (Miscellaneous Provisions) Act (U.K.), 1995, c. 42. The provisions relating to choice of law, in sections 9-12, came into effect 1 May 1996, and under section 10 it explicitly displaced the common law rule established in Boys v. Chaplin. Section 11 of the Act establishes the general rule that the lex loci delicti is to be the prima facie law to be applied in cases involving personal injury or death resulting from personal injury. Section 13 explicitly excludes defamation claims from the operation of Part III of the Act, that part relating to Choice of Law in Tort.

\textsuperscript{64} Phillips v. Eyre, supra note 56 at 29.

\textsuperscript{65} Castel, supra note 6 at 163.

\textsuperscript{66} Moran, supra note 50 at 242.

\textsuperscript{67} \textit{Ibid}.

\textsuperscript{68} Castel, supra note 6 at 163.
which is the most characteristic or substantial element of the tort of defamation.”

However, after reviewing the authorities on tort, he concludes that publication is in fact the essence of the tort of defamation, rather than the conduct giving rise to the defamation, and by doing so he effectively eliminates the place of acting as the place of the tort. Conversely, Joost Blom argued that “[i]t would only be consistent with the idea [in the second branch of \textit{Phillips v. Eyre}] to regard the \textit{locus delicti} for the purpose of the rule as the place of acting rather than the place of injury.” Yet even \textit{Machado}, which was a defamation case, regarded the act of publication in Brazil as the “wrong” for the purposes of the second branch of the \textit{Phillips v. Eyre} test. Peter Handford’s examination in “Defamation and the Conflict of Laws in Australia” comes to the same conclusion. He looks at the leading case in each of the four major common law countries excluding the United States, and finds that they all affirm that the tort was determined to be where publication occurred.

Nonetheless Castel picks up on Dickson J.’s reasoning in \textit{Moran} and suggests that under the test elaborated in that case, “the place of the tort of defamation would be in the state most substantially affected by the defamer’s activity or the consequences of that activity. The place of publication would no longer be the dominant element.” This perspective is supported by Handford, who writes that “in principle, there is certainly something to be said for the view that defamation should be regarded as being committed where the injury to reputation occurs, if that is different from the place of publication.” Of course, one of the problems that Handford is responding to is that of multiple publication. The nature of defamation is that there is an independent cause of action for every separate publication and so in \textit{Gorton v. Australian Broadcasting Commission} for example, the defamatory broadcast that was received in three separate jurisdictions gave rise to three distinct causes of

\begin{itemize}
\item \textit{Ibid.}
\item Peter Handford, “Defamation and the Conflict of Laws in Australia” (1983) 32 Int’l & Comp. L.Q. 452.
\item Castel, \textit{supra} note 6 at 166.
\item Handford, \textit{supra} note 71 at 467-68.
\item \textit{Supra} note 72.
\end{itemize}
action. In the United States many states have statutorily adopted single publication rules but such is not the case in Canada.

Castel goes further however. He suggests that for choice of law purposes, Canadian courts should apply the proper law of tort defined “as the system of law with which each issue involved in the alleged tort has the most substantial connection.” He comes to this conclusion after an analysis of sections 6, 145, 149, and 150 of the American Restatement (Second) of the Law of the Conflict of Laws (1971). This approach was considered by the New South Wales Court of Appeal in Australia, in Australian Broadcasting Corporation v. Waterhouse, in formulating a general principle that the jurisdiction of the plaintiff’s residence should dictate the choice of law. It also informed the House of Lords’ exception in Boys v. Chaplin. However, this general principle was considered and expressly rejected in Tolefson. Hence there is little value in laying out the test in detail here, but it is worth briefly noting the conclusions Castel draws from it. He argues that the application of the proper law of tort would solve the problems posed by aggregate communications that are published in numerous jurisdictions as explained above, since only one law would be relevant; probably, though not necessarily, the law of the jurisdiction where the plaintiff has suffered the greatest injury to his or her reputation. Injury in other jurisdictions would only go to the quantum of damages. Castel states:

In order to determine which law has the most significant relationship with the occurrence and the parties with respect to a particular issue, the court would examine the law of the following places: where the defendant did the major act of communication (i.e., assembling the material, printing, distribution, broadcasting); the location of the head office; the principal place of business; the residence, domicile and citizenship of the parties; where the alleged defamatory matter was published; and where the greatest injury and damages were caused to the reputation of the plaintiff. The court would also

76 Handford, supra note 71 at 465. See also Australian Broadcasting Corporation v. Waterhouse (1991), 25 N.S.W.L.R. 519 at 536 (C.A.). Also, more generally see Brown, supra note 10 at 73 et seq. States in the United States that follow the First Restatement rule of lex loci delicti are split between those that allow the plaintiff to choose only the most favourable forum, and those that divide the damages among jurisdictions, applying the law of each jurisdiction within which there was publication to the respective division of harm suffered there. See K. Richards, “Defamation Via Modern Communication: Can Countries Preserve Their Traditional Policies?” (1990) 3 Transnat'l Law 613 [hereinafter cited to Westlaw pages]; and see Hartmann v. Time Inc., 166 F.2d 127 (3rd Cir. 1948) as an example.

77 Castel, supra note 6 at 168.

78 Supra note 76 at 539.

79 Supra note 62.

80 Castel, supra note 6 at 175.
ask whether the policies of these places and of the forum would also be of relevance.\textsuperscript{81}

Alternatively, Castel argues that in more simple terms the place where the plaintiff suffered the most harm, along the lines suggested in Moran, should determine not only jurisdiction but also the choice of law. Since Tolofson categorically rejected the proper law of the tort approach, it is in terms of this more modest proposal that the question of whether, or to what extent, Tolofson would allow room for such a rule should be examined. An understanding of these issues is also essential for any inquiry into the particular challenges posed by the Internet and on-line defamation. We turn next to Tolofson and an analysis of the present state of Canada’s choice of law rule for torts.

