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# Bangoura v Washington Post: Case Comment

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***BANGOURA V WASHINGTON POST: CASE COMMENT***

**Matthew Baird**

## 1 INTRODUCTION

On September 16, 2005 the Court of Appeal for Ontario handed down its decision in *Bangoura v The Washington Post*<sup>1</sup>.

The case, concerning jurisdiction in Internet libel, was closely watched by the global media community. After the shock of the Australian High Court decision of *Dow Jones & Co. Inc. v Gutnick*<sup>2</sup>, the world's media companies desperately wanted to avoid any repeat of that decision which granted jurisdiction to a Victorian court to hear a defamation action against the New York Based Dow Jones company for articles that were published on one of their web sites.

Given that courts in common law countries are receptive to the decisions of each other's courts, a decision in favour of Cheickh Bangoura would have added to a growing corpus of law in common law jurisdictions that provides for the granting of jurisdiction to courts in the place of the plaintiff's residence in situations of Internet libel.

The media corporations of the world got the result they wanted and Bangoura was denied the right to sue *The Washington Post* in Ontario.

But, was it a fair decision, was it a correct decision and was it decided the way it was for the right reasons?

To assist in coming to a conclusion on this question, this paper will consider the facts of the case, relevant cases that define the applicable law, it will then look at the decision at first instance and then the appeal decision and then will critique the appeal decision with reference to relevant facts and applicable law.

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<sup>1</sup> [2005] Court of Appeal for Ontario C41379 (Unreported, Armstrong JA, Lang JA, McMurty CJO, 16 September 2005).

<sup>2</sup> (2002) 210 CLR 575.

## 2 FACTS

The case of *Cheickh Bangoura v The Washington Post, William Branigin, James Rupert, Steven Buckley, United Nations and Fred Eckhard*<sup>3</sup> was an action brought by Bangoura who was, at the time of the libel complained of, an employee of the United Nations<sup>4</sup>.

The alleged defamatory matter consisted of two articles that were published in a United States published newspaper, *The Washington Post*, on the 5<sup>th</sup> of January 1997 and the 10<sup>th</sup> of January 1997 and thereafter made available in *The Washington Post's* online archive<sup>5</sup> and continuing to be available<sup>6</sup>.

In summary the articles stated that Bangoura had been removed from his post at the United Nations Drug Control Program because of misconduct and mismanagement and also that his colleagues had accused him of sexual harassment, financial improprieties and nepotism<sup>7</sup>.

Mr Bangoura was, and his family were, ordinarily resident in Quebec from December 1996 but he was working in Kenya at the time the articles were first published and he re-joined his family in Quebec in February 1997, one month after the initial publication of the articles in question. In 2000 Mr Bangoura changed his place of residence to Ontario<sup>8</sup>.

The defendants in the action were the United States newspaper, *The Washington Post* which was published in the District of Columbia along with the contributing authors of the articles, William Branigin who at the time of publication was in the District of Columbia but at the time of action was resident in Virginia, James Rupert who at the time

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<sup>3</sup> *Bangoura v. Washington Post* (2004), 235 D.L.R. (4<sup>th</sup>) 564.

<sup>4</sup> *Ibid* 567.

<sup>5</sup> *Ibid* 568.

<sup>6</sup> As at 10 December 2005.

<sup>7</sup> William Branigin, James Rupert, 'Cloud of Scandal Follows U.N. Drug Control Official; Boutros-Ghali Ties Allegedly Gave Protection', *The Washington Post* (Washington D.C.), 5 January 1997, A1, William Branigin, 'U.N. Removes African From Drug Agency; Controversial Envoy's Misconduct Cited', *The Washington Post* (Washington D.C.), 10 January 1997, A13.

<sup>8</sup> *Bangoura v. Washington Post* (2004), 235 D.L.R. (4<sup>th</sup>) 564, 567-8.

of publication was in Cote d'Ivoire but at the time of action was resident in New York and Steven Buckley who was in Kenya at publication but was resident in Florida at the time of action<sup>9</sup>.

The action was also brought against the United Nations and a representative of the United Nations however claims against these defendants were not pursued<sup>10</sup>.

Mr Bangoura chose the place of his current residence, Ontario as the forum in which to commence his action against *The Washington Post* and its employees.

At the time of the publication of the article and the action *The Washington Post* was incorporated in the State of Delaware and had its head office in the District of Columbia. *The Washington Post* operated an office in Ontario for newsgathering purposes and according to evidence tendered to the court, had a claimed total of seven paid subscribers and no wholesale distribution in Ontario<sup>11</sup>.

The presiding judge noted that the low subscriber numbers seemed odd but accepted them on the basis that no other evidence had been tendered to the court<sup>12</sup>.

