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A common law position for a choice of law in internet defamation – the case for Hong Kong

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Abstract. With ever increasing access and use of internet worldwide, torts committed via internet are seen more often while legal positions in common law fail to keep pace with such developments. This can be seen especially in Hong Kong where conflict of law rules are still based on traditional common law authorities. In the event of internet defamation, the courts in Hong Kong necessarily apply the 'double actionability' rules such that there would only be a cause of action if such an alleged tort is actionable under both the law of the form (*lex fori*) and the law of the place where such wrong was committed (*lex loci delicti*). But, for internet defamation, how can the *lex loci delicti* be determined? This paper seeks to analyse this problem and proposes a suitable approach in determining the *lex loci delicti* in the event of internet defamation

1. Introduction

Whilst a freedom of expression is a value upheld by most of the world's constitutional orders, a need to protect a person from untrue statements which harm his or her reputation must also be recognised. In this modern world, untrue statements can pass across different countries in a matter of seconds or minutes. Such statements uploaded on websites or web-boards can attract wide group of readers around the world. With such new forms of defamation, however, '…law remains local, indeed parochial'.[1] It is more complicated when, for example, a person whose reputation is harmed is sitting in his office in Hong Kong while untrue statements relating to him are published on a website based in Thailand. Readers of that website include a group of persons in Australia. Such a scenario raises a question on conflict of laws as it involves 'foreign elements'.[2] Unlike in Thailand where a written but slightly outdated statute, namely the 'Conflict of Laws Act B.E.2481' prevails or in the European Union where the 'Rome II regulation'[3] is applicable, conflict of law rules in Hong Kong are still based purely on common law authorities. To be more precise, these common law authorities are all old and outdated. This is because Hong Kong did not implement the 'Private International Law (Miscellaneous Provisions) Act 1995' of the United Kingdom. To what extent such rules based upon decided common law cases of the last century can be adapted into modern internet torts? In light of no sign of legislative interest in Hong Kong as yet, this question remains pivotal to probe. This paper is divided into three parts. In the first part, general principles of conflict of law rules for cross-boundary torts are briefly described. Then, in the second part, relevant decisions relating to internet defamations in other common law jurisdictions are analysed to see how these may have influences upon traditional common law approach used in Hong Kong. Afterwards, this paper will suggest a suitable approach which the courts in Hong Kong should take in cases concerning internet defamations.

[1] Rick Glofcheski, *Tort Law in Hong Kong* (Sweet & Maxwell 2009) 645.
[2] In this context, foreign elements mean contacts with those systems of law other than that of Hong Kong. See Sir Lawrence Collins and the others (eds), *Dicey, Morris and Collins on The Conflict of Laws Volume 1* (14th edn, Sweet & Maxwell 2006) para 1-001.
[3] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

2. General Principles of choice of law rules for cross-boundary torts

When there is a case involving a cross-boundary tort, a court in Hong Kong inevitably has to resort to a complex state of law following a classic passage of Willes J. in *Phillips v Eyre*:[4]

> As a general rule, in order to found a suit…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 [the place of the forum]…Secondly, the act must not have been justifiable by the law of the place where it was done.

This passage came to be extensively discussed by the House of Lords in *Chaplin v Boys*.[5] Despite a widely accepted view among academic commentators that the House of Lords did affirm the above oft-quoted passage of Willes J., what their Lordship discussed proved confusing and unhelpful. Much of what were discussed 'were not necessary to the decision'[6] and their Lordships 'were so obscure and spoke with so many different tongues that the case *has no ratio at all*'.[7] In Hong Kong, this came to be affirmed by the Court of Appeal in *The Adhiguna Meranti*.[8] The case involved a consideration of the doctrine of *forum non conveniens*. In considering this issue, one of the factors the Court of Appeal had to consider was the law which would have been applicable to the alleged negligence in handling and caring of cargo in question. The Court of Appeal, upon examining the decision in *Chaplin v Boys*, reached a following conclusion: '[I]n a claim in Hong Kong based upon a tort committed abroad: (1) the governing law is that of Hong Kong [the forum]; and (2) the law of the *lex loci delicti* is relevant only to see whether civil liability for such tort there exists and has not been excluded'.[9] One would see that the Court of Appeal's approach reduced the role of the *lex loci delicti* to that of a sub-ordinated role.