IV. THE IMPACT OF TOLOFSON

Tolofson was a response to an increasing disarray in the area of choice of law, arising from dissatisfaction with the perceived injustice inherent in the rule in McLean. Some courts chose to follow the rule while others increasingly favoured either the \textit{lex loci delicti} or the \textit{lex fori}, using torturous distinguishing arguments to do so.\textsuperscript{82} Tolofson was in fact a joint judgment dealing with two automobile accident cases, which both raised the issue of what law should be applied when determining the liability of defendant drivers resident and insured in one province, in actions arising from accidents in that province but brought by plaintiffs resident and insured in another province.

It should be noted, before moving to the choice of law issue which formed the substance of the case, that the case also addressed the issue of jurisdiction. The principle that runs through the entire judgment is that of territorial jurisdiction, but La Forest J. affirmed nonetheless that courts are able to exercise jurisdiction over matters that may have originated in other states, and "[c]onsequently, individuals need not in enforcing a legal right be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience."\textsuperscript{83} He went on to note, however, that this right is limited by the principles articulated in Moran and affirmed in both Morguard Investments Ltd. v. De Savoye\textsuperscript{84} and Hunt v. T & N plc.,\textsuperscript{85} that a court may only exercise

\begin{itemize}
  \item \textsuperscript{81} \textit{Ibid.} at 173.
  \item \textsuperscript{82} Castel, \textit{Canadian Conflict}, supra note 59 at 59.
  \item \textsuperscript{83} Tolofson, supra note 9 at 304.
  \item \textsuperscript{84} (1990), 76 D.L.R. (4th) 256 (S.C.C.).
  \item \textsuperscript{85} (1993), 169 D.L.R. (4th) 16 (S.C.C.).
\end{itemize}
jurisdiction where it “has a ‘real and substantial connection’ [a term not yet fully defined] with the subject matter of the litigation.”86

It has been argued that unlike most other recent judgments and statutory provisions on the choice of law in tort in the common law world, La Forest J. sought to base his new rule on a solid theoretical foundation.87 La Forest J. held first, that the rule should respond to the underlying reality in which it operates; and second, that the rule should then be formulated only after identifying the general principle that should apply in responding to that reality. The reality he identified was the territorial limits of law under the international legal order, and the principle of comity.88

Turning to choice of law, La Forest J. began by questioning the accepted interpretation of the Phillips v. Eyre test, arguing that the first arm of the test is “strictly related to jurisdiction as is evident from its context.”89 The context referred to was the paragraph preceding the now-famous passage of the case, in which Willes J. discussed the jurisdictional limitations on bringing an action in English courts. Willes J. had commented previously that “the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law.”90 From this La Forest J. argued that it is only the second arm of the rule that deals with the choice of law, which “it is apparent from [Willes J.’s] earlier remarks was the place of the wrong, the lex loci delicti.”91

From this starting point, La Forest J. articulated the new rule for choice of law for tort in Canada:

From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the lex loci delicti.92

He went on to argue that such a rule is also best for the practical reasons that it has:

86 Telofson, supra note 9 at 304.
88 Telofson, supra note 9 at 303. Kincaid abstracts and refines the point as it is used here, Kincaid, ibid. at 544.
89 Telofson, ibid. at 298.
90 Cited in ibid. at 298 [emphasis added].
91 Ibid.
92 Ibid. at 305.
the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly.  

He added that such expectations are normally shared by those in other states, outside the place where a given activity occurs. Indeed:

If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. . . . Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.

If the full extent of the decision was this hard and fast *lex loci delicti* rule, which La Forest J. went on to hold should be applied without exception within Canada, the question of *where* the tort of defamation occurs would become even more crucial. Not only would Castel’s formulation of applying the proper law of tort no longer be tenable, but even his alternative of applying the law of where the greatest injury occurs would be inconsistent with La Forest J.’s rule. Moreover, with the rule’s rationale emphasizing that the law of where an *activity* is conducted should apply to its consequences, it would be natural to argue that the activity giving rise to the defamation would determine the place of the tort. Thus even the long standing rule that the place of publication constitutes the place of the tort might come under scrutiny. However the judgment in *Tolofson* is more complex.

Immediately following his pronouncement of the new rule, La Forest J. left an opening for precisely the kind of situation that multistate defamation presents:

it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, *i.e.*, the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise

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93 Ibid. A thoughtful review of the Australian High Court’s rejection of the *Phillip v. Eyre* test in *Breamington v. Godlemen* (1988), 169 C.L.R. 41 (H.C.) is provided in the judgment in *Australian Broadcasting Corporation v. Waterhouse*, supra note 76 at 525 et seq. The majority of the High Court in *Breamington v. Godlemen* also favoured the *lex loci delicti*.

94 *Tolofson*, supra note 9 at 305-06.
where the wrong directly arises out of some transnational or interprovincial activity. There, territorial considerations may become muted; they may conflict and other considerations may play a determining role. But that is not this case.\textsuperscript{95}

Multistate defamation is precisely a case where the act occurs in one place and the consequences are felt elsewhere thereby raising the thorny issue of where the tort actually occurred. The above \textit{obiter dicta}, to the effect that in such cases the "consequences would be held to constitute the wrong,"\textsuperscript{96} could allow for a rule stipulating that either the publication or the actual injury to reputation is the basis for determining the choice of law in defamation cases. Furthermore, earlier in the judgment, in considering \textit{Machado}, La Forest J. commented, "I add parenthetically that it could well be argued . . . that, unlike a motor vehicle accident, \textit{the tort of libel should be held to take place where its effects are felt.}\textsuperscript{97} Several questions arise from this statement. What is to serve as the guide for how the courts would approach such a problem? Is there nothing else in the case to inform the analysis and provide the basis for some predictability?