*The Washington Post* was also available in Ontario via the Internet with the articles available free of charge for 14 days after publication and thereafter through a paid archive<sup>13</sup>, although summaries of the articles continued to be available free. These summaries did contain some of the statements complained of<sup>14</sup>.

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<sup>9</sup> Ibid 569-70.

<sup>10</sup> *Bangoura v The Washington Post* [2005] Court of Appeal for Ontario C41379 (Unreported, Armstrong JA, Lang JA, McMurty CJO, 16 September 2005) [14].

<sup>11</sup> Ibid [10].

<sup>12</sup> *Bangoura v. Washington Post* (2004), 235 D.L.R. (4<sup>th</sup>) 564, 569.

<sup>13</sup> *Bangoura v The Washington Post* [2005] Court of Appeal for Ontario C41379 (Unreported, Armstrong JA, Lang JA, McMurty CJO, 16 September 2005) [11].

<sup>14</sup> Ibid [12].

It was accepted by the court that just one person in Ontario accessed the paid archive of the article, counsel for Bangoura<sup>15</sup>.

The defendants sought in the Ontario Superior Court of Justice to obtain an order staying the action and setting aside the service *ex juris* of the claim<sup>16</sup>.

### **3 CASES CONSIDERED IN *BANGOURA***

There are a number of decisions that have previously been relied upon by Canadian courts when deciding cases where questions of appropriate jurisdiction have arisen.

Where questions of appropriate jurisdiction for libel cases are concerned, it had already been established by a Canadian court in *Kroch v Rossell et Cie.*<sup>17</sup> that the basic rule in libel that publication takes place where the defamatory statement is heard is flexible in that the court can set aside service *ex juris* if the publication within the jurisdiction is only slight compared with publications elsewhere.

It had also already been found in *Jenner v Sun Oil Co. Ltd.*<sup>18</sup> that service *ex juris* could be set aside if the forum was not convenient.

From these and other decisions a test of real and substantial connection developed. This test, for example, evidenced in *Morguard Investments Ltd v De Savoye*<sup>19</sup> notes that for a province to assume jurisdiction over a matter it must satisfy the Canadian Constitutional requirement of territoriality.

The most developed form of the test appeared relatively recently in *Muscutt v Courcelles*<sup>20</sup>.

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<sup>15</sup> Ibid [11].

<sup>16</sup> *Bangoura v. Washington Post* (2004), 235 D.L.R. (4<sup>th</sup>) 564, 566.

<sup>17</sup> (1937) 156 L.T. 379 (C.A.).

<sup>18</sup> [1952] 2 D.L.R. 256 (Ont. H.C.)

<sup>19</sup> (1990) 76 D.L.R. (4<sup>th</sup>) 256 S.C.C.

<sup>20</sup> (2002) 114 A.C.W.S. (3d) 634.

In *Muscutt*, eight factors were identified as being relevant in determining the appropriateness of an assumption of jurisdiction by a court in Canada:

The connection between the forum and the plaintiff's claim

The connection between the forum and the defendant

Unfairness to the defendant in assuming jurisdiction

Unfairness to the plaintiff in not assuming jurisdiction

The involvement of other parties to the suit

The Court's willingness to recognise and enforce an extra-provincial judgement rendered on the same jurisdictional basis

Whether the case is interprovincial or international in nature

Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

Both the court of first instance<sup>21</sup> and the appeal court<sup>22</sup> in the *Bangoura* matter considered these eight factors.

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<sup>21</sup> *Bangoura v. Washington Post* (2004), 235 D.L.R. (4<sup>th</sup>) 564, 571-2.

<sup>22</sup> *Bangoura v The Washington Post* [2005] Court of Appeal for Ontario C41379 (Unreported, Armstrong JA, Lang JA, McMurty CJO, 16 September 2005) [19].

## **4 FIRST INSTANCE DECISION**

In the first instance, the presiding judge, Pitt J, considered the facts of the case and applied the eight-part *Muscutt* test.