Less than a decade from the time when *The Adhiguna Meranti* was handed down, the Privy Council had a chance to consider an appeal from Hong Kong in the case of *Red Sea Insurance Co Ltd v Bouyges S.A and Others*.[10] The fact involved a dispute between a Hong Kong-incorporated insurance company and a group of plaintiffs associated with a building project in Saudi Arabia. The plaintiffs commenced a claim against the insurance company seeking indemnification for making good damages occurred to the building so constructed.[11] In addition to defence submitted, the insurance company also advanced a counterclaim alleging a breach of the duty of care on one of the plaintiffs.[12] The said plaintiff argued that, under the law of Hong Kong, the insurance company had no right to bring a counterclaim since its right had not been subrogated because it had not paid relevant plaintiffs. This prompted the insurance company to maintain the Saudi Arabian law as the governing law.[13] The Privy Council, relying on the speech of Lord Pearson in *Chaplin v Boys* where there was an emphasis on the 'flexibility',[14] found the Saudi Arabian law to be applicable in this case. The Privy Council identified several factors to justify an invocation of an exception to the usual 'double actionability' approach. First, it was said that the insurance policy in question was governed by the Saudi Arabian law. The building project belonged to the Saudi Arabian government. Relevant contracts were subject to Saudi Arabian law. The place of performance was all in Saudi Arabia. Whilst the defendant was a Hong Kong-incorporated company, the principal place of business was in Saudi Arabia.[15] All these pointed to the application of the *lex loci delicti*, namely the Saudi Arabian law. It must be observed that a method of analysis which led the Privy Council to arrive at such a conclusion is akin to a 'proper law of the tort' analysis.[16] It is respectfully

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[4] *Phillips v Eyre* (1870) L.R. 6 Q.B. 1, 28-29.
[5] *Chaplin v Boys* [1971] A.C. 356.
[6] Adrian Briggs, 'What did *Boys v Chaplin* decide?' (1983) 12 *Anglo-American Law Review* 237.
[7] Ibid (emphasis added).
[8] *The Owners of Cargo lately laden on board the Ship or Vessel "Adhiguna Meranti" v The Owners of the Ships or Vessels "Adhiguna Harapan" and Others* [1987] HKLR 904.
[9] Ibid., 914.
[10] *Red Sea Insurance Co Ltd v Bouygues SA and Others* [1995] 1 AC 190.
[11] Ibid., 194-195.
[12] Ibid., 195.
[13] Ibid.
[14] Ibid, 200, citing *Chaplin v Boys* [1971] AC 356, 406.
[15] Ibid., 207.
[16] *Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5*) [2002] UKHL 19; [2002] 2 AC 883, [189] (per Lord Scott). For proper law of the tort analysis, see JHC Morris, "The Proper Law of a Tort" (1951) 64 *Harvard Law Review* 881.

submitted that in only rare circumstance such as in the *Red Sea Insurance* case would relevant connecting factors point strongly to only one jurisdiction.

But, the state of the common law does not end here for one should not lose sight of the decision of the House of Lords in *Harding v Wealands*[17]where the House of Lords engaged upon a complex matter of characterisation. In this context, one should be reminded of a careful delineation made by Lord Hoffman:[18]

> …the courts have distinguished between the kind of *damage* which constitutes an actionable injury and the assessment of compensation (i.e.*damages*) for the injury which has been held to be actionable. The identification of actionable damage is an integral part of the rules which determine liability…On the other hand, whether the claimant is awarded money damages (and if so, how much) or, for example, restitution in kind, is a question of remedy.

