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The cyberboundaries of reputation: implications of the Australian High Court’s Gutnick decision for journalists.

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The cyberboundaries of reputation: Implications of the Australian High Court’s Gutnick decision for journalists

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Abstract

The High Court decision in the landmark Dow Jones v. Gutnick defamation case in December 2002 was eagerly anticipated. The unanimous decision that defamation occurs where Internet material is downloaded rather than where it is uploaded angered media proprietors and free speech advocates who predicted publishers would have to work to the lowest common denominator of the most restrictive laws throughout the world if they were to avoid litigation. This article revisits the decision and finds the post-Gutnick publishing environment may not be as confusing or as restrictive as first made out. It argues that, despite the financial and intellectual investment in the appeal, any other result was improbable. The decision will serve as a useful teaching tool and as a warning to publishers to treat their Internet products as separate entities.

Background

The jurisdictional nightmare that is the Internet and the ideological and legal chasms between America’s liberal defamation laws and those of other countries were underlined in December’s landmark Dow Jones v. Gutnick defamation case (2002). Melbourne-based mining magnate Joseph Gutnick’s victory over media company Dow Jones in Australia’s High Court initially alarmed free speech advocates and unleashed uncertainty among Internet publishers over how they might abide by defamation laws in every jurisdiction throughout the world.
Doomsayers claimed the decision signalled the end of Web-based publishing and warned of far-reaching legal implications extending to other industries, such as online gambling (Nicholas, 2003). Newspaper editorials proclaimed this to be a retrograde step by the nation's highest court and a lost opportunity to guide other nations' courts in an important new area of jurisprudence (A dark day for the Internet, 2002). The Gutnick judgment was heralded as one of the first on Internet publishing by the highest court of any nation and was expected by many to have global ramifications (Shiel, 2002, p. 3). The case was perceived as so significant to defamation litigation that 18 media corporations, including international broadcasting and publishing powerhouses CNN and News Corporation, intervened in the proceedings.

In the judgment, Dow Jones failed in its argument that an Internet-based article had not been "published" in Victoria and therefore could not be subjected to the state's defamation laws. The High Court's decision now opens the door for Mr Gutnick to seek damages in the Victorian courts, assuming he is able to prove that the article defamed him.

Mr Gutnick had taken action against the American-based Dow Jones conglomerate for an article posted on the Website of its financial magazine Barron's (http://www.barrons.com), hosted by the Wall Street Journal (http://www.wsj.com), and also published in the American Barron's magazine. He argued that a 7000-word article, "Unholy Gains", sub-headed "When stock promoters cross paths with religious charities, investors had best be on guard", implied that he was a customer of Nachum Goldberg, had laundered money and that he had tried to conceal the relationship. Goldberg, an American-based businessman, was jailed for seven years for using a bogus Jewish charity to launder more than $40 million and evade tax (Dow Jones v. Gutnick, paras 171-175). Mr Gutnick's counsel said he had never had any business dealings with Goldberg, had never laundered money and had not bought his silence.

The High Court was asked to determine whether the article was "published" in Victoria and if it should be subject to that state's defamation laws, when it originated from a country which venerated press freedom as a foundation of its First Amendment and where Internet service providers and publishers relished almost blanket immunity from defamation litigation. The story was written in New York, uploaded to a Web server in New Jersey, and downloaded by subscribers throughout the world, including Victoria, Australia. The court heard that the article was published in about 305,000 copies of the print edition of the Barron's magazine, but it was proven that only five had made their way to Victoria. The key issue, however, was whether Mr Gutnick could sue over the Internet version, which had 550,000 subscribers internationally, of whom 1700 had Australian-based credit cards (Dow Jones v. Gutnick, paras 97 and 169).

