

GUTNICK v DOW JONES & CO INC

"CAUGHT BY THE GLOBAL NET"

Facts

Mr Joseph Gutnick, famed Melbourne businessman, issued defamation proceedings against Dow Jones for the tort of defamation in the Supreme Court of Victoria. His claim arose out of an article published by Dow Jones in one its publications entitled "Barron's Online".

The disputed article was written by William Alpert and entitled "Unholy Gains". Gutnick alleged that the article was defamatory because it suggested that he had dealings and was associated with a convicted tax evader, Nachum Goldberg. It was also alleged by Gutnick that the article suggested that he had been involved in manipulating stock prices in the US and that he had laundered money through a number of charities.

The article was originally published in hard copy on 30 October 2000 in Barron's Magazine. Dow Jones also published the article on the magazine's internet site "Barron's Online" located at www.wsj.com. Evidence showed that the magazine sold 305,563 copies with 14 sales recorded in Victoria, where Gutnick resided. Also, the website had 550,000 subscribers, of which 300 were registered in Victoria. It was not possible, however, to determine how many people may have downloaded the article in Victoria. Gutnick's original Statement of Claim only sought relief for defamation based on the on-line publication. The Supreme Court of Victoria later granted Gutnick leave to amend his Statement of Claim so as to include the printed article.

Dow Jones was served with the originating process in the United States in relation to the Victorian proceedings. Dow Jones entered a conditional appearance and applied for an order that the proceedings be stayed, arguing that Victoria was a clearly inappropriate forum for the trial. In determining whether to grant the order or not, the Supreme Court of Victoria was required to determine where the tort of defamation occurred, but more specifically, where publication took place. The authors note that the substantive case is yet to be heard.

In seeking the order the Courts (at all levels including the Supreme Court, Court of Appeal and High Court) focused on three related issues:

- (i) whether the Victorian Supreme Court could hear the proceedings;
- (ii) whether the proceedings ought be stayed on grounds of "inconvenient forum"; and
- (iii) how Australia should deal with allegedly defamatory material placed on a website in one territory and read elsewhere.

The Supreme Court of Victoria at first instance found that Victoria was not a clearly inappropriate forum to hear the proceedings and that publication occurred in Victoria. The Court of Appeal upheld the decision of the trial judge. Dow Jones was then granted special leave to appeal to the High Court of Australia to get a ruling on this matter. The High Court upheld the original decision. It is this final decision that many have cited as a landmark decision in the area of the internet and defamation law.

In determining the above three issues the Courts were asked by Dow Jones to reconsider the ordinarily straightforward nature of those questions due to the inherent and unique circumstances of this form of publication over the internet.

Publication

In delivering its judgment, the High Court discussed the definition of "publication" in defamation law. That was important because Gutnick argued that the defamatory matter was "published" in Victoria, thereby entitling him to invoke the jurisdiction of the Victorian Courts. It was equally important for Dow Jones to deny that publication had occurred in Victoria and therefore resist the exercise of the Court's purported jurisdiction.

The High Court therefore needed to consider whether the tort of defamation occurs in the place where the article is written (the act of publication) or the place where the article is comprehended (the fact of publication). Dow Jones argued that the alleged defamatory material was uploaded onto the Dow Jones server in New Jersey, that publication therefore occurred in New Jersey and consequently the tort was committed in New Jersey.

The majority of the High Court found that until the material is comprehended by the reader then 'no harm is done'. The High Court reiterated that publication is a bilateral act involving the publication of material and its later comprehension. By finding that defamation only occurs in the country where the article is first published would not recognise the fact that publication is a bilateral act.

The High Court found that, therefore, defamation takes place at the place where the material alleged to be defamatory is in comprehensible form such that it can be read and where it is damaging to a plaintiff's reputation. In the case of material on the Internet, the Court held that it is not 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.

Single Publication Rule

In attempting to rally the Court, Dow Jones relied on a number of policy arguments. In particular, it sought to argue that the internet was such a radically different forum of communication that prevailing principles of defamation law ought not to apply, and that the long-established principle that each publication (or "hit", in this case) gives rise to a separate cause of action was inappropriate for the internet.

Dow Jones tried to argue that the "single publication rule" which is legislated for in 27 states within the United States should be adopted in Australia. The single publication rule provides that the place of publication is fixed at the time of first publication and that there can be no multiplicity of actions. However, the Courts in Australia have generally not supported this rule, and the Court rejected this argument, relying on 150 year old English authority (*Duke of Brunswick*) in finding that the principle which holds that each publication gives rise to a separate cause of action should be upheld. The Court found that a single publication rule could only be introduced into Australia through the introduction of relevant statute: a matter for the legislature not the Courts.

