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The risky business of publication on the internet:

exploring the jurisdictional issues raised in *Dow Jones v Gutnick*

In *Dow Jones v Gutnick*[1], the High Court recently addressed issues of jurisdiction and liability arising in an action concerning material, allegedly defamatory, of a Victorian man, that was published on the internet in the United States and accessed in Victoria. The matter drew worldwide attention from internet publishers and industry leaders because the High Court was the most superior court to have heard these issues and the case presented an opportunity to explore the challenges that the border-transcending internet poses to the present legal paradigm. This article explores the court's decision and its likely impact upon future internet publication.

FACTS

Dow Jones published an article in its weekly financial magazine *Barron's*. The article, also published in an online edition of the magazine, alleged that Gutnick was a tax evader and a money launderer. In total, 305,563 print copies were sold, including some in Victoria. The subscription website, from which the article could be downloaded, was available to 550,000 subscribers. Gutnick was able to prove that, in Victoria, 300 people had downloaded the article and that an additional 14 people had seen the print version.

AT FIRST INSTANCE

Strategically, Gutnick limited his defamation claim to damage suffered to his reputation in Victoria through the publication of the article in Victoria both online and in hardcopy. Dow Jones, having been served in the US, entered a conditional appearance to the writ, applying in the alternate to have service set aside or the action permanently stayed. The court was required to determine jurisdictional issues.

Traditional jurisdictional disputes have typically required determination of three closely related issues:

- Whether the matter is so connected to a jurisdiction that the court has authority to hear and determine the dispute;
- Choice of law; and
- *Forum non conveniens*.

A closely related concern is the recognition and enforcement of foreign judgments, where the three jurisdictional issues may be re-evaluated by the court asked to enforce a foreign judgment.

Gutnick was a Victorian resident whose business was primarily based in Victoria. While his business and charitable interests did extend abroad, his business and social life were principally in Victoria. Dow Jones was a US-based corporate entity. Its web servers upon which the article was uploaded, and its corporate headquarters, were in New Jersey, and its editorial offices were in New York.

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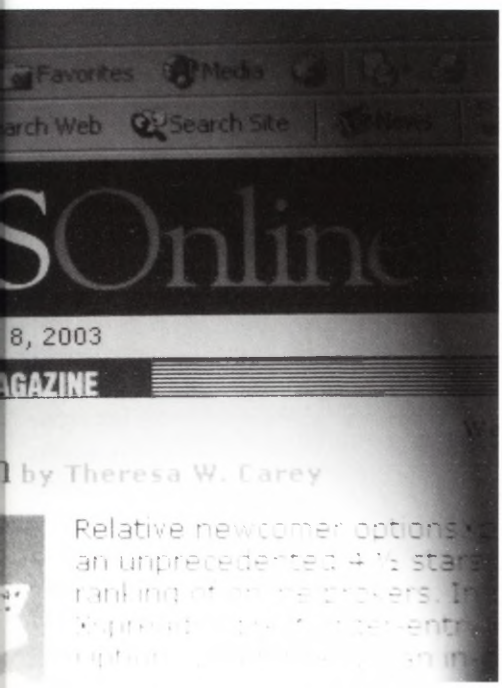

Dow Jones argued that the dispute should be heard in the US, applying the law of New Jersey, where it would be able to take advantage of the significant defences afforded by the US constitutional protection of freedom of speech.

Hedigan J found that the dispute could be heard in Victoria, applying Victorian law.[2] His Honour reached this conclusion through a strict application of the existing principles of defamation law, finding that publication had occurred at the place of download, that is, when and where the defamatory material was comprehended by the reader[3]. Dow Jones sought leave to appeal to the Court of Appeal.

THE APPEALS

The Court of Appeal (Buchanan JA, and O'Bryan AJA) denied leave to appeal on the basis that Hedigan J's decision was 'plainly correct'.[4] Dow Jones sought and was granted special leave to appeal to the High Court.