High-profile international QC Geoffrey Robertson argued for publisher Dow Jones that 98 per cent of those who had read the material lived in America, so the matter should be heard there. He also championed a single jurisdiction
rule, whereby media companies would be subjected to only one set of laws, in the country in which their Internet server was located, to avoid exposing publishers to “every jurisdiction” (Dow Jones v. Gutnick, para 191). Mr Robertson argued that Dow Jones had no active intention to publish the story in Victoria as it had been automatically downloaded from the Internet. In an earlier application for a stay of proceedings in the Victorian Supreme Court (which was unsuccessful, prompting Dow Jones’s High Court challenge), he went as far as suggesting that the Internet be declared a libel-free zone (Gutnick v Dow Jones, 2001, para 20).

Where does a defamation plaintiff have a cause of action?

The question of jurisdiction – which brings into play issues of “forum-shopping” by litigants and exploitative server location by publishers – was the crux of this case. While traditional media are controlled through licence conditions, import controls, domestic censorship and criminal laws, the Internet is global (and therefore transjurisdictional) and geographic boundaries have become problematic (Coroneos, 2000).

The seven High Court judges unanimously found that Mr Gutnick had the right to sue in Victoria, his place of residence and where he was best known. The leading joint judgment of Chief Justice Gleeson and Justices McHugh, Gummow and Hayne (hereafter “the leading judgment”) stated:

The spectre which Dow Jones sought to conjure up in the present appeal – of a publisher forced to consider every article it publishes on the worldwide Web against the defamation laws of every country from Afghanistan to Zimbabwe – is seen to be unreal when it is recalled that in all except the most unusual of cases, identifying the person about whom material is to be published will readily identify the defamation law to which that person may resort. (Dow Jones v. Gutnick, para 54)

Internet advocates Electronic Frontiers Australia immediately labelled the decision the “But what will they think of this in Zimbabwe?” factor (Jackson & Fitzsimmons, 2002, p. 4). A News Limited spokesman said international publishers would be forced to “edit their work to account for Australia’s restrictive defamation laws”. The decision would effectively allow Victoria to regulate other international defamation jurisdictions and would threaten America’s freedom of speech, the spokesman said (Jackson & Fitzsimmons, 2002, p. 4).

But a key tenet of the High Court ruling was that, as Mr Gutnick was pursuing Dow Jones only for damages he had suffered in Victoria, and was not making a sweeping international claim, the Victorian Supreme Court had the right to decide the matter. (In principle, defamation plaintiffs are allowed to sue wherever they can establish a cause of action, meaning that under Australian
law they could, in fact, sue across multiple jurisdictions for the single publication. This differs from US law, where 27 states have legislated that defamation is actionable only once under a special “single publication” rule (Dow Jones v. Gutnick, paras 29-37.).

While the justices discussed this point, it was not at issue because Mr Gutnick had already given an undertaking to the Supreme Court to sue only in Victoria, and sought:

to have his Victorian reputation vindicated by the courts of the State in which he lives and that he is indifferent to the other substantial parts of the article and desires only that the attack on his reputation in Victoria as a money-launderer should be repelled and his reputation re-established. (Dow Jones v. Gutnick, at para 6)

Justice Gaudron put it this way:

As the respondent has limited his controversy with the appellant to the publication of defamatory matter in Victoria, the controversy is one that can be determined in its entirety by the Supreme Court of that state and there can be no question of multiple suits in different jurisdictions. (para 65)

In the earlier Victorian Supreme Court judgment, which the High Court upheld, Justice Hedigan emphasised that the “critical issue is where and by whom was it published for the purposes of the law of defamation”.

I have concluded that the law in defamation has been for centuries that publication takes place where and when the contents of the publication, oral or spoken, are seen and heard and comprehended by the reader or hearer. (Gutnick v. Dow Jones, para 60)

He continued:

Under the draft Hague Convention, a plaintiff will be able to recover the whole of the damages suffered by reason of defamatory Internet publication by suing in the courts of the State in which either the defendant or the plaintiff is habitually resident. (at para 74)

Nations have been negotiating the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, which could be extended to cover Internet publishing (Cant, 2003). The treaty has been on the drawing board for almost a decade and aims to formulate uniform global rules.