The first question, I think, is whether the rule, and the hard line taken by La Forest J. on exceptions to it, must be read in light of the above \textit{obiter dicta}. That is, while the judgment creates the new rule and stipulates that it should generally be applied without exception domestically\textsuperscript{98} and only in carefully defined circumstances internationally,\textsuperscript{99} should the rule be restricted to cases where the activity itself constitutes the wrong and where the activity and the consequent injury occur in the same place? In other words, should cases where either the injury or the consequence of the activity constitutes the wrong, and arise in a different jurisdiction than the activity itself, be subject to a different rule? Or, should La Forest J.'s \textit{obiter dicta} regarding such cases simply help to define \textit{what} constitutes the wrong and \textit{where} the wrong occurs so that once those elements have been determined, they form the basis of the \textit{lex loci delicti} rule to be applied without exception? The distinction may be an important one when considering defamation in cyberspace, where it may be difficult to determine the \textit{locus} of the tort. Also, if the \textit{obiter dicta} only acts to define the \textit{locus} of the tort and once done the \textit{lex loci} applies, strictly speaking it is important to keep distinct the principles of \textit{lex loci actus} and \textit{lex loci delicti commissi}. The latter focuses on where injury

\textsuperscript{95} \textit{Ibid.} at 305 [emphasis added].
\textsuperscript{96} \textit{Ibid.}
\textsuperscript{97} \textit{Ibid.} at 299 [emphasis added].
\textsuperscript{98} \textit{Ibid.} at 314.
\textsuperscript{99} \textit{Ibid.} at 306.
resulted and not where the activity giving rise to it occurred. In the usual cases which La Forest J. considers, the two will coincide, yet he speaks of "where the activity occurred." I would argue that the obiter dicta, at least as it relates to defamation, should be interpreted as allowing for a different rule for cases where the activity and consequent harm arise in different jurisdictions.

Castel, in the Supplement to his Canadian Conflict of Laws which was published after Tolofson was handed down, still favours a rule that would define the jurisdiction where the reputation of the victim has been most injured as the place of the tort of defamation. He nonetheless suggests that "Tolofson v. Jensen and Lucas v. Gagnon would seem to lead to the place of publication." I am not so sure. La Forest J.'s judgment was influenced primarily by the principle of comity and the exclusive territorial jurisdiction of states, coupled with the importance of accommodating the movement of people, wealth, and skills across state lines in the development of a modern global civilization. These larger principles inform the practical considerations of simplicity, predictability, and certainty of rules. They also help explain how La Forest J.'s obiter dicta on cross border situations should be applied in defamation cases.

Let us suppose that the Tolofson rule does apply to defamation cases once the knotty problem of what constitutes the wrong is solved by the principles underlying Tolofson. Consider a case of defamation in which the activity giving rise to the defamation (such as writing material and uploading it onto the Internet) occurs in state X, and publication (communication to a third party) occurs in state Y where the plaintiff resides. The place of the wrong is held to be either the place of publication or where the injury is suffered. Then clearly the law of state Y would apply under the Tolofson rule. But consider the case, increasingly likely in cyberspace cases, where the activity arises in state X, the plaintiff resides in state Y, and publication takes place in state Z (or 145 countries) in which the plaintiff has working and personal ties. Does the combination of the Tolofson rule and La Forest J.'s obiter dicta mean that the place of publication should constitute the place of the wrong and so the law of state Z (or every state where the Internet news group is accessible) is then applied by the courts in state Y to a defendant from state X?

La Forest J. commented that "[i]t seems to me self-evident, for example, that state A has no business in defining the legal rights and

100 J. Swan & V. Black, Materials on Conflict of Laws, vol. 1 (Faculty of Law, University of Toronto Law School, 1996) at 104 [unpublished].

101 Tolofson, supra note 9 at 305.

102 Castel, Canadian Conflict, supra note 59 at 73.
liabilities of citizens of state B in respect of acts in their own country, or for that matter the actions in state B of citizens of state C, and it would lead to unjust results if it did." 103 But he also said, "There may be room for exceptions but they would need to be very carefully defined." 104 Such an exception might restrict the choice of law in multistate defamation cases to the law of the jurisdiction where the plaintiff suffered the most injury. While Bata v. Bata, Jenner v. Sun Oil and other authorities may suggest that the essence of the tort of defamation is publication, really the essence of defamation is the harm done to one’s reputation. Publication is a necessary element for the damage to occur, but the damage is the harm to reputation. As Viscount Simonds said in The Wagon Mound No. 2, “There can be no liability until the damage has been done. It is not the act but the consequences on which tortious liability is founded. Just as . . . there is no such thing as negligence in the air, so there is no such thing as liability in the air.” 105

Such a restricted exception would strike a balance between the need to apply the law of a foreign jurisdiction to the citizen or resident of one state in conflict with the reality of exclusive territorial jurisdiction in certain circumstances, and the need, in general terms, to restrict such extraterritorial application of law in the interest of comity and respect for territorial jurisdiction. Furthermore, this approach would be consistent with the need for states to promote the values of mobility and interdependence in an increasingly integrated global economy by opening “their national forums for the resolution of specific legal disputes arising in other legal jurisdictions.” 106 What is more, this would be consistent with La Forest J.’s emphasis on both certainty and the normal expectations of parties. Someone who issues a libellous statement may well expect to be subject to the law of wherever the potential plaintiff enjoys his or her principal reputation. Reputation is in a sense the very target aimed at by the defendant and it would be reasonable to expect him or her to foresee any repercussion arising from that quarter. On the other hand, to apply the laws of all states where publication occurs and where some marginal effect on reputation can be shown, would be beyond the reasonable expectations of most parties.