### **The connection between the forum and the plaintiff's claim**

With regards to this factor, Pitt J acknowledged that Bangoura did not reside in Ontario at the time of publication but he concluded that Bangoura was “an international public servant, who has found a home and work in Ontario where the damages to his reputation would have the greatest impact”.<sup>23</sup>

### **The connection between the forum and the defendant**

Pitt J accepted that the defendants had no direct connection with Ontario but noted that *The Washington Post* is a major newspaper that is “often spoken of in the same breath as the New York Times and the London Telegraph.”<sup>24</sup> He concluded, “the defendants should have reasonably foreseen that the story would follow the plaintiff wherever he resided.”<sup>25</sup>

### **Unfairness to the defendant in assuming jurisdiction**

Pitt J stated that given the global reach of *The Washington Post* he assumed that the defendant would have insurance coverage against damages for libel or defamation with international effect, and if it did not, that it should.<sup>26</sup>

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<sup>23</sup> *Bangoura v. Washington Post* (2004), 235 D.L.R. (4<sup>th</sup>) 564, 572.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

### **Unfairness to the plaintiff in not assuming jurisdiction**

Pitt J considered that Bangoura could be faced with objections to the assumption of jurisdiction if he were to pursue his action in the District of Columbia. This was based on a contention that Bangoura would not have a reputation to defend in the District of Columbia.<sup>27</sup>

### **The involvement of other parties to the suit**

On this point Pitt J simply commented on the fact that other defendants were resident in Florida and New York. It is assumed that this goes towards the fact that no jurisdiction will be totally appropriate or convenient to all parties.<sup>28</sup>

### **The Court's willingness to recognise and enforce an extra-provincial judgement rendered on the same jurisdictional basis**

Pitt J stated that he could see no reason why an Ontario Court would not enforce a foreign judgement in similar circumstances to that being sought by Bangoura.<sup>29</sup>

### **Whether the case is interprovincial or international in nature**

Pitt J noted that the case is not interprovincial and therefore, under this part of the test it would be more difficult to assume jurisdiction.<sup>30</sup>

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

## **Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere**

Pitt J deliberated on this point more than any other of the eight factors and concluded that the fact that an American court would be unlikely to enforce an Ontario judgement in these circumstances would be “an unfortunate expression of lack of comity”<sup>31</sup> and that such a situation “should not be allowed to have an impact on Canadian values”<sup>32</sup>.

As part of his reasoning on this issue Pitt J considered the unanimous Australian High Court decision of *Dow Jones & Co. Inc. v Gutnick*<sup>33</sup> and held that that *Gutnick* was “a very similar factual situation.”<sup>34</sup>

He used *Gutnick* to illustrate several relevant points. These included the reasoning that “In cases of multi-state defamation, it is the publication, not the composition of the libel, that is the actionable wrong”<sup>35</sup> and that “those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographical restriction”.<sup>36</sup>

It would appear, given the similarity of the facts, the similarity between Victorian and Ontarian defamation law and the level of the court that had made the decision, that Pitt J felt that *Gutnick* was supportive to his decision.

He also relied on *Wilson v Servier Canada Inc.*<sup>37</sup> to posit that the District of Columbia’s unwillingness to enforce any given order of an Ontario court should be non-determinative with regards to this part of the *Muscutt* test.<sup>38</sup>

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<sup>31</sup> Ibid 574.

<sup>32</sup> Ibid.

<sup>33</sup> (2002) 210 CLR 575.

<sup>34</sup> *Bangoura v. Washington Post* (2004), 235 D.L.R. (4<sup>th</sup>) 564, 573.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> (2000) 50 O.R. (3d) 219 (Sup. Ct.).

<sup>38</sup> *Bangoura v. Washington Post* (2004), 235 D.L.R. (4<sup>th</sup>) 564, 574.

He concluded with the observation that in libel suits in general and in the case at hand in particular, “character vindication, not money was the real objective.”<sup>39</sup>

As a result of the application of the *Muscutt* test to the facts Pitt J found that there was sufficient connection between the claim and Ontario and that the assumption of jurisdiction by Ontario was appropriate<sup>40</sup>.

Before the court had deemed the assumption of jurisdiction to be appropriate it turned briefly to the question of whether Ontario was the most convenient forum for the action to be heard<sup>41</sup>.

Pitt J considered that the factors to be taken into account when determining this question are also contained in *Muscutt*:

The location of the majority of the parties,

The location of key witnesses and evidence,

Avoidance of a multiplicity of proceedings,

The jurisdiction in which the factual matters arose,

The applicable law and its weight compared with the factual issues to be decided; and

Loss of juridical advantage<sup>42</sup>.

After consideration of all of these factors Pitt J held that both Ontario and the District of Columbia would be appropriate fora and relied upon the rule in *Upper Lakes Shipping*

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<sup>39</sup> Ibid 575.

<sup>40</sup> Ibid 576.

<sup>41</sup> Ibid 575.

<sup>42</sup> Ibid.

*Ltd. V Foster Yeoman Ltd.*<sup>43</sup> that states that the plaintiff's choice of forum should not be disturbed when no forum is clearly more appropriate<sup>44</sup>.

Pitt J therefore dismissed the motion applied for by the defendants and held that it was appropriate for Ontario to assume jurisdiction in this action<sup>45</sup>.