The concept of courts having jurisdiction over domestic smears without considering alleged harm further afield is not new. A 1982 Civil Jurisdiction
and Judgments amendment to a 1968 Brussels Convention on Jurisdictions and Judgments ruled that damages could be sought where a person lived or where they had a reputation (Edwards, 2000, p. 257). In a May 2000 UK case, Berezovsky v Michaels (interestingly, also defended by Geoffrey Robertson, QC), the House of Lords decided that a Russian businessman could use the English courts to sue the American Forbes magazine for defamation suffered in England, even when Forbes' British circulation amounted to only 0.25 per cent of its total distribution. In an earlier appeal to the Court of Appeal (Berezovsky v Forbes), Lord Justice Hirst said:

So far as the other two jurisdictions are concerned, the United States, which is Mr Robertson's first choice, is undoubtedly the country with which the defendants have by far the closest connection, and I accept that this is an important factor. However, the evidence shows that the plaintiffs' connections with the U.S. are far less strong than their connections here, and there is also the important factor that an American jury is far less well equipped than an English jury to assess the impact of the article in England, and the appropriate measure of damage having regard to the extent of the damage caused to each plaintiff in England.

On appeal, the House of Lords decided by majority that it was "perfectly possible for a foreign claimant to bring libel proceedings against a foreign publisher if the claimant has some reputation in England and that publication of the defamatory publication, however limited, occurred in England" (Berezovsky v Michaels, per Lord Nolan).

The Australian High Court in the Gutnick case reaffirmed this decision. Justice Ian Callinan expressed it this way: "If people wish to do business in, or indeed travel to or live in or utilise the infrastructure of different countries, they can hardly expect to be absolved from compliance with the laws of those countries." (Dow Jones v Gutnick, para 186)

He continued: "For myself I would see no immediate reason why, if a person has been defamed in more than one jurisdiction, he or she, if so advised might not litigate the case in each of those jurisdictions." (para 202)

Internet technology and the act of publishing

The High Court dismissed Dow Jones' contention that the act of publication occurred at the place where an Internet publisher uploaded material to the Web, in this case to a server in New Jersey.

In the Victorian Supreme Court trial (Gutnick v Dow Jones), counsel for Dow Jones Geoffrey Robertson, QC, had made much of the 1849 case of the Duke of Brunswick in which it was ruled "the act (of publishing) is complete

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by the delivery ... before any reading takes place whether or not any reading takes place". (Day 2 transcript, 2001)

Robertson gave the hypothetical case of a bookseller who sells a book in New Jersey to a customer who in turn flies to Victoria. He said the fact that the defamatory material in the book was not read until outside the jurisdiction had no bearing on the jurisdiction in which it was published – in this case New Jersey. The Web subscriber was simply “retrieving one copy of the book, bringing it back to Victoria through a computer so it can be read”, Robertson contended (Day 2 transcript, 2001).

The leading judgment in the High Court case resisted this interpretation and restated the traditional interpretation of defamation law by reaffirming: “Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener or the observer.” (Dow Jones v. Gutnick, para 26) The justices described the act of publication as a “bilateral act”, requiring the receiving party’s involvement before defamation could be said to have occurred. Thus, merely launching defamatory material on to a computer server was not in itself sufficient to constitute defamation. It had to be actually read by somebody for harm to reputation to have occurred. In the leading judgment, the High Court ruled:

In defamation, the same considerations that require rejection of locating the tort by reference only to the publisher’s conduct, lead to the conclusion that, ordinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principal focus of defamation, not any quality of the defendant’s conduct. In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a Web browser to pull the material from the Web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed. (at para 44)

