Gutnick Shows Need for New International Jurisdictional Principles

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Recent court decisions in Australia and the United States illustrate the difficulties of reaching a consensus that reconciles existing jurisdictional law with the realities of Internet publishing. As this article reports, publishers may be haled into court in another state or even another country where they have minimal, if any, contact. These decisions highlight the need for new international jurisdictional principles, such as those proposed at a recent meeting of the International Bar Association in Durban, South Africa. Otherwise, publishers will be forced to deal with foreign courts that treat the Internet as a local phenomenon.

Dow Jones & Co. v. Gutnick

The recent decision handed down by the High Court of Australia, Australia's highest Court of Appeal, in *Dow Jones & Co. v. Gutnick*[1] has raised concerns among legal and publishing communities. Suing in the Supreme Court of Victoria, businessman Joseph Gutnick sought damages for defamation in relation to online material published in *Barron's Online* magazine, owned by the U.S. company Dow Jones. The material in dispute was only accessible via subscription and was downloaded by a relatively small number of residents of the State of Victoria. Dow Jones sought to stay the proceedings on the grounds that the Victorian Supreme Court had no jurisdiction to hear the action. The High Court of Australia grappled with two key issues:

- Where did "publication" occur?
- Is the Australian court an appropriate and convenient forum for the matter to be heard?

The High Court unanimously endorsed the trial judgment of Justice Hedigan in finding that because publication had occurred in Victoria, the court had jurisdiction as an appropriate and convenient forum for the defamation action.

Dow Jones had argued that the material at issue was published in New Jersey and that, therefore, the law of New Jersey should govern all questions of substance in the proceeding. Some 99 percent of the print edition of *Barron's* 300,000 circulation was in the United States. The online site had some 500,000 paying subscribers, of whom only a very small number were in Victoria. The High Court maintained that it was aware of the far-reaching implications of any decision that it made and of the need to protect publishers. However, the Court maintained that this objective could be achieved without creating jurisdictional rules that would effectively enforce a single rule of conduct for publishers. The majority judgment of Justices Gleeson, McHugh, Gummow, and Hayne stated:

> [T]hose who would seek to order their affairs in a way that will minimise the chance of being sued for defamation must be able to be confident in predicting what law will govern their conduct. But certainty does not necessarily mean singularity. What is important is that publishers can act with confidence, not that they be able to act according to a single legal system, even if that system might, in some sense, be described as their "home" legal system. Activities that have effects beyond the jurisdiction in which they are done may properly be the concern of the legal systems in each place. In considering where the tort of defamation occurs it is important to recognise the purposes served by the law regarding the conduct as tortious: purposes that are not confined to regulating publishers any more than they are confined to promoting free speech.[2]

Thus, the Court considered that it could claim extraterritorial jurisdiction if sufficient checks were in place to provide publishers with the "confidence" to predict what law applied to their conduct.

The Court explicitly rejected Dow Jones's contention that "publication," for the purposes of defamation law, occurs at the time and place where the material downloaded. The majority stated:

> Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act—in which the publisher makes it available and a third party has it available for his or her comprehension.[3]

The Court accepted that the Internet represented a considerable technological advance but denied that the Web provided cause for a reassessment of the laws of jurisdiction as they applied to defamation law:

> In the course of argument much emphasis was given to the fact that the advent of the World Wide Web is a considerable technological advance. So it is. But the problem of widely disseminated communications is much older than the Internet and the World Wide Web. The law has had to grapple with such cases ever since newspapers and magazines came to be distributed to large numbers of people over wide geographic areas.[4]

In such cases, the location of the tort is ordinarily found at the place where the damage to reputation occurs. According to the long-established "comprehension" rule, that will ordinarily be where the allegedly defamatory material is available in comprehensible form—assuming, of course, that the person defamed has in that place a reputation—that 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.[5]

Turning its attention to the case at hand, the Court noted that Gutnick confined his claim in the Supreme Court of Victoria to the alleged damage caused to his reputation in Victoria because of the publication that occurred in that state. Thus, the place of commission of the tort was readily located as Victoria. According to the Court, the State of Victoria is where the alleged damage to

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Gutnick's reputation occurred because the publications that he complained about were comprehensible to readers in Victoria. The Court said that it is his reputation in that state, and only that state, that Gutnick sought to vindicate; therefore, the substantive issues arising in the action should be determined according to the law of Victoria.

The Court felt that the law already provided sufficient checks to ensure that the implications of such a ruling would not be exploited by opportunistic plaintiffs. The Court acknowledged that "[m]ore difficult questions may arise if complaint were to be made for an injury to reputation which is said to have occurred as a result of publications of defamatory material in a number of places."[6] But the Court pointed out that in a case where multiple actions are brought, questions about vexation would arise, and an application for a stay of proceedings or antisuit injunction could be instituted. Moreover, the Court felt that if all of the publisher's conduct has occurred outside the jurisdiction, this would be a relevant consideration in determining whether the publisher has a defense to the claim made.