Or as echoed in the same case by Lord Rodger, '[q]uestions relating to the actionability of heads of claim were substantive, while questions as to the quantification of damages for actionable heads of claim related to the remedy and so were classified as procedural'.[19] It is a trite private international law methodology in common law jurisdictions that matters which are classified as procedural would be governed by the law of the forum (*lex fori*) while matters which are classified as substantive would be governed by the applicable law to the substance (*lex causae*).[20] Although *Harding v Wealands* was decided under the Private International Law (Miscellaneous Provisions) 1995, the House of Lords maintained that this statute preserves the common law position in relation to the matters classified as procedural.[21] There is however no logic in such a substantive / procedural distinction. 'Consequently, courts must determine what is substantive and what is procedural on an issue-by-issue basis'.[22]

So, to conclude, the state of general principles applicable to determining a choice of law in cross-boundary torts are as follows: in most of the cases the *lex fori* would prevail as an applicable law but this is only the case when such torts committed are also actionable or amounted to civil wrongs under the *lex loci delicti*. In exceptional circumstances, only the *lex fori* or the *lex loci delicti* may prevail as an applicable law if the connecting factors point strongly to only one law under the exception as in the *Red Sea Insurance* case. On either basis, the calculation or assessment of damages will be a matter of the *lex fori* as part of the procedural matter following the House of Lords in *Harding v Wealands.*

Against such general principles, the question which this paper sought to ask from the outset is: how can these principles be applicable to torts committed on internet, since on the internet there is no *territory* as such?

3. Choice of law in internet defamations

The leading case discussing internet defamations is the case before the High Court of Australia Dow Jones & Company Inc v Gutnick.[23] It is to be noted that prior to the decision in this case, the High Court of Australia already abandoned the conventional common law approach of 'double actionability' in determining a choice of law in torts. This was jettisoned in favour of a strict lex loci delicti approach.[24] Therefore, the task of the court in the *Gutnick* case was to locate the place where the tort was committed.

To summarise, the facts in the *Dow Jones* case was that a businessman whose personal and business activities are spent mostly in Victoria got his reputation harmed on a news subscription website published by Dow Jones Inc, a company incorporated in Delaware, with an editorial office in New York, but with

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[17] *Harding v Wealands* [2006] UKHL 32; [2007] 2 AC 1.
[18] Ibid., [24].
[19] Ibid., [66].
[20] James Fawcett and Janeen M. Carruthers, *Cheshire, North & Fawcett Private International Law* (14th edn, Oxford University Press 2008) 75.
[21] See *Harding v Wealands* (n 17) [51].
[22] Richard Garnett, *Substance and Procedure in Private International Law* (Oxford University Press 2012) para 2.18.
[23] *Dow Jones & Company Inc v Gutnick* [2002] HCA 56; (2010) 210 CLR 575.
[24] *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; (2000) 172 ALR 625; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491; (2002) 187 ALR.

the server maintained in New Jersey.[25] At the heart of the case were arguments for and against two competing theories. The first theory, which was unanimously endorsed by the High Court of Australia, is the theory akin to the land-based tort of defamation, namely the place where reputation is harmed. Or in other words, where the defamatory material is read and understood.[26] In the context of internet, it was found to be where the material is 'downloaded on to the computer of a person who has used a web browser to pull the material from the web server'.[27] The second theory, which was advocated for by Dow Jones Inc has gained supported in the United States of America where it is known as the 'single publication rule' tracing to where the material was published.[28] In this context, Dow Jones Inc submitted that the place where the server is maintained is the publishing place for this purpose.[29] However, both theories have their own weaknesses and limitations. In fact, neither of them appears appropriate for the internet defamation context. As Kirby J recognised, this is an area of law where 'international discussion in a form as global as the internet itself' is required.[30] This part will therefore be further divided into two sections whereby weaknesses and limitations of each theory in its application to the internet defamation will be analysed.