Kincaid has argued that La Forest J. is incorrect in his selection of comity as the principle that should inform the formulation of the choice

103 Tolson, supra note 9 at 306.
104 Ibid.
106 Tolson, supra note 9 at 303.
of law rule. Kincaid notes that comity is an expression of a forum’s self-interest and he questions the extent to which a state has an interest in having its law of tort applied by another forum to a tort occurring in a foreign state.\(^{107}\) He goes on to argue that if one accepts that tort law is more about the private interests and rights of the parties than it is about the public interests of the forum or connected foreign jurisdiction, then comity should not be the value informing the choice of law rule.\(^{108}\) Kincaid states:

If choice of law rules are a matter of forum policy, rather than imposed law, then tort choice of law rules are part of the tort adjudication rules. It follows [from the view that tort law is essentially for the adjudication of private interests and rights] that private interests should be paramount in formulating choice of law rules, as in formulating tort rules themselves.\(^{109}\)

I have already argued above in Part II, that particularly with defamation law the private value of the individual’s reputation is at stake, and that notions of corrective justice would better inform the formulation of the rule. The individual’s reputation is at the heart of defamation and it should inform the court’s creation of a choice of law exception for defamation cases. Such an exception could stipulate that in multistate defamation cases, the law of the jurisdiction where the plaintiff’s reputation has suffered the greatest harm (as determined by the plaintiff) should be the substantive law applied in the case.

I would conclude, therefore, that the obiter dicta in Tolofson should not be understood to simply address the problem of what constitutes a wrong and where it is committed, to which the Tolofson rule of the lex loci delicti should then be applied without exception. Rather, the obiter dicta leaves an opening for the creation of a narrowly defined exception, essentially the articulation of a distinct choice of law rule, which applies to such situations as multistate defamation. In the case of multistate defamation, this exception could be defined in terms of a rule for applying the law of the jurisdiction where the plaintiff’s reputation suffered the most injury, as Castel suggested as an alternative to the proper law of tort prior to Tolofson. The question that remains to be addressed is whether such an exception would adequately address the problem of the increased probability of multistate defamation and other potentially unique challenges posed by the Internet.

\(^{107}\) Kincaid, supra note 87 at 543.

\(^{108}\) Ibid. at 544-45.

\(^{109}\) Ibid. at 544.
V. DEFAMATION IN CYBERSPACE

There is a great deal being written on the legal issues surrounding society’s increasing forays into and exploitation of cyberspace. Much of that relating to defamation and conflict of laws tends to have an air about it of the exploration of new frontiers or the entering into a brave new world in which none of the normal rules apply. One writer urges that “to bring order and predictability to computer bulletin board defamation... judges [must] create a federal common law to govern the tort,”110 on the grounds that “traditional conflict theories do not provide an adequate framework for federal courts to adjudicate interstate computer bulletin board libel cases.”111 Another writes that “[t]raditional notions of jurisdiction are outdated in a world divided not into nations, states, and provinces but networks, domains, and hosts,”112 and then goes on to make proposals for a new regime to cover cyberspace legal issues based on maritime and admiralty law.113 Yet even another states:

[As] interaction occurs in cyberspace without regard to physical location... The virtual nature of the Internet creates real problems for courts in deciding which court can exercise jurisdiction and which state or nation’s laws should apply to a particular transaction across the Internet. Traditional notions of jurisdiction are based on physical presence or activities directed towards a physical location. ...114

A closer reading of such writings, however, leaves one with the impression that there has been a failure to really analyze why defamation in cyberspace should be so different, and precisely how and why traditional theories or approaches are inadequate to deal with it. Caught up with the ease with which at a click on a “hypertext” command on a Web page, an individual can leap jurisdictional boundaries without even knowing whence they came and to where they are going, commentators are perhaps failing to keep the essence of defamation in perspective. As a recent article dryly noted:

the key is to focus on the actors, actions, and legally significant relationships. Saying that an event has taken place on the Internet does not advance the

111 Ibid. at 1077.
113 Ibid. at 103-04.
114 Muth, supra note 4 at 13.
analysis at all. Rather, someone somewhere will have directed information to be transmitted or will have made that information available for retrieval.\footnote{115}

What I propose to do is to explore defamation on the Internet in the context of the conflict of laws rules examined thus far, analyze how those rules could or should be applied to cyberspace defamation, and identify situations that might in fact make those rules inadequate or make their application problematic.

A natural starting point is the case law dealing with on-line defamation. As mentioned in the introduction, there have already been several cases arising in various jurisdictions. However, few of them are on point for conflict of laws purposes and others were settled out of court. As a consequence, they are of no precedential value. Perhaps the two most famous cases did not even really deal with the Internet at all, but rather dealt with commercial on-line services. These two cases are more important for questions as to the extent to which such services are to be held accountable for defamation occurring on their networks. In \textit{Cubby Inc. v. CompuServe Inc.}\footnote{116} a libel action was brought against CompuServe for defamatory material that had appeared in an on-line newsletter called “Rumourville.” “Rumourville” was an electronic newsletter carried in one of CompuServe’s forums called the “Journalism Forum” (each forum operating like a separate computer bulletin board and at times real time conference areas), and it was alleged to have impugned a competing on-line publication called “Scuttlebutt.” The “Journalism Forum” was managed and operated by a subcontractor, and so CompuServe had no control over the content. The Court held, on a motion by CompuServe to dismiss for lack of any cause of action, that CompuServe was a distributor rather than a publisher, and that there was no evidence that it did or had reason to know of the defamatory material. The Court, while noting that “CompuServe and companies like it are at the forefront of the information industry revolution,”\footnote{117} simply analogized the service that CompuServe offered to “[i]n essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications.”\footnote{118} As such, the rule from \textit{Smith v. California.}\footnote{119} that booksellers and distributors could only be held liable if it could be

\footnote{115} “Policing the Internet” \textit{The Lawyer} (28 November 1995) 15 available in Lexis, News library, Lawyer file.


\footnote{117} \textit{Ibid.} at 140.