The High Court (Gleeson CJ, McHugh, Gummow, Hayne, Gaudron, Kirby and Callinan JJ) dismissed the appeal.[5] All members of the court agreed that Victoria had jurisdiction to hear the dispute applying Victorian law and that Victoria was not a clearly inappropriate forum. Gleeson CJ, McHugh, Gummow and Hayne JJ delivered a joint judgment, with which Gaudron J agreed. Kirby and Callinan JJ both delivered separate judgments.

The appellant, Dow Jones, argued that the threshold issue to be determined by the court was whether the existing law of defamation could be applied to publication in cyberspace via the ubiquitous internet. The appellant submitted that it could not, and further, that it was desirable that there be a 'single law governing the conduct of a person's publishing material on the Internet'.[6] The appellant argued that the common law should be reformulated by abolishing the rule that every publication of defamatory material constitutes a separate tort, and by adopting a new rule to the effect that publication takes place at point of upload. These modifications would ensure that an internet publisher could govern its conduct according only to the law of the place where its web servers were maintained, unless that place was 'adventitious or opportunistic'.[7] The appellant submitted that without such a rule, internet publishers, 'would be bound to take account of the law of every country on earth, for there were no boundaries which a publisher could effectively draw to prevent anyone, anywhere, downloading the information it put on its web server'.[8]

APPLICATION OF EXISTING COMMON LAW RULES

Their Honours concurring in the joint judgment found that the internet did not necessitate modification of the existing defamation law. This law, their Honours noted, had proved able to contend with other widely disseminated communications.[9] Callinan J largely agreed with this conclusion, emphasising that as the appellant was engaged in international business for profit through their subscription website, 'they can hardly be expected to be absolved from compliance with the laws of those countries'.[10]

Kirby J took a different approach, agreeing with the appellant that the technological features of the internet required that the law, its underlying principles and policy, be reconsidered.[11] However, Kirby J considered that this court was not the place to undertake the necessary reformulation, as adversarial proceedings could not allow the requisite degree of consultation with industry, government, and other key players.[12] Rather, a more appropriate resolution could be achieved through the admittedly protracted process of continuing multilateral international negotiations.[13] Further, Kirby J noted that internet publishers might be able to take reasonable and practical steps in order to limit their fear of unlimited liability. In particular, Kirby J considered that there was some merit in expecting an internet publisher to consider the law of the jurisdiction of the subject's habitual residence.[14] Such an approach would be consistent with Australian Law Reform Commission reviews of defamation law and of choice of law.[15]

No member of the court accepted that the appellant's suggested new rule be adopted such that publication be taken to occur at point of upload.[16]

In order to determine where the tort had been committed, their Honours concurring in the joint judgment applied the test of 'where in substance did this cause of action arise'.[17] Their Honours considered this to be the appropriate test, despite the fact that it had been established in an entirely different context in *Distillers Co (Biochemicals) Ltd v Thompson (Distillers)*[18], and subsequently approved by the High Court in *Voth v Manildra Flour Mills Pty Ltd (Voth)*[19]. Given the nature of the tort of defamation, their Honours considered that the place in substance where the cause of action arose would be the place where damage to reputation was suffered, namely the point of download.[20] Callinan J agreed ▶

with the conclusion that publication occurred at the point of download,[21] but not with the test used to reach it. Callinan J considered that the *Distillers* test, even when applied in *Voth*, had been used to determine jurisdiction, and that it was highly inappropriate to use the test to determine the place of publication in a defamation law context.[22] Kirby J also agreed that the act complained of in defamation law was publication. While Kirby J did not specifically agree that this included the point of download, his Honour did agree that it would include Victoria, at very least as the place of residence of the plaintiff.[23]

The court had agreed unanimously that the existing rules of defamation were to be applied to the internet and that the place of publication included Victoria. The issues that remained were jurisdiction, choice of law, and *forum non conveniens*.

JURISDICTION

Supreme Court (General Civil Procedure) Rules 1996 (Vic), Order 7.01(1) provides:

'Originating process may be served out of Australia without order of the court where ...

(i) the proceeding is founded on a tort committed within Victoria; or

(j) the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring; ...'