3.1. The law of the place where the reputation was harmed

The main weakness of this case is that it leaves the defendant, e.g. internet publisher, to meet 'liability without end'.[31] This was not much of a concern in the *Gutnick* case itself for in that case Mr. Gutnick provided an undertaking to sue only in Victoria.[32] Bone convincingly provided a scenario if the person whose reputation was harmed is not Mr. Gutnick whose reputation may be geographically confined to Victoria and the USA where his business was mostly relevant. Instead, what if such a person has global reputation, for example the Secretary-General of the United Nations?[33] However, this main weakness as pointed out is focused on the conflict of law rules in Australia whereby the *lex loci delicti* prevails. Transposing this into the context of Hong Kong, it will not present a problem if the defamatory material is downloaded in Hong Kong. In that case, there will be no 'real' conflict as the *lex fori* and the *lex loci delicti* are essentially the same. However, under certain circumstances where materials are accessible in other countries, conflicts between the two are inevitable. In the *Investasia Ltd* case before the Court of First Instance in Hong Kong,[34] the issue involved two plaintiffs, a company registered in the British Virgins Islands and an individual who managed this company. This individual businessman is a Hong Kong resident with previous Japanese nationality. They commenced proceedings against two Japanese-based defendants over two libellous articles which were written in Japanese and published in Japan.[35] The plaintiffs alleged that one article was posted on the internet and made available to users in Hong Kong with evidences showing that they had substantial connection with Hong Kong and that they had suffered substantial damage by the defendants' publications therein. The Court showed its willingness to apply a very liberal view on the question of reputation in the forum. Relying on the fact that the plaintiffs had reputation in Hong Kong and the dispute concerned alleged articles which were published also in Hong Kong resulting in damages sustained in Hong Kong, Hong Kong was found to be the natural forum for the resolution. The court considered also the scale of publication with the factual number of 500,00 copies of the managed published of which 157 were distributed in Hong Kong and ruled that they were sufficient to be regarded as defamatory material.[36] As stated by Findlay J.,[37]

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[25] *Gutnick* (n 23) [2], [41], [42].
[26] Ibid., [44].
[27] Ibid.
[28] Ibid., [32].
[29] Ibid., [18].
[30] Ibid., [166].
[31] Shawn A. Bone, 'Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by *Gutnick v. Dow Jones & Co*' (2005) 62 *Washington & Lee Law Review* 279, 307.
[32] *Gutnick* (n 23) [6].
[33] Bone (n 31) 308.
[34] *Investasia Ltd & Anor v Kodansha Co. Ltd & Anor* [1999] 3 HKC 515.
[35] Ibid., 515-516.
[36] Ibid., 516-517.
[37] Ibid., 522.

> In the result, I am satisfied that the plaintiff has established that it is right that it should have leave to proceed with this action in respect of the tort committed in Hong Kong and the damage sustained in Hong Kong. Hong Kong is, in my view, clearly 'the natural forum for the resolution of the dispute'; the dispute being one concerning the alleged libels published in Hong Kong resulting in damage sustained in Hong Kong. The appeal is dismissed.