\footnote{118} \textit{Ibid.}

\footnote{119} 361 U.S. 147 (1959), cited in \textit{ibid.} at 139.
shown that they had knowledge or should reasonably have had knowledge of content, applied. The Court in *CompuServe* added:

A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.\(^{120}\)

The situation leading to *Stratton Oakmont Inc. v. Prodigy Services Company*\(^{121}\) was very similar. A hacker, using a dormant mail account of a former Prodigy employee, posted defamatory material about the plaintiff firm in the “Money Talk” forum of Prodigy (Prodigy being a commercial on-line service similar to CompuServe and American Online). Again, as in the *CompuServe* case, the plaintiff brought the action against the service provider rather than the originator of the material. With the amount of the claim being for 200 million dollars, it is not difficult to see why. Once again, the Court framed the issue as a question of whether Prodigy could be considered a publisher for the purpose of the libel claim as distinct from a distributor.

Surprisingly, the Court distinguished the case from *CompuServe* on the facts. It held that Prodigy was a publisher, given that it had advertised itself as a family-oriented service which exercised editorial control over the services it provided, had promulgated “content guidelines” on-line, and in fact employed both screening software and human systems-operators (sysops) to enforce the guidelines.\(^{122}\) The Court therefore analogized Prodigy to a newspaper and decided that *Miami Herald Publishing Co. v. Tornillo*,\(^{123}\) which held that newspapers were more than passive receptacles or conduits for news, comment and advertising, should apply.\(^{124}\) The Court went on to say:

Let it be clear that this Court is in full agreement with *Cubby* and *Auvil*.\(^{125}\) Computer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates. It is Prodigy’s own policies,

\(^{120}\) *CompuServe*, supra note 116 at 140.


\(^{122}\) *Ibid.* at *3.


\(^{124}\) *Prodigy*, supra note 121 at *3.

\(^{125}\) *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928 (E.D. Wa 1992). This was a case brought against affiliates of CBS for defamation on the basis that the lag time between receipt and retransmission of network programs, and the technological capability to screen the material, created a duty to exercise editorial control. The Court rejected the argument, finding that it was both unrealistic and would create a chilling effect on the media.
technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher.\textsuperscript{126}

These two decisions are important in that they have been interpreted as having the combined effect of encouraging service providers to abandon any and all attempts to exercise editorial control over their networks, thus potentially leading to more on-line defamation.\textsuperscript{127} They have been cited as informing the new United Kingdom's Defamation Bill, introduced in the House of Lords on 8 February 1996, which addresses the standard of care commercial on-line service providers will be held to for libellous material on their networks.\textsuperscript{128} These cases do not involve conflict of laws issues. Nonetheless they remain important for the purposes of this discussion for the insight they give into the way in which courts are likely to analogize traditional defamation principles to issues of on-line libel (and indeed the fact that on-line defamation is generally accepted as being libel and not slander is at least partially attributable to CompuServe).

There have been a number of cases in which the plaintiff has gone directly after the individual responsible for the libel, even when it has been published via a commercial on-line service. In Medphone Corp. v. Denigris,\textsuperscript{129} the plaintiff corporation brought an action against an individual, Peter Denigris, for defamatory remarks published in Prodigy's "Money Talk" forum, which allegedly caused not only damage to product reputation but also a decline in the firm's stock prices. The case settled with Denigris agreeing not to make any further false statements about Medphone by any medium or form of communication.\textsuperscript{130} Suarez

\textsuperscript{126} Prodigy, supra note 121 at *5.

\textsuperscript{127} See for example Muth, supra note 4 at 13; see also the by-line of John B. Kennedy, Nat'I L.J. (10 July 1995) B7, also available in Lexis, Genfed library, Ndaw file. Note however, that this interpretation has been affected by the Exon amendment in the United States which would, if found to be constitutional, require the on-line service providers to monitor information posted by users. Thus, as A. M. Froomkin, assistant professor at University of Miami put it, "They would have to monitor in order to satisfy the Exon censorship requirements, and by doing so they would incur tremendous potential liability [due to the Prodigy decision]," quoted in A. P. Lewis, "Judge Allows Libel Lawsuit Against Prodigy to Proceed" The New York Times (26 May 1999) D4.

\textsuperscript{128} "Libel bill gains second reading" New Media Age (28 February 1996) s available in Lexis, World library, Alwld file. See also M. Lynch, "Service Providers Fearful of Libel Action Avalanche" Reuters Textline Computing (1 February 1996) available in Lexis, World library, Ttxtln file, in which it was reported that the Lord Chancellor was being lobbied by a consortium of high-profile on-line providers including Microsoft, CompuServe and Europe Online to clarify their position and ensure that the standards would not be onerous.


Corp. Industries v. Meeks\textsuperscript{131} was one of the earliest of these cases and it generated considerable comment. Meeks, an editor of an on-line newsletter posted on a California BBS called WELL which was also accessible via the Internet, alleged in the newsletter that Suarez Industries was a "scam" electronic postal service. Suarez sued for in libel. Meeks' lawyer argued that defamation in cyberspace should be treated differently from that in other media, since the plaintiff is in a position to answer the allegations freely. Nonetheless Meeks also settled, agreeing to pay 64 dollars in court costs and to fax any further stories of the plaintiff to him for advance vetting.\textsuperscript{132}

The Australian case of Rindo\textit{s v. Hardwick}\textsuperscript{133} actually made it to judgment and was more significant in monetary terms as well. Anthropologist David Rindo\textit{s} brought an action in the West Australian Supreme Court against a fellow anthropologist for libellous material posted on an Internet Usenet news group with a subscription of some 23,000 users. The action was undefended and therefore is of little precedential value, but Ipp J. found that the message carried imputations of pedophilia, and he awarded Rindo\textit{s} 40,000 dollars.\textsuperscript{134} Unfortunately the case was also unreported, but it appears that there was a conflict of laws element to the case and Timothy Arnold-Moore indicates that Ipp J. applied the \textit{lex fori}, though the reasons for doing so are not given.\textsuperscript{135}

\textit{Godfrey v. Hallam-Baker}\textsuperscript{136} is another case that would have involved conflict of laws principles and would have had significant precedential value. In this case, nuclear physicist Dr. L. Godfrey brought an action in the High Court of London for remarks made on a Usenet news group by another physicist, Dr. Hallam-Baker. Research turns up conflicting reports as to whether Dr. Hallam-Baker was a researcher in Switzerland or a lecturer in America, but either way it would appear that the case

\textsuperscript{131} No. 267513 (Ct. C.P. Cuyahoga Co. 1994).

