Defamation on the internet - Gutnick v Dow Jones

Danet Khuth and Melissa Lessi

Danet Khuth is a third year law student studying at the University of Technology, Sydney. Melissa Lessi is a final year law student from the University of Sydney.

Overview

On 28 August 2001, Justice Hedigan of the Victorian Supreme Court handed down the landmark decision of *Gutnick v Dow Jones and Company Inc.*[1] The case involved Australian business, sporting and religious figure, Joseph Gutnick, who brought proceedings against US media giant, Dow Jones, alleging that an article published in Dow Jones' magazine, "Barrons", defamed him. The article was produced in print form and was also available for download by subscribers at Dow Jones' website. Dow Jones applied to the Supreme Court of Victoria to either dismiss the proceeding because the Victorian Supreme Court lacked jurisdiction or to transfer the case to the New Jersey for hearing on the basis that it would be the more appropriate forum. The advantage of having the case tried in New Jersey rather than Victoria was the real likelihood that Gutnick's claim would fail under the US' First Amendment Rule.

It was held that the publication of arguably defamatory material on the internet occurred in Victoria, where the material was downloaded, even though the web server was located in the US. Joseph Gutnick was therefore granted the right to sue Dow Jones under Victorian Law. Moreover Victoria was also held to be the more appropriate forum over New Jersey to try the case because Joseph Gutnick and his business were based in Victoria, where the alleged defamation ultimately occurred.

Facts

The case revolved around an article entitled "Unholy Gains" published in Barrons magazine which purportedly defamed Joseph Gutnick's reputation. Gutnick claimed that the article stated that he was the biggest customer of convicted money-launderer and tax evader, Nachum Goldberg. This statement, and the accompanying clear pictures of both Gutnick and Nachum, implied that Gutnick was masquerading as a respectable citizen when he was a tax evader who laundered large amounts of money through his close association with Goldberg.

Gutnick asserted that Dow Jones caused the article to be published in Victoria via the internet in permanent article form making it available to Victorian internet users, including brokers and financial advisers, who did or could have, obtained access to the article. Only a small number of the printed form of the relevant copy of Barrons actually came to Australia, but a few of them were sold in Victoria.

Issues

The two main arguments put forward by the Dow Jones was one of jurisdiction and *Forum non conveniens*.

Jurisdiction Issue

Dow Jones' first argument was based on its assertion that Victoria had no jurisdiction to entertain the proceeding because the internet publication occurred when and where the material was uploaded, that is, when it was pulled from the server in New Jersey by a request emanating from a Victorian web browser. However, Justice Hedigan held, consistent with the traditional law of defamation, that publication takes place where and when the contents of the publication are seen and comprehended, that is the publication occurred at the place of downloading.

It was also argued by the defendant that the world wide web was a system unlike any other and therefore defied traditional analysis. Justice Hedigan held that the law must nevertheless cope with it and that in any case the article was not a 'world wide web publication' but an 'internet publication' since access to the publication was limited by the imposition of passwords and charges.[2]

Counsel for Dow Jones briefly dabbled with the proposition that cyberspace was a defamation-free zone, but the argument was not explored.[3]

Forum non conveniens

On failure of the previous argument, Dow Jones submitted that New Jersey was prima facie more substantially connected than Victoria and that the Court should exercise its power[4] to stay a proceeding and allow the case to be transferred to New Jersey on the basis of *forum non conveniens*.[5] Justice Hedigan applied the test at common law, that is, "whether it has been shown that the jurisdiction under attack is clearly an inappropriate forum"[6] and rejected the defendants submission based on the following reasons:

- the publication of the alleged defamatory statements was in Victoria;
- the plaintiff was a resident of Victoria with his business headquarters, family, social and business life are based in Victoria;
- the plaintiff was only concerned with the part of the article which defamed him as a money-launderer which attacked his reputation in Victoria; and
- the plaintiff has not undertaken to sue in any other place other than Victoria.

He held that these reasons easily defeated the defendant's claim that New Jersey would be the more appropriate forum. Accordingly, Dow Jones' application for a stay and transfer of the proceedings was denied.