Their Honours concurring in the joint judgment held that jurisdiction was clearly established within Order 7.01. As Gutnick alleged damage to his reputation in Victoria arising from publication of the article, Order 7.01(1)(j) was satisfied and it was largely academic whether or not Order 7.01(1)(i) was also satisfied.[24] Essentially, both Callinan and Kirby JJ agreed.[25]

CHOICE OF LAW

Their Honours concurring in the joint judgment determined that the dispute should be determined applying Victorian law,[26] as Gutnick's claim sought only to vindicate damage to his reputation caused by publication in Victoria.[27] Callinan J essentially agreed.[28] Kirby J considered that in this case, the specific act complained of was publication and therefore the focus of the choice of law enquiry should be upon the place of publication, which, in his opinion, included Victoria.[29] Kirby J was cognisant of the difficulties this conclusion would pose to internet publishers.[30]

> "It was clear that Victoria was the place where the most substantial damage to his reputation would be felt."

FORUM NON CONVENIENS

The discretion of the primary judge to stay proceedings on the basis of *forum non conveniens* arose pursuant to *Supreme Court (General Civil Procedure) Rules* 1996 (Vic) Order 7.05(2)(b), which essentially provides that the court has discretion to stay proceedings where 'Victoria is not a convenient forum for the trial of the proceeding'. The High Court could not overturn the exercise of discretion by the primary judge unless it was shown there was error warranting disturbance.[31] The entire court agreed that no such error could be shown in this case. Victoria had jurisdiction to determine the dispute applying Victorian law. Victoria was the place where the wrong had been committed. There was no basis upon which to set aside the exercise of discretion.[32]

KIRBY'S DISSATISFACTION

While Kirby J agreed that the appeal should fail, he voiced his concern that this result was 'contrary to intuition'.[33] Kirby J was particularly concerned that the specific problems presented by internet publication be fully debated and resolved in a more appropriate forum, in order to ensure 'national legislative attention' and 'international discussion in a forum as global as the internet itself'.[34] Kirby J noted that internet publication could give rise to significant legal difficulties where a plaintiff sought to vindicate damage to his or her reputation in multiple jurisdictions arising from a single internet posting, downloaded worldwide. However, the present case did not raise such concerns as Gutnick had limited his action to damage to his reputation sustained in Victoria, a place that the defendant knew to be his place of residence and the centre of his business operations. It was clear that Victoria was the place where the most substantial damage to his reputation would be felt.[35] In this context, Kirby J agreed that the appeal should be dismissed.

OBITER TO CONSIDER IN THE FUTURE

Their Honours concurring in the joint judgment also considered that this case had been framed in such a way that it did not raise the more serious concerns of the potential for litigation where the injury to reputation results from global publication of defamatory material. However, their Honours pointed out that even in such a case, many of the defendant's concerns could be addressed by the existing law such as the doctrine of *forum non conveniens* or anti-suit injunction.[36] Interestingly, their Honours also canvassed the possibility of the development of a new defence for internet publishers on the grounds of reasonableness. Such a defence would permit the court to consider 'where the conduct took place, what rules about defamation applied in that place or those places' and whether the publisher 'acted reasonably before publishing the material'.[37]

CONCLUSION

Given the construction of Gutnick's claim, this case did not necessitate a different approach to that taken in other matters involving defamation arising from widely disseminated publications. However, internet publishers can take solace in at least two aspects of the decision. Firstly, as expressed by Kirby J, the myriad of complex legal and technical issues evoked by the internet, such as jurisdiction and enforcement of foreign judgments, cannot be finally resolved in adversarial proceedings where issues pertaining to the enforcement of foreign judgments ensure that these issues are truly international and require consensus. In this respect, it is hoped that the High Court's decision will provoke further debate towards consensus on the terms of an international treaty to address the issues. Such debate has been underway for some time in the slow but continuing negotiations towards agreement upon a 'Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Civil Judgments'.[38]

The second aspect of the decision in which internet publishers can take solace is that there are presently existing legal and practical restraints on the potential for unlimited litigation in respect of defamatory internet publications. Their Honours concurring in the joint judgment pointed out the existing and potential legal restraints as including *forum non conveniens* and scope for new defences. Kirby J noted that practical restraints include the expense of bringing multiple suits and the prime restriction that the plaintiff must have a reputation to be vindicated in the jurisdiction. Few plaintiffs will have a truly international reputation.