\textsuperscript{132} See McCarthy, \textit{supra} note 130 at 549; and Resnick, \textit{supra} note 5.


\textsuperscript{134} Thompson, \textit{ibid.}

\textsuperscript{135} Arnold-Moore, \textit{supra} note 133.

\textsuperscript{136} Discussed in C. Dyer, "Scientist Wins Out of Court Damages for Internet Libel\textit{ The Guardian} (5 June 1995) at 5, also \textit{available in} Lexis, World library, Textnews file [hereinafter \textit{Godfrey}].
would have had conflicts issues to resolve. However the case settled, ostensibly for a considerable sum, a month before going to trial.

It is perhaps appropriate to end this review of the case law with another American case that actually made it to trial. In *It's In The Cards, Inc. v. Fuschetto*, the defendant had posted allegedly defamatory material about the plaintiff firm on SportsNet, a BBS for sports memorabilia aficionados. The plaintiff sued in libel and the defendant sought to dismiss the action on the basis that the BBS communications constituted a "periodical," which according to statute required the plaintiff to demand a retraction prior to filing suit. The lower court granted the motion and the plaintiff appealed. What is interesting for the purposes of our analysis, and in contrast to the *CompuServe* and *Prodigy* cases, is that the Wisconsin Court of Appeal refused to draw the same analogy as the Court below. In reversing the judgment below, the Court said:

The magnitude of computer networks and consequent communications possibilities were non-existent at the time this statute was enacted. Applying the present libel laws to cyberspace or computer networks entails rewriting statutes that were written to manage physical, printed objects, not computer networks or services. Consequently, it is for the legislature to address the increasingly common phenomenon of libel and defamation on the information superhighway.

VI. CONFLICT OF LAWS & DEFAMATION IN CYBERSPACE

It is not easy to try to distill meaningful inferences from these cases for the purposes of this analysis or to get a sense from them as to how courts would likely approach choice of law or even jurisdiction issues. Nonetheless I think some useful observations are possible. As already noted, for instance, courts appear ready to treat elements of on-line defamation cases as analogous (at least to some degree) to more traditional modes of communication. However, not too much should be concluded from this. In the *CompuServe* and *Prodigy* cases the analogies were easy to make. The networks in those cases were finite systems with identifiable paying subscribers and were managed by corporate entities. Thus they were intuitively a small step from such standard forms of communication as newspapers or cable TV networks. The Internet itself would be less amenable to such analogizing.

137 Compare Dyer, *ibid.* (describing Hallam-Baker as an American lecturer) with Scott-Bayfield, * supra* note 133, and M. Rich, "Electronic War of Words Heads From Computer to Court" *Financial Times* (13 August 1994) 24 (both claiming that Hallam-Baker was a researcher at Cern, the European nuclear physics lab in Geneva).

138 193 Wis. 2d 429 (Wis. C.A. 1993) (hereinafter *It's In The Cards*).

In general terms the challenges posed by defamation in cyberspace can perhaps be divided into those that are of a practical kind and those that present real conceptual difficulties. I will begin by looking at the practical problems and their ramifications. The differences between the commercial network services and the Internet itself (served by access providers) and the decisions as to the degree of liability such commercial services should bear are important for practical reasons. On the one hand, if commercial services are to bear some responsibility, and both the Prodigy case and the new United Kingdom’s Defamation Bill suggest they may, then they will likely be deep pocket targets when defamation arises from or through their network.

On the other hand, the vast number of users on the Internet access it through sources other than such commercial networks. Moreover CompuServe suggests that courts may very well adopt a hands-off approach to commercial networks. The ramifications of those two facts, that no entity controls what is on the Internet itself, and that even commercial servers may be deemed to be simply distributors, is that everyone communicating on-line is a publisher. This is the significant practical difference between on-line defamation and that in printed matter, and one of the real challenges posed by cyberspace. It is not that the essence of the defamation is different, but that the potential for such defamation arising and the breadth of its reach is vastly increased. For while a person may write defamatory material in a letter to the editor in the New York Times, which is distributed throughout the world thereby creating potential conflict of laws problems, it must first be published by the paper. Once a letter is accepted, the paper also accepts some of the liability. Therefore there are checks on a person’s libellous impulses and liability is apportioned with more liability going to those who can pay (which admittedly may be an incentive to litigate, but which also reinforces the diligence of such publishers in vetting material). As becomes evident from the cases, in cyberspace a person is just a modem call away from publishing his or her whims to the world. As in the case of Dr. Rindos, an impulse can lead to invective being circulated to 23,000 people all around the world in seconds, causing instant harm and invoking liability that the writer may never have imagined.

How, in such a case, can conflict of laws rules be applied? If the plaintiff were, for example, an Ontario resident bringing an action in Ontario courts for libel published on a Usenet news group against a defendant residing outside of Ontario, how would the court respond under Rule 17.02? An initial and interesting question would be how can “publication” on the Usenet be proven? Once a communication is on a
news group it is accessible in over 145 countries around the world, but it
does not mean that anyone in Ontario has actually seen it. “Publication”
requires communication of the defamatory material to a third party by
someone other than the plaintiff. Would the plaintiff be required to
submit affidavit evidence demonstrating that someone in Ontario actu-
ally read the message in order to establish that publication occurred in
Ontario? The facts in Jenner v. Sun Oil suggest so, for in that case the
plaintiff did lead affidavit evidence of the radio broadcast having been
heard in Ontario.\textsuperscript{140} It is clear that the courts in Rindos and in the
Godfrey case took jurisdiction, though the basis for doing so is not clear.
It is possible that under the “real and substantial connection” test for
jurisdiction which was reaffirmed in Tolofson,\textsuperscript{141} the plaintiff’s residence
being in Ontario alone might be found sufficient for the court to take
jurisdiction.