## **5 APPEAL DECISION**

It would appear that the decision of the Ontario Superior Court of Justice caused serious consternation among the global media community. Clearly, after the decision in *Gutnick*, concern was building that media companies would increasingly be at risk of being subjected to foreign jurisdictions in matters of defamation.

Accordingly, the decision was appealed to the Court of Appeal for Ontario and in addition to submissions from the defendants the court accepted for consideration a factum of the intervenor, also known as a friend of the court submission, from the Media Coalition.<sup>46</sup>

Demonstrative of the global level of interest in the outcome of the appeal, the Media Coalition was comprised not only of Canadian and American media corporations, but also major media companies from The United Kingdom, Australia and Japan as well as numerous media industry associations, journalists associations and free expression organizations such as the Electronic Frontier Foundation<sup>47</sup>.

The detailed submission from The Media Coalition laid out a host of arguments as to why the Ontario courts should not assume jurisdiction in the matter. The court found this

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<sup>43</sup> (1993) 14 O.R. (3d) 548 (C.A.).

<sup>44</sup> *Bangoura v. Washington Post* (2004), 235 D.L.R. (4<sup>th</sup>) 564, 576.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Bangoura v The Washington Post* [2005] Court of Appeal for Ontario C41379 (Unreported, Armstrong JA, Lang JA, McMurty CJO, 16 September 2005) [49].

<sup>47</sup> Factum of the Intervenor, The Media Coalition, *Bangoura v The Washington Post* (Court of Appeal for Ontario, Armstrong JA, Lang JA, McMurty CJO, 16 September 2005) 23.

submission to be helpful and interesting but regarded the suggested approaches provided by the Media Coalition to be superfluous to the case<sup>48</sup>.

Chief Justice McMurtry and Justices Armstrong and Lang heard the appeal on the 8<sup>th</sup> of March 2005.

In their decision they agreed that Pitt J was correct in using the eight-part *Muscatt* test to assist in the determination of the decision. They noted that although the *Muscatt* test was formulated in an interprovincial situation, the Supreme Court case of *Beals v Saldanha*<sup>49</sup> made it clear that the factors also applied to international situations<sup>50</sup>.

The appeal judges then went on to consider the application by Pitt J of each of the *Muscatt* test factors.

### **The connection between the forum and the plaintiff's claim**

The appeal judges stated that they believed that the connection between Bangoura's claim and Ontario was "minimal at best"<sup>51</sup> and that there was "no connection with Ontario until more than three years after the publication of the articles"<sup>52</sup>.

They went on to state that "[p]ermitt[ing] a plaintiff to assume a new residence and sue a defendant there in respect of events that occurred elsewhere seems to be harsh to defendants, and this is particularly so when those events comprise a completed tort."<sup>53</sup>

Additionally they stated that "even if the connection is significant, however, the case for assuming jurisdiction is proportional to the damage suffered in the jurisdiction"<sup>54</sup> and that

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<sup>48</sup> *Bangoura v The Washington Post* [2005] Court of Appeal for Ontario C41379 (Unreported, Armstrong JA, Lang JA, McMurty CJO, 16 September 2005) [49].

<sup>49</sup> [2003] 3 S.C.R. 416.

<sup>50</sup> *Bangoura v The Washington Post* [2005] Court of Appeal for Ontario C41379 (Unreported, Armstrong JA, Lang JA, McMurty CJO, 16 September 2005) [20].

<sup>51</sup> *Ibid* [22].

<sup>52</sup> *Ibid*.

<sup>53</sup> *Ibid*.

it would be difficult to assume “jurisdiction over an out-of-province defendant unless the plaintiff had assumed significant damage within the jurisdiction.”<sup>55</sup>

The appeal judges held that there had been no evidence of damage suffered in Ontario that was significant enough to justify an assumption of jurisdiction<sup>56</sup>.

### **The connection between the forum and the defendant**

The appeal judges disagreed with the judge at first instance when he stated that *The Washington Post* “should have reasonably foreseen that the story would follow the plaintiff wherever he resided”<sup>57</sup>. They stated that it was not reasonably foreseeable that Bangoura would become a resident of Ontario three years later<sup>58</sup>. They added that “to hold otherwise would mean that a defendant could be sued almost anywhere in the world based upon where a plaintiff may decide to establish his or her residence long after the publication of the defamation.”<sup>59</sup>

### **Unfairness to the defendant in assuming jurisdiction**

The appeal judges simply stated that there was no evidence of any insurance against global liability for libel or defamation<sup>60</sup> and thereby issued a rebuttal of the motion judge’s view that any unfairness would be mitigated by the existence or expectation of existence of insurance.