Although the case largely addressed the issue of a jurisdiction, rather than an issue of a choice of law, nevertheless it reasonably reflects general attitude of the courts and how the *locus delicti* may be determined. As observed by Garnett, such an attitude potentially results in enabling claimants to sue a foreign publisher based upon only limited distribution in the forum.[38] Likewise, such an attitude means also that the forum court, upon satisfying the jurisdictional ground, may be too ready to apply the *lex fori* even where the impact upon the claimants' reputation is likely to be minimal. Taking the case of the *Investasia* as an example, how many readers in Hong Kong, even with availability of internet access, can apprehend the article written in Japanese? '[C]ourts have given excessive weight to the fact of publication in the forum and too little attention to the nature and content of the material published'.[39] In the other case referred to by Garnett in his article, *Tracy v O'Dowd*,[40] there an American businessman contested before the court in Northern Ireland that a New-York-based publisher posted an alleged article on internet. The fact was that most people who read this article were in the USA while small percentages of internet users were from Northern Ireland.[41] The Court ruled in favour of the defendants on the ground of jurisdiction as the plaintiffs did not have substantial connection with the forum and that the impact of publication within the forum is limited.[42] Although both cases were decided under common law jurisdictions, different approaches the courts took in analysing cross border defamation can be seen. Purely basing on the law where reputation was harmed means that internet publishers will be increasingly exposed to burdens as well as liabilities. Likewise, the forum courts, or in the case of this article, the Hong Kong courts, may arbitrarily choose the relevant laws of one of these related countries to found the basis for the 'double actionability' rules. In other words, the courts will have a wide array of choices for *lex loci delicti* and it is submitted criteria for choosing one over the others will be arbitrary. The courts can always manipulate and 'play around' elusive concept of 'connecting factors'.

The most recent case where alleged defamatory materials over the internet were considered is the case before the Court of Appeal in the United Kingdom in *Payam Tamiz v Google Inc*.[43] Whilst the central issues in the case are not relevant to the choice of law, the decision reached raises no less concerns. The facts of this case concern alleged comments made to the post entry in a blog on the famous 'Blogger.com'. A letter of claim was sent to Google UK Ltd who passed it on to Google Inc in the USA. Subsequent complains made by e-mail was passed on from Google Inc to the actual blogger.[44] Eady J. at first instance refused to find Google Inc. as a publisher of these libellous comments holding it was impossible to put responsibility on Google Inc. considering the amounts of blogs 'which in the aggregate contain more than half a trillion words, with 250,000 new words added every minute'.[45] The Court of Appeal disagreed. For Richards LJ , the act of providing a place for hosting blogs is akin to the act of providing a notice board. '[I]t makes the notice board available to bloggers on terms of its own choice and it can readily remove or block access to any notice that does not comply with those terms'.[46] He continued,[47]

Thus, if Google Inc allows defamatory material to remain on a Blogger blog after it has been notified of the presence of that material, it might be inferred to have associated itself with, or to have made itself

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[38] See in general Richard Garnett, 'Dow Jones & Company Inc v Gutnick: An Adequate Response to Transnational Internet Defamation?' (2013) 14 *Melbourne Journal of International Law* 196, 209.
[39] Ibid., 210.
[40] Ibid, citing *Tracy v O'Dowd* (unreported, High Court of Justice in Northern Ireland (Queen's Bench Division), 28 January 2002).
[41] Ibid.
[42] Ibid., 211.
[43] *Payam Tamiz v Google Inc* [2013] EWCA Civ. 68.
[44] Ibid., [8]-[9].
[45] Ibid., [16].
[46] Ibid., [33].
[47] Ibid., [34].

responsible for, the continued presence of that material on the blog and thereby to have become a publisher of the material.

But, the conclusion reached by the Court of Appeal in the end is worth noting. The Court of Appeal did not give permission to serve the service out of the jurisdiction. The reason was that the blog entry would be substituted by newer entries. 'By the very nature of a blog, they will have been followed by numerous other comments in the chain, and whilst still accessible, will have receded into history'.[48] The issue in this case did not turn on the choice of law but the attitude of the Court of Appeal in readily finding Google Inc. as a publisher within the context of the English law appears to send out the signal that the Court of Appeal considered the alleged defamatory articles to be published in the United Kingdom where the plaintiffs resided.