What law would be applied? Suppose that a plaintiff has a lot of
friends and connections spread around the world, all avid Internet
surfers, and who all introduce affidavit evidence that they indeed saw the
invidious on-line attack on the plaintiff’s character. Is the court to apply
the law of each of those jurisdictions? American courts, which apply the
rule of the First Restatement,\textsuperscript{142} essentially a \textit{lex loci delicti} rule, are
divided between those that apply only one law (that of the \textit{lex fori} as the
forum where the \textit{lex fori} and the \textit{lex loci delicti} converge), and those that
actually apply the law of each and every state where the wrong has
arisen.\textsuperscript{143} If Tolofson is not read to include the exception proposed
earlier, but is taken at face value in its \textit{obiter dicta} that “the tort of libel
should be held to take place where its effects are felt,”\textsuperscript{144} then Canadian
courts would be faced with this inelegant and rather indeterminate
prospect.\textsuperscript{145}

This, in my view, reinforces the argument that La Forest J.’s \textit{obiter
dicta} should not be interpreted as only going to the determination of

\textsuperscript{140} Jenner v. Sun Oil, supra note 1.
\textsuperscript{141} Supra note 9 at 304.
\textsuperscript{142} Restatement (First) Conflict of Laws 377 (1934).
\textsuperscript{143} Richards, supra note 76 at *32-33. In the United States, 16 states and the District of Columbia
applied the \textit{lex loci delicti} rule up until a decade ago: H. Hill Kay, “Theory into Practice:
Choice of Law in Courts” (1983) 34 Mercer L.R. 521 at 583.
\textsuperscript{144} Tolofson, supra note 9 at 299.
\textsuperscript{145} An examination of the \textit{lex loci delicti} rule as it is applied in continental European systems
concludes that “it is also of interest to notice that none of the systems considered really face up
to the problem of how to define the \textit{locus delicti} in situations where the tortious conduct
and the harm of which the plaintiff complains occur in different countries.” C. G. J. Morse,
where the tort occurred, after which the *lex loci delicti* is applied. With the type of multistate defamation cases that are likely to arise with the increased use of the Internet, this could create problems of indeterminacy—one of the features La Forest J. explicitly sought to avoid in *Tolofson*. The application of a rule that mandates selection of the law of the jurisdiction where the greatest harm is done to the plaintiff’s reputation, however, would not face such indeterminacy. It would restrict the applicable laws to one, rather than potentially dozens under a rule focusing on wherever the effects of the tort are felt.

On the other hand, an approach that accepted *Tolofson* as creating an exception would require the courts to examine which of the forums in which publication occurred, had the plaintiff suffered the greatest harm to his or her reputation. This may seem rather indeterminate as well. What evidence is to be considered? Place of work? Place of domicile? Is it to be an objective test or a subjective one? It is interesting to note that several European forums allow the plaintiff to determine where the injury occurred for the purposes of choice of law.\(^{146}\) This would be consistent with the emphasis above on reputation as being the value that should inform the rule and the notion that, with defamation at least, it is the private interest that is the paramount consideration.\(^{147}\) However, to avoid the plaintiff simply selecting the law most favourable to his or her cause and then arguing that the most harm was suffered in that jurisdiction, it is suggested that the courts should retain the discretion to apply some degree of objective analysis to where the greatest harm was suffered.

Unfortunately we do not know how the cases reviewed would have dealt with this issue of widespread publication. The *CompuServe* and *Prodigy* cases, and presumably the *It’s In The Cards* case, settled once the motions had been decided. Arguably there is little difference between the nature of the cyberspace cases examined above and those relating to more traditional forms of communication. Defamatory material on CNN or in *Time* must surely be “published” around the world, and defamation arising from such sources would entail exactly the same kind of analysis. The difference is not so much in the kind of analysis, but rather in the practical considerations that make defamation far more likely to arise with increasing use of cyberspace, and therefore that much more important. Virtually anyone can print material on the Internet. However, calm and level-headed people get to vet what goes on CNN or

\(^{146}\) Ibid. at 72, 80.

\(^{147}\) Castel himself notes that Canadian defamation law policy objectives are to protect the reputation of plaintiffs rather than punishing defendants, Castel, *supra* note 6 at 167-68.
into *Time*, and even then, only people who are relatively newsworthy are the subject of such media.

Turning then to conceptual problems, it is submitted that there are aspects of defamation on-line that really do present difficulties for traditional conflict of laws rules. These problems are not reflected in the cases examined above, though in *Suarez* the plaintiff's counsel did make the suggestion that his client's "Internet reputation" had been injured.\(^{148}\) Here lies the clue to this line of inquiry.\(^{149}\) In order to fully understand the significance of this argument, the nature of certain communications on-line must be fully and clearly understood.

Take as an example the "Journalism Forum" in CompuServe that was at the heart of the *CompuServe* case. Increasingly such forums are taking on the characteristics of communities in their own right. People not only post messages in what develop into ongoing dialogues, but they also can "meet" there for real time conferences in which ideas are exchanged and people begin to actually get to know one another and develop relationships that continue over time.\(^{150}\) CompuServe's system software also facilitates participants in conference discussions agreeing to go off to separate "meeting rooms" for real time, one-on-one conversation, thus further increasing the ability to actually develop relationships of significance on-line.\(^{151}\) The forums on CompuServe actually have subscriptions, but even the Internet versions will have loyal users who return day after day to the CB-Chat cite or Usenet news group on their area of interest.

The point is that communities in the true sense of the word may develop, but without spatial or geographic location. The only nexus is in cyberspace. An individual may come to know, develop relationships with, and hence establish a reputation in the mind's eye of a community of people who are separated by jurisdictional frontiers, continents and oceans. He or she may in fact conduct business within and with

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\(^{148}\) Resnick, *supra* note 5 at 6.