Appeal

The defendant appealed the decision of Justice Hedigan but it was unanimously upheld by Justices Buchanan and O'Bryan stating that they believed the decision was "plainly correct".[7] Dow Jones is considering taking the case to the High Court despite the failure of the appeal.[8] As it stands, Joseph Gutnick retains the right to sue Dow Jones in Victoria.

Implications of *Gutnick v Dow Jones*

The ruling by Justice Hedigan is considered by some commentators to signify a real threat to free speech.[9] The outcome of the decision is that anyone publishing material online may be forced to comply with vastly different libel laws in numerous jurisdictions.

Although Justice Hedigan drew a distinction between internet publications and world wide web publications, there is still some substance to Dow Jones' argument that international websites may become wary about granting subscriptions to Australians for fear of being sued under Australian law. In comparison to other countries such as the UK and US, Australian defamation laws are regarded as more strict.[10]

We will have to wait and see whether Dow Jones will appeal the case in the High Court. Until then, international websites may need to think twice before they publish any online material that could be regarded as defamatory of citizens of countries that have stricter libel laws. Some publishers could even decide to address this issue by excluding certain countries from accessing their web content to avoid the risk of being sued.

1 [2001] VSC 305

2 See n1 above, as per Hedigan J at [68]

3 See n1 above, as per Hedigan J at [20]

4 By virtue of R8.09 of the Supreme Court's Rule.

5 See n1 above, as per Hedigan J at [8]

6 See n1 above, as per Hedigan J at [102]

7 *Dow Jones & Company Inc v. Joseph Gutnick,* Court of Appeal, 21 September 2001, unreported judgement.

8 K Towers, "Dow Jones looks at High Court move in Gutnick action", Australian Financial Review, 22 September 2001.

9 "Gutnick ruling threaten net and free speech", Editorial from The Australian, 29 August 2001 and see also J Birmingham, "What first Amendment?", The Industry Standard, June 18 2001. www.thestandard.com.au/articles/article_print/0,1454,14519,00.html (accessed 27 September 2001)

10 P Barlett, "Victorian libel law casts a global net", published at www.it.mycareer.com.au on 29 August 2001, (accessed 27 September 2001)

RACV wins IT case against Unisys

Irene Zeitler, Freehills

Irene Zeitler is a partner in the Intellectual Property Group at Freehills' Melbourne office and is a consultant to the associated patent attorney firm, Freehills Carter Smith Beadle. Irene has substantial expertise in the field of information technology, intellectual property and trade practices.

Overview

For IT suppliers, the case of *RACV Insurance Pty Ltd & Anor v Unisys Australia Ltd & Ors*[1] should remind them to not make any false or misleading representations in pre-contractual negotiations.

For customers, litigation of this kind is expensive. Coupled with the risks inherent in running a case heavily reliant on witness recollection means that customers should seek alternative forms of settlement to litigation when dissatisfied with their suppliers.

Australian cases involving corporate customers initiating proceedings against suppliers of IT systems which fail to meet expectations have been relatively rare. Nevertheless, this is what RACV Insurance Pty Ltd (RACVI) and RACV Group Services Pty Ltd (RACVGS) did in December 1996, when they filed proceedings in the Supreme Court of Victoria against Unisys Australia Ltd (Unisys).

The history of the case goes back to 1993, when RACVI entered into a contract with Unisys to design, supply and install a work flow management system, based on the imaging of documents (WMS System). The idea of the WMS System was to replace RACVI's existing paper base system for the processing of claims. The system handed over by Unisys as complete in March 1995 was a failure. Although Unisys attempted to fix the problems with the WMS System, it was unsuccessful. In June 1996, RACVI terminated its contract with Unisys.

Five years later, the matter came to trial before Hansen J who handed down a judgment in favour of RACVI and RACVGS in August 2001.

Causes of action alleged against Unisys

RACVI and RACVGS alleged three causes of action against Unisys. They were:

- contravention by Unisys of section 52 of the Trade Practices Act (TPA) which prohibits a corporation engaging in conduct which is misleading or deceptive
- negligent statement by Unisys
- breach of contract by Unisys.

RACVI and RACVGS alleged that Unisys had made negligent statements and certain false representations in