In his judgment, Justice Callinan said Dow’s submission that publication occurred where it was first published, could “not withstand any reasonable test of fairness”. If it were accepted, publishers would be free to manipulate the uploading and location of data so as to insulate themselves from
liability in Australia, or elsewhere, for example, by using a Web
server in a “defamation-free” jurisdiction or one in which the
defamation laws are tilted decidedly towards defendants. (*Dow
Jones v. Gutnick*, para 199)

Dow Jones had also tried to convince the court that the Internet was such a
revolutionary form of communication it required a review of the basic prin-
ciples of place of publication with regards to defamation. The court remained
un convinced. Justice Michael Kirby pointed out that, despite the novel nature
of the Internet,

it also shares many characteristics with earlier technologies that
have rapidly expanded the speed and quantity of information
distribution throughout the world. I refer to newspapers distrib-
uted (and sometimes printed) internationally; syndicated tele-
graph and wire reports of news and opinion; newsreels and film
distributed internationally; newspaper articles and photographs
reproduced instantaneously by international telefacsimile;
radio, including shortwave radio; syndicated television pro-
gr ammes; motion pictures; videos and digitalised images; tele-
vision transmission; and cable television and satellite broad-
casting. (*Dow Jones v. Gutnick*, para 125)

*Other Internet decisions*

The Gutnick Supreme Court and High Court outcomes provide an interest-
ing contrast with an earlier NSW Supreme Court case, *Macquarie Bank v.
Charles Berg*. In this case, an acquaintance of a disgruntled Macquarie Bank
employee allegedly posted a Website called Macquarieontrial.com, which stat-
ed his grievances against the bank “from the perceived safety of a USA server”
(Edwards, 2000, p. 255). In a June 1999 hearing, in which Macquarie sought
an injunction, not only did NSW Supreme Court Justice Simpson refuse to
restrain publication of the site, she also rejected jurisdiction on the grounds it
would “superimpose the law of NSW relating to defamation on every other
state, territory and country of the world”.

“It may well be that, according to the law of the Bahamas, Tazhakistan or
Mongolia, the defendant had an unfettered right to publish the material,”
Nevertheless, Justice Smart, who later ruled on this case in late 2002, distin-
guished the publication in this case from that in the Gutnick case on the basis
that this Website was openly available for all to see — those interested sought it
out and “pulled” it to themselves, whereas the Dow Jones publication was sub-
cr i ber-based and was, in fact, “pushed” upon the subscribers (*Macquarie

The Gutnick decision may be cited as a case of persuasive influence when other transjurisdictional Internet defamation cases are heard, but whether it will be used as a precedent in overseas decisions is debatable. Two American defamation cases in the immediate wake of the Gutnick decision indicate that American courts may be headed in a different direction. On December 13, 2002, America’s Court of Appeals for the 4th Circuit overruled a lower District Court decision which found that a Virginian prison warden could sue for defamation in Virginia, his home state, against two Connecticut newspapers for articles posted on the Internet from Connecticut. In Young v. New Haven Advocate, Young, the warden, sued the papers over stories discussing alleged “harsh conditions” at his prison, which had taken in a large number of inmates from overcrowded Connecticut facilities.

The US Court found that the Web stories “did not have any content with a connection to readers in Virginia”. It dismissed the action because the newspapers “did not post materials on the Internet with a manifest intent of targeting Virginia readers” and that the newspapers “do not have sufficient Internet contacts with Virginia to permit the District Court to exercise specific jurisdiction over them”.