\(^{149}\) It is interesting that of all of the papers claiming that traditional rules could not apply to cyberspace, none that I could find really explored or even fully recognized this line of inquiry. Burnstein comes close in a footnote, Burnstein, *supra* note 112 at 93, fn. 111.

\(^{150}\) By real time, I mean that the participants of the conference are all on-line simultaneously, linked through the forum which acts as the clearing house of comments submitted by each participant. Thus the comments of each participant scrolls down the screen of each of the other participants, making for a rather staccato discussion, but creating the poor man's version of video conferencing. Video conferencing itself is now feasible on the Internet and is likely to become increasingly accessible in the near future.

\(^{151}\) The use of terminology which necessarily analogizes from our spatial reality is interesting and is written about with some eloquence by Lawrence Lessig in his analysis of how legal systems will deal with cyberspace, "The Path of Cyberlaw" (1993) 104 Yale L.J. 1743.
members of this community.\textsuperscript{152} As the only writer I have found that really plumbs this aspect of the Internet puts it:

what will be new are the communities that this space [cyberspace] will allow, and the constructive (in the sense of constructivist) possibilities that these communities will bring. People meet, and talk, and live in cyberspace in ways not possible in real space. They build and define themselves in cyberspace in ways not possible in real space.\textsuperscript{153}

The question that arises then, is when one member of such a community defames another member of the community, where has the harm occurred? "Publication" has occurred in some 145 countries, but that is not very helpful. Should the focus be on the law of the jurisdiction of the plaintiff's residence? Why? The plaintiff has not suffered harm to his or her reputation in the real space community in which he or she lives. It is within the community on-line that his reputation has been injured. Arguably the Godfrey case is not so different from this example, in that the harm there would have been in an academic community that straddles borders, but I would suggest that the greatest harm would still be ascertainable by reference to the real world of Godfrey's place of work. In the hypothetical suggested here that is not the case. Does one then look at the laws of the real space jurisdictions of each of the members of the on-line community? That is obviously impractical, and really no more helpful than simply looking at all the places of publication. It is even arguable that publication as it is understood in defamation law has really only occurred on-line.\textsuperscript{154} It is not clear that any of the tests discussed, whether a literal reading of the \textit{lex loci delicti} rule in \textit{Tolafson} or the proposed "place of the most harm" exception would be able to address the conceptual problems inherent in a case like this.

While failing to really analyze these conceptual difficulties in any meaningful way, it is nonetheless an intuitive response to them that many writers seem to tend towards radical proposals such as the establishment of new legal systems analogous to admiralty law to govern relations in cyberspace, or universal conventions for conflict of laws dealing with Internet issues.\textsuperscript{155} It is not clear how Canadian conflict of laws rules as they stand now could be best applied in the type of situation

\textsuperscript{152} Translation is one area of business that is growing on the Internet, and a number of news groups are devoted to it. See for example the news group alt.sci.lang. One may clearly develop a reputation in such a community, and suffer appreciable material injury from defamation in such a community.

\textsuperscript{153} Lessig, \textit{supra} note 151 at 1745-46.

\textsuperscript{154} Someone somewhere is reading the message in the real world, constituting publication, but it only has meaning by reference to the "reality" in cyberspace.

\textsuperscript{155} See for example, Burnstein, \textit{supra} note 112.
presented here. Confronted with such a case, Canadian courts might well retreat to an application of the *lex fori*, but there remains the question of how they would get there in a principled manner. I would suggest that it is in fact only one example of the type of conceptually different and difficult problems that will eventually arise from the increasing use of and reliance on cyberspace. I would nonetheless tend to caution for resistance to overly ambitious responses. Lessig, while not dealing with the specifics of the types of legal problems likely to arise, argues that the inefficiency of the common law’s incremental approach, in fact, lends itself well to advancing into cyberspace at a pace that will not do damage to an environment that society and the legal community do not yet fully understand:

It will require that individuals gain an experience with this new space that gives them the sense of what this new space is. Only when this experience is common should we expect to be in a position to understand its significance. When the technology, when the experience, when the life in cyberspace presses us, only then should we expect law to understand enough to resolve these questions rightly... A prudent court—Supreme Court, that is—would find ways to let these questions simmer for a while, to let the transition into this new space advance, before venturing too boldly into its regulation.156

VI. CONCLUSION

This paper has suggested that society’s increasing use of the Internet and on-line services vastly increases the likelihood of multistate defamation cases arising. That being so, I have examined the conflict of laws rules that would apply to multistate defamation cases in the wake of *Tolofson*. Given that in my view the essential value which should inform any choice of law rule relating to defamation is that of the right of the individual to the protection of his or her reputation, and in light of the language of *Tolofson* itself, a narrow exception can be articulated that is consistent with both. In multistate defamation cases evoking choice of law issues, such an exception would be to apply the law of the jurisdiction where the plaintiff’s reputation suffered the most harm.

This paper has also tried to illustrate that a consideration of the issues relating to defamation in cyberspace can help to highlight both the practical and conceptual challenges which will confront Canada’s legal system with people’s increasing use of the Internet. In particular it argues that in practical terms cyberspace is likely to lead to more multistate defamation cases encompassing widespread publication, and

156 Lessig, *supra* note 151 at 1752.
suggests that the proposed rule of applying the law of the place of most harm would be both adequate and appropriate to meet that challenge. It also suggests, however, that cyberspace does present conceptual problems that the legal community is only beginning to understand, and for which existing and proposed rules may prove to be inadequate tools. It is important to consider such problems, but it is argued that caution is also required in formulating appropriate responses. This paper, then, does not aspire to have all the answers, but it does emphasize the importance of the issues, and attempts to suggest some responses and to crystallize some of the more difficult questions—and, in Lessig’s terms, to be a part of the simmering process.