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid [23].

<sup>57</sup> Ibid [25].

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> Ibid [27].

### **Unfairness to the plaintiff in not assuming jurisdiction**

The appeal judges stated that it was difficult to accord weight to this factor because of the lack of connection between the plaintiff and Ontario<sup>61</sup>.

### **The involvement of other parties to the suit**

The appeal judges stated that the issue of some plaintiffs residing in third jurisdictions was not a factor that favoured Ontario and that the key issue was that the main defendant was located in the District of Columbia<sup>62</sup>.

### **The Court's willingness to recognise and enforce an extra-provincial judgement rendered on the same jurisdictional basis**

The appeal judges stated that should Ontario issue a judgement against a foreign defendant for Internet jurisdiction the Ontario courts would be obliged to enforce similar judgements from foreign jurisdictions against Ontario publishers<sup>63</sup>.

### **Whether the case is interprovincial or international in nature**

The appeal judges agreed with the judge of first instance that the international nature of the case made it harder to assume jurisdiction<sup>64</sup>.

### **Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere**

The appeal judges disagreed with the statements by the motion judge that a failure to recognise a Canadian libel judgement represented a lack of comity, instead, they stated

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<sup>61</sup> Ibid [29].

<sup>62</sup> Ibid [31].

<sup>63</sup> Ibid [34].

<sup>64</sup> Ibid [35].

that the United States of America simply subscribed to different policy considerations to that of Canada with regards to freedom of speech and the protection of reputation<sup>65</sup>.

The appeal judges also dismissed the relevance of *Gutnick* by stating, “The issue in the case was *forum non conveniens*.”<sup>66</sup>

The result of the appeal was that the finding at first instance was overturned and it was held that it would be inappropriate for the Ontario courts to assume jurisdiction to hear the dispute between Bangoura and *The Washington Post*<sup>67</sup>.

This was a result of the appeal judges disagreeing with the motion judge on almost all findings with regards to the eight-part *Muscutt* test.

## **6 CRITIQUE OF APPEAL DECISION**

It is arguable that the appeal decision in Bangoura was made on policy grounds rather than on a strict application of the eight-part *Muscutt* test.

Although no single component of the *Muscutt* test is determinative in deciding if a real and substantial connection test exists it would appear that the appeal judges have interpreted the application of the test in a way that goes towards a refusal of jurisdiction.

In some instances, the appeal judges seem to have given perfunctory treatment to relevant facts and in others they appear to have misapplied the basic rules of libel.

There are serious issues with the application of each of the parts of the *Muscutt* test to the facts in *Bangoura*:

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<sup>65</sup> Ibid [39].

<sup>66</sup> Ibid [42].

<sup>67</sup> Ibid [46].

### **The connection between the forum and the plaintiff's claim**

The appeal judges discussed the tort that Bangoura complained of as being a “completed tort”<sup>68</sup> which took place at a time when Bangoura was not a resident of Ontario. This interpretation implies that the tort is based on the time and place of original publication in the common sense of the word, not on the relevant factor of where and when the defamatory statement entered the mind of a third person<sup>69</sup>. This finding is fundamental to the appeal judges reasoning that there was not sufficient connection between the tort and the forum in which remedies were being sought.

In no way was the tort completed. At the time of hearing and even today, the articles complained of remain available to be viewed freely in summary, and completely for a small charge, and absent the vindication of a successful judgement, Bangoura's reputation continues to be damaged by the ongoing publication of the articles complained of.

It would appear that the appeal judges applied the single publication rule. However, the single publication rule is not law in Canada<sup>70</sup>.

By using the single publication rule, the appeal judges made a basic and fundamental error in the application of Canadian law. This error alone is enough to terminally undermine the validity of their decision.

The appeal judges held that there had been no evidence of damage suffered in Ontario that was significant enough to justify an assumption of jurisdiction. This is unfortunate in that the judges have again focussed on the issue of actual financial loss to Bangoura as opposed to the less tangible or future ongoing damaged caused by the publication of the articles.

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<sup>68</sup> Ibid [22].

<sup>69</sup> *Jenner v Sun Oil* [1952] 2 D.L.R. 256 (Ont. H.C.) 529.

<sup>70</sup> Philip H Osborne, *The Law of Torts* (2<sup>nd</sup> ed, 2003).

### **The connection between the forum and the defendant**

In stating that it was not reasonably foreseeable to *The Washington Post* that Bangoura could become a resident of Ontario and suffer damages there, the Appeal judges seem to have ignored the fact that Bangoura was an international public servant and an employee of the United Nations. It would have to be reasonable to assume that Mr Bangoura could become resident anywhere and that an article published by a paper with the worldwide reach of *The Washington Post* could cause damage to his reputation wherever he may settle.