3.2. The Single-Publication Rule

Apart from the above-mentioned theory of land-based tort of defamation, within the *Gutnick* case, the application of the 'single publication rule' was considered and discussed. This rule has been established in the USA and it has been reflected in the 'Restatement of Torts, Second' in 1977.[49] In many States of the USA, the 'Uniform Single Publication Act' is also enacted.[50] The essence of these, as explained by Cohen, 'is a legal fiction which deems a widely disseminated communication…to be a single communication regardless of the number of people to whom, or the number of states in which, it is circulated'.[51] It certainly does not incur as much uncertainties as the theory of land-based tort. Nevertheless, protection of interests may be tilting towards the publisher. The first case that affirmed the applicability of single publication theory is the American case of *Firth v State of New York.*[52] The case concerned a publishing of a report on the internet which contained defamatory materials. The court ruled that the single publication rule shall be applied to books, printed media and electronic means of internet publishing emphasising the drawbacks of possible multiplicity of actions and excessive liabilities to be borne by publishers.[53] According to Chan, benefits of applying the single publication rule are that the rule avoids 'recovery of excessive damages' provides the 'conserving of judicial resources', and protect defendants from 'undue harassment'.[54] This was, however, rejected in the *Gutnick* case. In light of the judgment,[55]

Publications within Australia, but in different States or Territories, may require consideration of additional principles. Although the choice of law to be made in such a case is again the law of the place of the tort, questions of full faith and credit or other constitutional questions may well arise. It is unnecessary to pursue those matters further at the moment and we return to cases in which there are international rather than solely intranational aspects.

In the *Gutnick* case, the Court further emphasised limitations incurred by the application of the single publication rule. These include limits to 'judicial innovation' of the common law legal system within Australia; since reform and further development of the judiciary is imminent in order to cope with the vast mushrooming of internet that relates to defamatory publishing.[56] It is the responsibility of the courts to extend the common law while at the same time the courts have to maintain the neutrality within technology.[57] However, such a change will possibly go beyond a mere re-expression of the common law. It requires weighing many factors and the courts do not seem to be so appropriate to undertake such a lead

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[48] Ibid., [50].
[49] The term 'Restatement of Law' is explained as: 'A series of volumes authored by .the American Law Institute that tell what the law in a general area is, how it is changing, and what direction the authors (who are leading legal scholars in each field covered) think this change should take…The various Restatements have been a formidable force in shaping the disciplines of the law covered; they are frequently cited by courts and either followed or distinguished; they represent the fruit of the labor of the best legal minds in the diverse fields of law covered'. J R Nolan and others, *Black's Law Dictionary*, 6th edn (Saint Paul, Minnesota, 1990), 1313.
[50] 'The Uniform Single Publication Act, promulgated in 1952 by the National Conference of Commissioners on Uniform State Laws…' see Joseph C. Knakal, JR., 'Statutory Comment: Problems under the Uniform Single Publication Act' (1958) 15 *Washington and Lee Law Review* 321.
[51] Debra R. Cohen, 'The Single Publication Rule: One Action, Not One Law' (1996) 62 *Brooklyn Law Review* 921, 924.
[52] *Firth v State of New York* 184 Misc.2d. 105; 706 N.Y.S 2d.835; Misc.2d.2000 (March 8,2000).
[53] Ibid., 108-116.
[54] Gary CHAN Kok Yew, 'Internet Defamation and Choice of Law: In *Dow Jones & Company Inc v Gutnick*' (2003) *Singapore Journal of Legal Studies* 483, 499-500.
[55] *Dow Jones v Gutnick* (n 23) [37].
[56] Ibid., [123]-[126].
[57] Ibid., [127]-[128].

for a change.[58] The Court in the *Gutnick* case therefore turned to the land-based torts and picked by default the Australian law as an applicable law.