The court considered the publisher’s commercial presence and whether it had intended to target an audience, whereas, conversely, the Australian High Court looked at where the allegedly defamed person felt the harm was inflicted upon them. (Ross, 2003, p. 58)

In the second American case, of Revell v. Lidov on December 31, 2002, the US Court of Appeals in the 5th Circuit ruled that a former FBI official could not bring a libel suit in Texas over a story posted on a Columbia University Website (RCFP, January 2003). In this case, Oliver Revell had attempted to sue Hart Lidov, a Harvard professor, and Columbia University over an article Lidov wrote which was posted on Columbia’s Web page, about the terrorist bombing of Pan Am Flight 103, which exploded over Lockerbie, Scotland, in 1988. The story alleged that Mr Revell and other members of the Reagan administration had had previous knowledge of the attack and had failed to stop it, and that Mr Revell had ensured his son, who was due to board Flight 103, changed flights. Mr Revell had sought substantial damages, claiming his reputation had been smeared in Texas, where he lived at the time. But the court found his case could not be brought in Texas, where Columbia’s Website had fewer than 20 subscribers, as the story did not contain references to Texas and did not specifically target a Texas audience. “If you are going to pick a fight in Texas, it is reasonable to expect that it be settled there,” the court said. “But we look to the geographic focus of the article, not the bite of the defamation, the blackness of the calumny or who provoked the fight [to determine where the suit should be brought].” (RCFP, January 2003)
England’s Law Commission also considered Internet defamation issues in a preliminary report on the issue in December 2002 (Law Commission, 2002). Like Australia’s High Court, it took a conservative line by recommending against reform in the area of jurisdiction, suggesting any solution would require an international treaty (Law Commission, 2002, p. 47). However, it recommended the review of the liability of Internet service providers and the position of archived Internet publications, which at the moment face a new cause of action each time the archive is accessed.

Implications for the news media

While it appears that the Gutnick decision has more potential repercussions for international publishers whose racier, more liberal material is some distance from complying with Australia’s comparatively strict libel laws, it has some key implications for domestic editors and publishers. Those few publishers, however, who already distribute their material nationally should not be greatly affected, as they are already forced to comply with Australia’s heterogeneous myriad of state laws. For example, Australian Associated Press (AAP) has been aware of the potential for litigation and has had “risk control procedures” in place for its news content for years (Jackson & Fitzsimmons, 2002, p. 4). So too has The Australian newspaper, which brings out different state-based editions, and the major television networks.

Newspapers publishing Internet versions need to assess them legally in their own right for each edition, rather than just automatically duplicating the print edition in an online format. Many smaller newspapers host “shovelware” Websites, online clones of their print versions. This is a dangerous practice in the light of the Gutnick decision, which basically says that media outlets are opting to publish wherever a reader chooses to download their products. This carries all sorts of risks, particularly where they are featuring stories about people from other states which might be safe when published in their own jurisdictions, but might be more difficult to defend when published in their place of residence. As Pearson (2003, p. 18) suggests, newspapers which do not have the resources to vet their Web editions separately might be better off without them.

Newspapers choosing to continue with their Website publishing need to take special note of the place of residence of the individuals mentioned in their stories and think through the defamation defences available in the states where their predominant reputation resides. As Justice Michael Kirby said in Dow Jones v. Gutnick (para 151): “The material has to be accessed or communicated in a jurisdiction where the plaintiff has a reputation. That will usually be the place where the plaintiff is resident.” Of course, there will be some individuals who have substantial reputations in a number of jurisdictions, such as prominent politicians who might choose to sue in their home state or in Canberra, or prominent sports people who might have grown up in one jurisdiction but have

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their present base and business interests in another. In fact, Justice Ian Callinan (Dow Jones v. Gutnick, para 202) remarked that he felt litigants should have the right to sue anywhere they had a reputation, so the point remains contentious. Editors need to bear in mind the locations where individuals have a significant reputation when they are assessing the defamation implications of a Web-based story.

The Gutnick decision may also have implications for other laws, such as contempt of court and parliament. Now the Web product is deemed to be published wherever it is downloaded for defamation purposes, the Internet version of newspapers should not contain details of sub judice criminal matters in other states, identification of interstate jurors or sexual offence victims (or even those accused of sexual offences in some states); or details of parliamentary committee deliberations in other states. Many other state-based laws can also enter the equation. The print version might be safe under the home state’s laws, but the Website might render the publisher liable to prosecution for contempt in another jurisdiction, a point highlighted by the NSW Law Reform Commission in its discussion paper on Contempt by publication (2000, para 3.8).