This is in addition to the fact that Mr Bangoura's family had already settled in Canada.

The appeal judges added that to hold that Bangoura's residence in Ontario was reasonably foreseeable "would mean that a defendant could be sued almost anywhere in the world based upon where a plaintiff may decide to establish his or her residence long after the publication of the defamation."

Given that the appeal judges appear to have inappropriately applied the single publication rule again, this statement is the strongest indication that the decision of the appeal judges was based purely on a policy grounds and did not have regard for a strict interpretation of libel laws or to the potential serious unfairness to the plaintiff.

### **Unfairness to the defendant in assuming jurisdiction**

In addressing this point the appeal judges simply stated that there was no evidence of any insurance against global liability for defamation. The relevance of this point in determining unfairness to the defendant is unclear and ignores relevant facts about the business of *The Washington Post*.

The business of *The Washington Post* is to publish a newspaper and a web site with national and international reach and influence.

*The Washington Post* is not a ‘local rag’, in fact, it’s primary distribution area encompasses not just the District of Columbia but also Virginia and Maryland<sup>71</sup> and it should reasonably be expected by the publishers that the articles that they publish would have impact far beyond the boundaries of these jurisdictions.

In fact, by publishing content on the Internet, *The Washington Post* is clearly indicating that they wish to have a reach far beyond that of the District of Columbia.

In the most recent annual report of The Washington Post Company, owner of *The Washington Post* and the online publishing subsidiary, Washington Post.Newsweek Interactive Company (WPNI), which is responsible for the publication of the washingtonpost.com website, it is stated with reference to the washingtonpost.com site that:

This site has developed a substantial audience of users who are outside of the Washington, D.C. area, and WPNI believes that at least three-quarters of the unique users who access the site each month are in that category. Since 2002 WPNI has required most users accessing the washingtonpost.com site to register and provide their year of birth, gender and zip code. The resulting information helps WPNI provide online advertisers with opportunities to target specific geographic areas and demographic groups.<sup>72</sup>

It would seem incredulous that it could be regarded that a media organization that directly profits from intentionally distributing and targeting its content on a global basis could be found to be unfairly prejudiced by having to contend with the impact of its actions that have implications in jurisdictions beyond it’s primary place of business.

Additionally the distributed nature of the publishing of *The Washington Post* clearly gives rise to an implication that *The Washington Post* should assume that it could be subject to legal actions in multiple jurisdictions.

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<sup>71</sup> The Washington Post Company, *Annual Report* (2004) 17.

<sup>72</sup> *Ibid* 18.

Although the newspaper's editorial office is in the District of Columbia<sup>73</sup>, the company is incorporated in Delaware<sup>74</sup>, its printing presses are in Virginia and Maryland<sup>75</sup>, the publisher of the washingtonpost.com site is in Virginia<sup>76</sup> as are its web servers<sup>77</sup>, it has contributing journalists based in countries such as Cote d'Ivoire and Kenya<sup>78</sup> and even has a permanent office in Ontario<sup>79</sup>.

Surely under these circumstances it cannot be said to be unfair that *The Washington Post* could be subjected to actions outside of the District of Columbia. Surely it is not only reasonably foreseeable by *The Washington Post* that they could be subject to actions outside of the District of Columbia, but that it was actually foreseen.

The appeal judges highly defendant friendly view of the nature of Internet publishing in *Bangoura* also seems to be at distinct odds with the earlier views of other members of the same court.

These views were espoused in *Barrick Gold Corp. v Lopehandia*<sup>80</sup>. In the opinion of Blair JA and Laskin JA "Communication via the Internet is instantaneous, seamless, interactive, blunt, borderless and far reaching."<sup>81</sup> This comment was made with reference to the case of *Vaquero Energy Ltd. v Weir*<sup>82</sup>. Although Doherty JA provided a dissenting opinion, the dissent did not extend to this part of the majority decision.

Such a divergent view of the Internet in relation to matters of defamation among colleagues of the same court certainly seems to be difficult to fathom.

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<sup>73</sup> Ibid 15.

<sup>74</sup> Ibid.

<sup>75</sup> The Washington Post Company, *Business Properties; Newspapers* <<http://www.washpostco.com/business-newspapers.htm>> at 10 December 2005.

<sup>76</sup> The Washington Post Company, *Business Properties; Interactive* <<http://www.washpostco.com/business-interactive.htm>> at 10 December 2005.

<sup>77</sup> According to a traceroute conducted by the author on 10 December 2005.