Finally, the Court pointed out that a claim for damage to reputation will warrant an award of substantial damages only if the plaintiff has a reputation in the place where the publication is made. The value of a judgment would also be affected by whether it can be enforced in a place where the defendant has assets. According to the Court, plaintiffs are unlikely to sue for defamation published outside the forum unless a judgment obtained in the action would be of real value to the plaintiff. In light of these limitations, the Court concluded that

> 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 World Wide 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.[7]

Implications of *Gutnick*

Gutnick makes quite clear that—when material is placed on a subscriber's website and accessed and read by subscribers within an Australian state, a court of that state has jurisdiction to hear an action for defamation concerning the material.

Gutnick has significant and obvious implications for Internet publishers. Before placing potentially defamatory material on a website, foreign publishers should seek advice about whether the material is defamatory under Australian law. Confusing the matter is the fact that defamation laws vary among the states within Australia. If the material is likely to be defamatory, the decision to publish should turn on advice regarding whether an argument of forum non conveniens can be sustained. If the people in question live in Australia and their reputations lie primarily within the country, the decision to publish would be risky at best.

Moreover, Australian residents do not pose the only risks. Plaintiffs can actually seek to avail themselves of the defamation laws in a country even though they do not reside there. In an era of globalization, companies have reputations in many countries. If it is likely that a forum non conveniens argument would succeed, the publisher should also seek advice as to whether a defamation suit is likely to succeed in the court that it has nominated as the more appropriate forum.

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Gutnick is significant given that the law of defamation in the United States is considerably more favorable to defendants. The comments of Stuart Karle, general counsel of Dow Jones in New York, are of interest:

> The Justice most hostile to Dow Jones' arguments stated that he saw this case as an attempt by an American publisher "to impose upon Australian residents for the purposes of this and many other cases, an American legal hegemony in relation to Internet publications" and to confirm upon the United States "an effective domain over the law of defamation, to the financial advantage of publishers in the United States."[8]

However, the real hegemony permitted by this decision is that of libel law of Victoria over a communication that beyond dispute was largely published in America by an American magazine directed at Americans and concerned exclusively with issues relevant to American readers. The Australian High Court may regard publication as a local issue, but *Gutnick* leaves a set of global problems in its wake.

Young v. New Haven Advocate

At the same time (December 2002), the U.S. Court of Appeals for the Fourth Circuit arrived at a rather different conclusion when considering much the same issues in *Young v. New Haven Advocate*.[9] The question for determination was whether two Connecticut newspapers and some of their staff subjected themselves to personal jurisdiction in Virginia by posting on the Internet news articles that, in the context of discussing the State of Connecticut's policy of housing its prisoners in Virginia institutions, allegedly defamed the warden of a Virginia prison. The U.S. District Court of Western Virginia denied the defendants' motion to dismiss, concluding that it could exercise personal jurisdiction over them under Virginia's long-arm statute because "the defendants' Connecticut-based Internet activities constituted an act leading to an injury to the plaintiff in Virginia."[10]

The Fourth Circuit relied on another recent decision that it had handed down on the question of jurisdiction and the Internet. In *ALS Scan, Inc. v. Digital Service Consultants, Inc.*,[11] the appellate court considered the difficulties resulting from applying traditional jurisdictional rules when

> an out-of-state citizen, through electronic contacts, has conceptually "entered" the State via the Internet for jurisdictional purposes. In that case, the Court held that "specific jurisdiction in the Internet context may be based only on an out-of-state person's Internet activity directed at [the forum state] and causing injury that gives rise to a potential claim cognizable in [that state]."[12]

Applying *ALS Scan*, the court in *Young* decided that the test for jurisdiction required asking whether the newspapers manifested an intent to direct their website content, which included certain articles discussing conditions in a Virginia prison to a Virginia audience. As the court recognized in *ALS Scan*, the act of placing information on the Internet is not sufficient by itself to subject the publisher to personal jurisdiction in each state where the information is accessed:

> Thus, the fact that the newspapers' websites could be accessed anywhere, including Virginia, does not by itself demonstrate that the newspapers were intentionally directing their website content to a Virginia audience. Something more than posting and accessibility is needed to "indicate that the [newspapers] purposefully (albeit electronically) directed [their] activity in a substantial way to the forum state" . . . The newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers.[13]

The court then noted that the newspapers appeared to maintain their websites to serve local readers in Connecticut, expand the reach of their papers within their local markets, and provide their local markets with a place for classified ads. Moreover, the focus of the article was the Connecticut prisoner transfer policy and its impact on the transferred prisoners and their families in Connecticut, and it could hardly be said to be targeting Virginia readers. Thus, the Fourth Circuit concluded that the newspapers did not have sufficient Internet contacts with Virginia to permit the district court to exercise specific jurisdiction over them.