Similar to Australia, in the United Kingdom the 'single publication rule' was unwelcomed. This could be seen in a series of cases against *The Times* newspaper where this theory was rejected.[59] The fact of the case was that two articles alleging Mr. Loutchansky's involvement with mafia and money-laundering were published in *The Times* in late 1999 and these articles were also posted on the website. The articles on the website remained accessible even by the end of the year 2000.[60] The issue of the applicability of the single publication rule in this case arose, not in the context of the conflict of laws, but in the context of alleged time-bar by the defendants counted from the date when the articles first published on the internet. The Court of Appeal, without much elaboration, quickly rejected the single publication rule. However, it is submitted that, for the purpose of the conflict of laws consideration, the judgment does not carry much weight for the court considered the issue within the specific context of the case when the alleged defamatory materials became internet archives. As the Court of Appeal stated, '[w]here it is known that archive material is or may be defamatory, the attachment of an appropriate notic…will normally remove any sting from the material'.[61] English courts have not yet had chances to consider the exact same issue as in the *Gutnick* case. It is pertinent to note, however, that the *Loutchansky* case reached the European Court of Human Rights as *The Times* claimed that rejecting the single publication rule would expose newspapers and publishers to incessant liability and this in turn violated the freedom of expression as guaranteed by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[62] However, the European Court of Human Rights perceived no need to examine this issue agreeing with the conclusion reached by the Court of Appeal that a mere putting of short notice on the archive would 'normally remove any sting from the material'.[63] Therefore, it is submitted that the *Loutchansky* case along with the decision of the European Court of Human Rights provided no convincing authorities for the application of the law of the place of harm to reputation over the law of the place of publication.

However, recent statutory interventions in Ireland and the United Kingdom appear to indicate that the single publication rule indeed wins.[64] Connolly refers to the Defamation Act 2009 of Ireland in s.38(1)(b) which states:

> …For the purpose of bringing a defamation action within the meaning of the *Defamation Act 2009*, the date of accrual of the cause of action shall be the date upon which the defamatory statement is first published and, where the statement is published through the medium of the internet, the date on which it is capable of being viewed or listened to through that medium.

In the United Kingdom, this single publication rule is now stated in what has become the Defamation Act 2013, in s.8:

> 1) This section applies if a person –
>
> (a) publishes a statement to the public ("the first publication"), and
>
> (b) subsequently publishes (whether or not to the public) that statement or a statement which is substantially the same…
>
> (4) This section does not apply in relation to the subsequent publication if the manner of that publication is materially different from the matter of the first publication.
>
> (5) In determining whether the manner of a subsequent publication is materially different from the manner of the first publication, the matters to which the court may have regard include (amongst other matters) –

[58] Ibid., [137]-[138].
[59] See *Loutchansky v Times Newspapers Ltd and others (Nos. 4 and 5); Loutchansky v Times Newspapers Ltd (Nos.2, 3 and 5*) [2001] EWCA Civ. 1805; [2002] QB 783.
[60] Ibid., [1]-[9].
[61] Ibid., [74].
[62] *Case of Times Newspapers Ltd (Nos. 1 and 2) v The United Kingdom* (*Applications 3002/03 and 23676/03*) [26]-[28].
[63] Ibid., [47].
[64] See stimulating discussions and observations in Ursula Connolly, 'Multiple Publication and Online Defamation – Recent Reforms in Ireland and the United Kingdom' (2012) 6 *Masaryk University Journal of Law and Technology* 35.

(a) the level of prominence that a statement is given;

(b) the extent of the subsequent publication

The essence of these updated legislations means the enhanced protection given to internet publishers, especially in case of any minor additions of comments to published materials.