<sup>78</sup> *Bangoura v. Washington Post* (2004), 235 D.L.R. (4<sup>th</sup>) 564, 569.

<sup>79</sup> Ibid.

<sup>80</sup> (2004) 239 D.L.R. (4<sup>th</sup>) 577 (ON C.A.).

<sup>81</sup> Ibid 590.

<sup>82</sup> [2004] A.J. No 84 (QL) (Alta. Q.B.).

### **Unfairness to the plaintiff in not assuming jurisdiction**

The appeal judges stated that it was difficult to accord weight to this factor because of the lack of connection between the plaintiff and Ontario. This presumed lack of connection to Ontario is based purely on the view that the plaintiff was not resident in Ontario when the article was first published but ignores the fact that article remains available and thus continues to be made available in Ontario among other places and that Ontario is the place of residence of Bangoura at the time of bringing the action and is therefore the place where any damage to his reputation will have the greatest effect.

Once again, the appeal judges have incorrectly applied the single publication rule and in doing so have reached a conclusion that when considering proper Canadian law, the facts do not support.

### **The involvement of other parties to the suit**

The appeal judges stated that the issue of some plaintiffs residing in third jurisdictions was not a factor that favoured Ontario and that the key issue was that the main defendant was located in the District of Columbia.

Clearly, the location of the management office of the main defendant being located in the District of Columbia is a relevant factor, but there are many other places that have a jurisdictional nexus with the matter and Ontario is one as well. At worst, this would be a neutral factor.

## **The Court's willingness to recognise and enforce an extra-provincial judgement rendered on the same jurisdictional basis**

The appeal judges statement that should Ontario issue a judgement against a foreign defendant for Internet jurisdiction, the Ontario courts would be obliged to enforce similar judgements from foreign jurisdictions against Ontario publishers, also appears to be a policy argument along the lines of their argument that if they were to grant jurisdiction then publishers could be subjected to litigation anywhere in the world.

To support their argument the appeal judges referred to the case of *Leufkens v. Alba Tours International Inc.*<sup>83</sup> that dealt with an Ontario plaintiff suing a Swiss travel company for injuries sustained in Costa Rica<sup>84</sup>.

The appeal judges considered the finding in *Leufkens* that by allowing the plaintiff to proceed in Ontario, Ontario travel companies could be exposed to litigation in foreign countries for injuries sustained by customers in Ontario. They quoted a statement from *Leufkens* that travel operators who confine their activities to Ontario should be entitled to expect that claims against them would be litigated in Ontario<sup>85</sup>.

Although the appeal judges accepted that publishing on the Internet is inherently less confined than local tourism operations<sup>86</sup>, they once again relied on the lack of evidence of actual reach into Ontario by *The Washington Post* to find that the activities of *The Washington Post* were sufficiently confined to a place other than Ontario.

This interpretation seems to once again ignore the principle that libel occurs where the information enters the mind of a third party and as such the damage occurs at the place of the third party. In this way, Internet libel is totally distinguishable from a situation of

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<sup>83</sup> (2001), 53 O.R. (3d) 112.

<sup>84</sup> *Bangoura v The Washington Post* [2005] Court of Appeal for Ontario C41379 (Unreported, Armstrong JA, Lang JA, McMurty CJO, 16 September 2005) [33].

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid* [34].

physical injury and the appeal judges should never have referred to *Leufkens* as grounds for denying jurisdiction to Bangoura.

### **Whether the case is interprovincial or international in nature**

The appeal judges agreed with the judge of first instance that the international nature of the case made it harder to assume jurisdiction although the international nature alone should not be enough to discourage a court from granting jurisdiction.

### **Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere**

The appeal judges posited that the courts of the District of Columbia would not enforce a judgement by an Ontario court in this matter and that they would be fully within their rights to do so and that any such refusal would not be an example of a lack of comity as described by the motion judge.

However, the appeal judges seemed to ignore the ruling in *Wilson v Servier Canada Inc.*<sup>87</sup> that a foreign refusal to enforce an order should not be a factor that should be considered by a court, that the ability to enforce a judgement is a matter for the plaintiff to weigh up<sup>88</sup>.

The appeal judges also appeared to give no consideration at all to the comment by Pitt J that “in a libel suit generally, and specifically in this libel suit, character vindication, not money is the real objective.”<sup>89</sup>

This comment is the central issue in this part of the *Muscutt* test. Bangoura was seeking to be vindicated more than financially compensated. A judgement in his favour by an Ontario court would have provided Bangoura with the vindication that he sought. The

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<sup>87</sup> (2000) 50 O.R. (3d) 219 (Sup. Ct.).

<sup>88</sup> Ibid 229-230.