Despite the concern at the time of the decision that litigants would start chasing Australian publishers for defamation on foreign turf, there is little practical likelihood of that becoming a major concern, other than for the largest media conglomerates. There is the huge challenge of collecting damages in the event of a transnational court victory, a point unpleasantly familiar to a successful UK plaintiff who sought and won damages for libel from an American company under Britain’s court system – but has yet to cash in (Matusevitch case, 2000). Dow Jones’ counsel, Geoffrey Robertson, had raised the spectre of unenforceability in the earlier Victorian Supreme Court trial, to which Justice Hedigan replied: “The issue is only relevant if the defendant declines to honour any judgment obtained which would be an improper course and damaging to the defendant’s reputation world-wide.” (at para 115) Nevertheless, it is unlikely a small regional defendant such as the Ballarat Courier would be eager to rush to Zambia to pay a defamation settlement and, equally, it is unlikely that the Zambian plaintiff could expeditiously pursue their judgment in Australia. As Justice Kirby stated: “The costs and practicalities of bringing proceedings against a foreign publisher will usually be a sufficient impediment to discourage even the most intrepid of litigants.” (Dow Jones v. Gutnick, para 165) It is even more problematic if the publisher has no assets or business base in the jurisdiction where the action is being brought. That is why major corporations and wire agencies with diverse multinational interests have more to fear from this prospect than smaller operations. News Corporation, for example, with interests in several countries including China, might be vulnerable in this regard.

American academic Lilian Edwards cites the quandary:

When a defendant lives abroad, judgment will still need to be recognised and enforced by the courts of the defendant’s resi-
dence, unless he has assets in the pursuer's country of residence. Many countries may choose not to recognise, either because they have no clear mechanisms in place for recognition of foreign decrees, or because the legal basis of a judgment runs against principles of their own legal system such as an over-riding constitutional preference for freedom of expression. (Edwards, 2000, p. 260)

An important repercussion of the Gutnick decision will be its impact on Australia's international reputation on censorship issues. When the Australian Parliament approved the 1999 Broadcasting Services Amendment (Online Services) Act, amidst a cornucopia of assurances that it would clean up Internet pornography and violence for the Australian public, visiting American Civil Liberties Union Professor Nadine Strossen described Australia as "a global village idiot" (Forder & Quirk, 2001, p. 287). The Act "undoubtedly" prompted some Website hosts to move their operations offshore (Forder & Quirk, 2001, p. 293). This also occurred in England, when several servers, operated by HavenCo (http://www.havenco.com), began operating from ships and a rig in "Sealand", six miles off the English coast, in a bid to exploit jurisdictional loopholes. Its owners claimed Sealand was an independent principality and not subject to the same laws as nearby England (Mariano, 2001). The fallout from the Gutnick decision on international perceptions is yet to be fully gauged, though initial reactions from leading international media outlets were negative. They included headlines like "Sue you" in The Times of London (2002, December 11), "A blow to online freedom" in the New York Times (2002, December 11), and "Internet libel fence falls" in the Washington Post (2002, December 11).

Conclusion

For all its fanfare, the Gutnick decision might be most useful to journalism educators for its expression of the basic traditional principles of defamation law. The High Court justices' logical exposition of fundamental ingredients of defamation such as the act and place of publication make for excellent reading for students and journalists trying to come to grips with the basic definitions of this most elusive and often contentious tort.

Its most important legacy for media practitioners might be the reminder to publishers that the Internet versions of their products are different legal entities from their print-based publications and need to be treated as such. The larger media outlets with expert legal advice were already on notice about this, but now the smaller operators need to review their Internet publications, particularly with regard to defamation and contempt.

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