4. Suitable approach that courts in Hong Kong should adopt in relation to internet defamation cases

Courts in Hong Kong are tied by the 'double actionability' rule as mentioned above. They need to satisfy first that the purported defamatory materials would give rise to defamation under the law of Hong Kong. Two different theories discussed above would be relevant to claimants who have to prove or point to the appropriate *lex loci delicti*. In the context of the internet, if the single publication rule is rejected, the claimants will have a wide array of choices to choose from to satisfy this limb of the rule. Even if the article is not taken as defamatory in the place where it was published, still it may be taken as defamatory elsewhere. By contrast, adopting the single publication rule means the claimant's choice of the *lex loci delicti* would be restricted and the publisher would have an advantageous edge if under the law where the publisher is incorporated or uploaded the materials, publishing of such statement would not be conceive as defamatory. The question then is whether there may be any other theory which can be applied in the context of internet defamation in order to determine the appropriate *lex loci delicti*. One of the approaches which is discussed by Chan[65] and also discussed in the *Gutnick* case[66] is to adopt the test stated in a different context by the Privy Council in *Distillers Co v Thompson*.[67] The main issue in the case was whether the Supreme Court of New South Walses has a jurisdiction when the plaintiffs sued an English company who manufactured a drug causing serious effect to the foetus. The plaintiff's mother took this drug and the plaintiff was born without arm and with defective eyesight.[68] The court held that the negligence was due to a lack of communication as to the danger of the drug to the pregnant woman. Such communication was not given in New South Wales and therefore there was a cause of action in New South Wales.[69] However, in his article, Chan raised a concern that the tortfeasor's conduct may prove to be too distant or even unconnected from the place where the plaintiff's reputation was harmed. He gave an example of the case, as in the *Gutnick* case, if the reporter actually prepared the article while on his trip in Tahiti or several people in different countries contributed to the article. 'Locating a single governing law on the basis on the place of preparation of the alleged defamatory material would be impracticable'.[70] Moreover, Chan also did not perceive as possible the idea of using the law of the place where the server is located as the applicable law. He gave two significant reasons. First, the location of the server may have no connection with the tortfeasor, i.e. the publishing company. Secondly, like the 'forum shopping', publishers may start locating the jurisdiction most favourable for locating the server.[71]

It is submitted here that all possible theories mentioned above share the same characteristic. All of them are still based on the same or usual paradigm of the conflict of laws, e.g. 'territoriality'. They try to point to relevant connecting factors which are still 'land-based'. In his article, Chan tried to purpose his own formulated rules to determine applicable law in the event of internet defamations. Still, this proposed formulation still hinges upon land-based connecting factors such as the plaintiff's habitual residence, the place where the plaintiff's reputation is damaged, or the place of publication.[72] It is questionable whether the use of land-based connecting factors to cases involving internet is convincing at all. Indeed, one of the approaches discussed by Chan in his article also is to declare the internet the 'No Law' Zone.[73] The author supports this idea and indeed it is such an idea where uniformity may be brought. By way of

[65] Chan (n54) 506-507.
[66] *Gutnick* (n 23) [141]-[153].
[67] *Distillers Co. (Biochemicals) Ltd v Laura Anne Thompson* [1971] A.C. 458.
[68] Ibid., 464.
[69] Ibid., 469.
[70] Ibid., 506.
[71] Ibid., 507.
[72] Ibid., 514.
[73] Ibid., 509.

analogy, high seas are maritime areas which do not belong to the jurisdiction of any countries. International community could reach an agreement as to the rights of each country within the high seas in the form of the United Nations Convention on the Law of the Sea 1982. Likewise, internet has no boundary. It can be accessed by anyone from any country around the world. It is beyond the scope of private international law to effectively pinpoint to the court of one jurisdiction or the law of one country to govern activities over the internet. An international treaty shall be implemented and agreed by states in order to operate a new and distinct regime. However, it can be perceived that it will take uncountable modifications and discussions before such an international convention can be reached. Even if there will be a treaty as such, there is no guarantee that all countries will ratify this. In the meantime, as far as Hong Kong is concerned, in light of outdated state of private international law, Hong Kong can only live with what it has. Problems can be ameliorated by jurisdiction mechanism. In other words, courts should decline jurisdiction if claimant does not have substantial connection with Hong Kong, for example if the claimant is a seasonal tourist discovering defamatory material on the internet while on a trip to Hong Kong. Or else, the courts should be prepared to stay its proceedings in favour of other jurisdictions which may be more connected with the parties or the defamatory materials in question. Otherwise, if the Hong Kong courts decide to take jurisdiction, a high chance under the existing 'double actionability' rule is that the courts will have to apply Hong Kong law since the *Red Sea Insurance* exception is limited in its application.

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