<sup>89</sup> *Bangoura v. Washington Post* (2004), 235 D.L.R. (4<sup>th</sup>) 564, 575.

ability to enforce against *The Washington Post* in any meaningful way would have been beside the point.

The appeal judges should not have ignored the value of vindication in their reliance instead on the ability to enforce as being a decisive factor.

Further, the appeal judges dismissal of *Gutnick* as matter of *forum non conveniens* is indefensible. *Gutnick* was a jurisdiction decision through and through. The issue of *forum non conveniens* was a minor part of the decision.

There are only two explanations for the view of *Gutnick* taken by the appeal judges. Either they did not read *Gutnick* or they fundamentally misunderstood the decision and its reasoning. Neither possibility reflects favourably on the court.

## **7 CONCLUSION**

Without doubt, *The Washington Post*, The Media Coalition and media and publishing companies the world over breathed a collective sigh of relief at the decision of the Court of Appeal for Ontario, but was it a good decision?

As has already been noted, in many ways the appeal decision seemed to be a matter of taking a policy position and making sure that the facts and existing law were moulded to fit the desired outcome.

Repeatedly, key facts, proper application of existing Canadian law, highly persuasive foreign cases such as *Gutnick* and the views of the motion judge were all given perfunctory treatment at best in the course of delivering a judgement that took the safe path and satisfied the desires of media companies.

Even accepting the fact that the performance of counsel for Bangoura probably contributed greatly to many of the deficiencies in the appeal decision, the decision in

*Bangoura* is deeply flawed and was clearly intended to avoid upsetting the status quo in Internet publishing and thereby dodged some of the most difficult and vexing questions yet to be resolved for issues relating to jurisdiction and the Internet.

*Bangoura* is an unfortunate example of the willingness of some Canadian courts to pander to international business interests in the face of overwhelming law to the contrary.

The acutely deficient nature of the decision in *Bangoura* therefore does little to assist in the resolution or development of the issues first addressed in *Gutnick* beyond serving as an example of the power of policy over logic in this highly contentious area of law.

## **BIBLIOGRAPHY**

### **1. Articles/Books/Reports**

Branigin, William, Rupert, James, 'Cloud of Scandal Follows U.N. Drug Control Official; Boutros-Ghali Ties Allegedly Gave Protection', *The Washington Post* (Washington D.C.), 5 January 1997, A1

Branigin, William, 'U.N. Removes African From Drug Agency; Controversial Envoy's Misconduct Cited', *The Washington Post* (Washington D.C.), 10 January 1997, A13

Osborne, Philip H, *The Law of Torts* (2<sup>nd</sup> ed, 2003)

### **2. Case Law**

*Bangoura v. Washington Post* (2004), 235 D.L.R. (4<sup>th</sup>) 564

*Bangoura v The Washington Post* [2005] Court of Appeal for Ontario C41379 (Unreported, Armstrong JA, Lang JA, McMurty CJO, 16 September 2005)

*Barrick Gold Corp. v Lopehandia* (2004) 239 D.L.R. (4<sup>th</sup>) 577 (ON C.A.).

*Beals v Saldanha* [2003] 3 S.C.R. 416

*Dow Jones & Co. Inc. v Gutnick* (2002) 210 CLR 575

*Jenner v Sun Oil Co. Ltd.* [1952] 2 D.L.R. 256 (Ont. H.C.)

*Kroch v Rossell et Cie.* (1937) 156 L.T. 379 (C.A.)

*Leufkens v Alba Tours International Inc* (2001), 53 O.R. (3d) 112

*Morguard Investments Ltd v De Savoye* (1990) 76 D.L.R. (4<sup>th</sup>) 256 S.C.C.

*Muscutt v Courcelles* (2002) 114 A.C.W.S. (3d) 634

*Upper Lakes Shipping Ltd. V Foster Yeoman Ltd.* (1993) 14 O.R. (3d) 548 (C.A.)

*Vaquero Energy Ltd. v Weir* [2004] A.J. No 84 (QL) (Alta. Q.B.)

*Wilson v Servier Canada Inc.* (2000) 50 O.R. (3d) 219 (Sup. Ct.)

### 3. Other Sources

Factum of the Intervenor, The Media Coalition, *Bangoura v The Washington Post* (Court of Appeal for Ontario, Armstrong JA, Lang JA, McMurty CJO, 16 September 2005) 23

The Washington Post Company, *Annual Report* (2004)

The Washington Post Company, *Business Properties; Newspapers*  
<<http://www.washpostco.com/business-newspapers.htm>> at 10 December 2005

The Washington Post Company, *Business Properties; Interactive*  
<<http://www.washpostco.com/business-interactive.htm>> at 10 December 2005