Justice Kirby, in refuting the applicability of the single publication rule in Australia posed a number of additional arguments for rejecting Dow Jones' contention that the single publication rule should be adopted in Australia. He found that legal rules should be 'technology-neutral'. He found that there are many types of technology that have expanded the speed at which information can be disseminated and as such the internet should not be granted its own rule. He also found that the law of defamation protects against damage to reputation. Therefore, if the single publication rule was applied, then a person whose reputation was damaged in a jurisdiction other than the jurisdiction in which the publication was first published, may have no cause of action if they are unable to prove the necessary requirement of reputation in that first jurisdiction.

Forum Non Conveniens

A key and related issue in the decision of the Supreme Court of Victoria was whether the Victorian Supreme Court should decline to exercise its "long arm" jurisdiction over Dow Jones on the basis that it was an inappropriate forum. As expected, Dow Jones alleged that the proceeding had greater connection to the United States than Victoria. They argued that due to:

- (i) the fact that the article had been published in Victoria; and
- (ii) that Gutnick and his family had residence, business headquarters and social life in Victoria, that Victoria was not an inappropriate forum.

Gutnick's rejection of this argument was accepted by the Court.

However, His Honour Dennigan J did not indicate that all the factors favoured Gutnick. For instance he commented on the limited publication of the article within Victoria. However, there was a preponderance of factors clearly favouring Gutnick which when coupled with the lack of factors in favour of the Defendant clearly demonstrated that Victoria was not a clearly inappropriate forum in which to litigate this dispute.

On Appeal to the High Court the Court endorsed the decision at first instance.

Analysis

When viewed as a whole the case adopts an orthodox approach to the issues of publication, the place of commission of the tort, and jurisdiction. Whether that is inappropriate in relation to internet publishing is arguable. It is the authors' view that in determining whether something has been published and is defamatory (or not) the greater consideration ought be given to the fact and extent of publication and not the means of communication. It is preferable if the issue of means of communication continues to remain technology-neutral.

First, the case is a warning for those that publish over the internet and whose publications can be read overseas, that they must be aware that they can be successfully sued for defamation in those jurisdictions. The case endorses other decisions such as *Kitakufe v Oloya* and *Licra v Yahoo* which are consistent with a growing body of international jurisprudence concerning the circumstances in which Courts will be justified in exercising jurisdiction over foreign internet conduct.

Second, not only will the case reinforce the rights of Australian Courts to exercise jurisdiction, but also to impose their domestic legal standards on foreign internet conduct. Of course, the issue as to whether any such judgments are enforceable is another matter and not one to be addressed for present purposes, save to say that it would be of little utility for Australians to sue US defendants for defamation in Australia unless those defendants had a presence and assets in Australia against which a judgment could be executed.

Importantly, it should also be noted that case has greater implications in respect of those jurisdictions in which there are no defences of "good faith". So it would seem, it could be more enticing for plaintiffs to sue for defamatory foreign internet content in those jurisdictions.

The practical result is that defendants who may be legally entitled to make statements in another jurisdiction by posting them on the internet or through email, could be faced with defending claims in other jurisdictions where the statements might be defamatory.

Finally, the Gutnick decision is consistent with a series of English forum non-conveniens cases confirming defamatory publications in a non-internet context. The most significant is *Berezovsky v Michaels*, a case which concerned an article in the American magazine "Forbes", accusing two Russian businessmen of being criminals on an outrageous scale. The magazine was circulated overwhelmingly in the United States, although copies were available in both Russia and England. The aggrieved businessmen sued in England, hoping to take advantage of English defamation law. The publisher of Forbes argued that the case ought be heard in the United States or Russia, on a ground that neither the businessman or the magazine had any real connection with England. The House of Lords found against Forbes: the case could be heard in England, although the businessmen were limited to claim compensation for such damage to their reputation as had occurred in that country.

Against the backdrop of the above decision, the Gutnick decision is neither revolutionary or surprising. It would seem the decision would have been more surprising if the Court had found that Gutnick ought be denied from pursuing his defamation in his home State.

Stuart Gibson, Partner
Jonathan Feder, Lawyer

Middletons Lawyers

Melbourne and Sydney, Australia

stuart_gibson@middletons.com.au

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