The anomalies between *Young* and *Gutnick* are readily discernible. If the *Young* test had been applied by the Australian High Court, jurisdiction would have been denied. Arguably, the article in *Barron's Online* hardly demonstrated an intent to target readers in Victoria. In fact, the article was explicitly directed at American readers, according to Dow Jones's counsel, Geoffrey Robertson, QC, providing them with an analysis of Gutnick's business activities in light of the expansion of his operations in the United States.

Thus, publishers in the United States may find that plaintiffs are barred from bringing an action against them in any state other than that to which the Internet publication was targeted—unless such plaintiffs have a reputation in Australia; then they will be free to bring the same action in an Australian court, where the defamation laws are notoriously conservative.

Revell v. Lidov

In a decision reflecting the reasoning of *Young*, the U.S. Court of Appeals for the Fifth Circuit ruled in *Revell v. Lidov* on the last day of 2002.[14] The claim related to an alleged defamatory article published on a bulletin board on the website of the School of Journalism at Columbia University. The court held that the publication must in some way connect with the forum. The publisher's conduct and connection with the forum should allow it to reasonably anticipate that it would be sued in that forum; therefore, jurisdiction was denied.

Although the plaintiff lived in Texas, the defendant had never been to Texas, had not conducted a business in that state, and was apparently unaware that the plaintiff resided in Texas. The Internet site had only twenty Internet subscriptions in Texas. The article contained no reference to Texas or the plaintiff's activities there. It was not directed at Texas readers, as distinguished from readers in other states. Texas was not the focal point of the article.

Based on the Due Process Clause of the Fourteenth Amendment, the Fifth Circuit rejected the view taken in *Gutnick* that a forum has jurisdiction simply if an Internet site is accessed within that forum.

The Durban Principles

In *Gutnick*, only Justice Kirby was prepared to acknowledge that the advent of the Internet meant that jurisdictional principles had to be reformulated in order to provide publishers with some measure of certainty and protection. However, in Kirby's view that was a task best left to the legislature rather than the judiciary. Given the concern that the *Gutnick* outcome has aroused in legal and publishing circles, the need for the international community to endorse and implement a united approach on the question of jurisdiction on the Internet is pressing.

One potential model emerged from the October 2002 International Bar Association conference in Durban, South Africa, at which media lawyers from more than twenty-one countries discussed the issues relating to jurisdiction on the Internet. The attending media lawyers recognized that the exposure of online publishers to defamation actions was significant. Although plaintiffs might not be able to recover significant damages because of the limited nature of the publication in that plaintiff's jurisdiction, legal costs in defending the claim would be considerable.

The media lawyers produced a draft known as the Durban Principles, which includes the following points:

1) A court is competent to determine a claim arising from the content of an Internet posting if the court is in any of the following:
   a) a forum that is the domicile of the claimant,
   b) a forum that is the domicile of the defendant, or
   c) a forum to which the claimant and defendant expressly have consented and to which there is a reasonable nexus.
2) For the purposes of determining any claim arising from the content of an Internet site posting, a competent court shall apply the substantive law of the jurisdiction with the most significant connection to the Internet site, without regard to conflict-of-law rules. For a site that does not involve the sale of goods or services apart from content, ordinarily that jurisdiction will be one in which the editorial work on the content is completed (i.e., where the decision to publish is made) whether or not that is the forum in which the content is uploaded or stored.
3) In any claim arising from the content of an Internet site posting, it shall be a complete defense to liability if within twenty-four hours of receiving a complaint as to the content, the Internet content provider posts a notice that a complaint has been made and provides a link to the text of the complaint on its site.[15]

Importantly, this model would not have prevented Gutnick from suing Dow Jones in Australia. It would, however, prevent opportunistic nonresidents from going to Australia to sue, seeking to capitalize on that country's conservative defamation laws. It is, therefore, worthy of commendation to the international community.

Endnotes

1. Dow Jones & Company, Inc v. Gutnick [2002] HCA 56 <www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html> (10 December 2002).
2. *Id.* at 24.
3. *Id.* at 26.
4. *Id.* at 38.
5. *Id.* at 44.
6. *Id.* at 49.
7. *Id.* at 54.
8. Stuart Karle, *Dow Jones & Co. v. Gutnick*—Australian High Court: Publishers should keep their assets, if not their articles, in the United States, LDRC MEDIALAWLETTER, Dec. 2002, at 5.
9. No. 01–2340, 2002 U.S. App. LEXIS 25535 (4th Cir. Dec. 13, 2002).
10. *Id.* at *8.
11. 293 F.3d 707 (4th Cir. 2002).
12. *Id.* at 714.
13. *Young*, 2002 U.S. App. LEXIS 25535, at *16–*17.
14. No. 01–10521, 2002 U.S. App. LEXIS 27200 (5th Cir. Dec. 31, 2002).
15. More information about the Durban Principles is available from the author.