In practice, the High Court's decision is likely to have a limited impact on global internet publication. This is primarily because of US dominance in internet publication. For example, even if Gutnick is successful in his defamation action, it remains to be seen whether any resulting judgment is enforceable in another jurisdiction. Should Dow Jones not have sufficient assets within Victoria, Gutnick may choose to turn to US courts to enforce the judgment, where the High Court's jurisdictional decision is unlikely to be influential. US courts take a very different approach in determining the jurisdiction issues arising in the context of internet defamation. A US court would be entitled to re-examine the authority of the Victorian Court to hear and determine the dispute. Rather than focusing on the place of publication, US courts consider the effects of a defendant's action, the nature of the website upon which the material was published and whether the website targeted the jurisdiction in which the plaintiff claims to have been defamed.[39] On such an analysis, it is unlikely the Victorian Court would have jurisdiction to hear and determine the dispute in accordance with Victorian law. Given the dominance of the US in internet publishing, the attitude of US courts is more likely to be determinative of the extent to which a plaintiff in an action for defamation arising over the internet is likely to be successful in the enforcement of judgments in their favour. PL

ENDNOTES:

1 [2002] HCA 56, 10 December 2002.

2 [2001] VSC 305 at [99].

3 ibid at [60].

4 [2001] VSCA 249 at [11].

5 [2002] HCA 56 per Gleeson CJ, McHugh, Gummow and Hayne JJ at [48], with whom Gaudron J agreed at [56], Callinan at [203], and Kirby J at [167].

6 ibid at [19] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

7 ibid at [20].

8 ibid.

9 ibid at [38] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

10 ibid at [186] per Callinan J.

11 ibid at [111]-[113], and [118] per Kirby J.

12 ibid at [132]–[134].

13 ibid.

14 ibid.

15 See Australian Law Reform Commission, *Unfair Publication: Defamation and Privacy*, Report No 11, (1979) at 191 and Australian Law Reform Commission, *Choice of Law*, Report No 58, (1992) at 58 and Australian Law Reform Commission, *Choice of Law*, Report No 58, (1992) at p59.

16 [2002] HCA 56 at [130]-[134] per Kirby J, at [21], and [24]-[26] per Gleeson CJ, McHugh, Gummow and Hayne JJ and at [199] per Callinan J.

17 ibid at [43].

18 [1971] AC 458 at 468.

19 (1990) 171 CLR 538 at 566-570.

20 ibid at [44].

21 ibid at [198].

22 ibid at [196] per Callinan J.

23 ibid at [150] per Kirby J.

24 ibid at [45] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

25 ibid at [201] per Callinan J.

26 ibid at [48] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

27 ibid.

28 ibid at [199] per Callinan J.

29 ibid.

30 ibid.

31 ibid at [160] per Kirby J.

32 ibid at [163] per Kirby J, at [48] per Gleeson CJ, McHugh, Gummow and Hayne JJ and at [202] per Callinan J.

33 ibid at [164] per Kirby J.

34 ibid at [152], and [164]-[165].

35 ibid at [155].

36 ibid at [50] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

37 ibid.

38 See further http://www.hcch.net/e/workprog/jdgm.html (Accessed 12 January 2003)].

39 See *Calder v Jones* 465 US 783 (1984), *Zippo Manufacturing Co. v Zippo Dot Com, Inc* 952 F. Supp. 1119 (W.D. Pa. 1997), *Young v New Haven Advocate* 2002 US App. LEXIS 25535, No 01-2340, 2002 WL 31780988 (4th Cir. December 13, 2002), and *Revell v Lidov, The Board of Trustees of Columbia University and Columbia University School of Journalism* 2002 US App. LEXIS 27200, No 01-10521, 2002 (5th Cir. December 31, 2002).