

CASE NOTE

Gloom, doom and Gutnick: Dow Jones & Company Inc. v Gutnick¹

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The Internet is a remarkably effective tool for expressing dissatisfaction with public figures. Publication on the Internet has the potential to cause much greater damage to a person's reputation than the dissemination of traditional printed statements. Accordingly there has been a steady flow of defamation suits through the courts in a number of jurisdictions. The defamation action raised by Joseph Gutnick, an Australian mining magnate, against Dow Jones and Company Inc. (**Dow Jones**) has received considerable media attention world-wide. A fair amount of that media attention has been of the apocalyptic variety including more than a few panic stricken predictions that days of freedom of speech on the Internet have gone forever.

It is not surprising that the Gutnick decision offends the sensibilities of journalists, publishers and informed commentators in the United States. The First Amendment has provided considerable safeguards to protect their rights to investigate and report on the activities of prominent people. The legal issues visited in the Gutnick decision are not, however novel, nor is it novel that a American publisher can be sued for defamation in another jurisdiction.

1. FACTUAL BACKGROUND

Joseph Gutnick is well-known in Australia for his business, religious and philanthropic activities. He is the chairman and managing director of eight publicly listed mining companies and the President of Melbourne Football Club.

Dow Jones publishes The Wall Street Journal, Barron's, the Dow Jones Newswires and a number of other publications. Barron's weekly magazine is available in print and Internet editions. The Internet edition can be accessed by subscribers to Barron's, the Wall Street Journal and wsj.com. Dow Jones had published a 7000 word article in the online edition of its weekly magazine, Barron's, entitled "Unholy Gains" (**the article**) on 29 October 2000. Barron's online magazine was, at the time the article was published, accessible by 1700 wsj.com subscribers in Australia. These subscribers gained access by entering a user name and password assigned to them by Dow Jones on the Barron's Online Web site.

¹ [2002] HCA 56 (10 December 2002) Accessible at http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html

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The article discussed Mr. Gutnick's business and religious interests in depth and contained allegations that Mr. Gutnick was involved in money laundering, fraud and stock swindling. For example, the author of the article, Bill Alpert stated that:

*“some of Gutnick’s business dealings with religious charities raise uncomfortable questions. A Barron’s investigation found that several charities traded heavily in stocks promoted by Gutnick. Although the charities profited, other investors were left with heavy losses”.*³

The article also drew unfavourable connections between Mr. Gutnick, Nachum Goldberg, a convicted money launderer and Juda Wernick, a US resident facing trial on charges of stock manipulation through illegal use of charitable organisations.

2. BACKGROUND TO PROCEEDINGS

Mr. Gutnick raised defamation proceedings initially in the Supreme Court of Victoria against Dow Jones⁴. Dow Jones applied for the matter to be heard in the State of New Jersey.

The editorial offices for Barron's, Barron's Online and WSJ.com are situated in New York City. Articles submitted to Barron's or Barron's Online are reviewed in the New York editorial offices then transmitted to a computer server located in Dow Jones' editorial office in South Brunswick, New Jersey. Material was then uploaded onto Dow Jones' file servers in the South Brunswick office.

On the basis of these facts Dow Jones argued that publication actually occurred in South Brunswick, New Jersey where the material was uploaded to its Internet server. In response, Gutnick's lawyers argued successfully that publication occurred in Victoria where the article was downloaded by subscribers and that the tort of defamation took place in Victoria.

In his decision, Justice John Hedigan considered the following issues:

- (a) where does publication occur when defamatory material is posted on the Web; and

³ Alpert, B “Unholy Gains”, Barron's, 30 October 2000 at 24

⁴ Gutnick v Dow Jones & Co Inc [2001] VSC 305 (28 August 2001) Accessible at AUSTLIJ <http://www.austlii.edu.au/au/cases/vic/VSC/2001/305.html>

- (b) can a plaintiff bring proceedings against a publisher of online content in any jurisdiction where defamation occurs?

The Supreme Court held that publication occurs when an article is downloaded from the Internet. Therefore, where a defamatory statement is published on the Web, the plaintiff has the right to raise defamation proceedings in any jurisdiction where the offending statements can be accessed provided that the plaintiff has a sufficient connection to that jurisdiction. Since Mr. Gutnick lived, worked and enjoyed a good business reputation in Victoria, the Supreme Court of Victoria was an appropriate forum for the dispute. Leave was therefore granted to Mr. Gutnick to continue with defamation proceedings against Dow Jones in Victoria.

This decision was appealed by Dow Jones before the High Court of Australia in Canberra on 28 May 2002. Prior to the appeal some of the world's largest media companies including Fairfax, Reuters, News Limited, The Washington Post, The New York Times, Amazon.com and Guardian Newspapers were granted leave to join the appeal as interveners supporting the appellants.

Dow Jones sought to have the decision of the Supreme Court set aside or, alternatively, an order that further proceedings in the matter be permanently stayed.

The High Court issued its written judgment on 10 December 2002 dismissing the appeal. Commentators had considered it most unlikely that the High Court would overturn the Supreme Court's decision particularly in the light of comments made by the appellate judges during the oral submissions of the parties. For example, Justice Michael McHugh was quite brusque with Sir Geoffrey Robertson QC (for Dow Jones) at one stage of the hearing telling him that

*“the basis of the law of defamation is to protect reputation not publishers”.*⁵

3. SERVING PROCEEDINGS OUTSIDE AUSTRALIA

The Supreme Court (General Civil Procedure) Rules 1996 (**Victorian Rules**) allow plaintiffs to serve the originating process in civil actions on parties outside Victoria without the leave of the Court provided that certain conditions are met.

⁵ See, for example, Burton, B “Australian defamation case tests web freedom” Asia Times (Oceania) May 30, 2002 <<http://www.atimes.com/oceania/DE30Ah02.html>>

Rule 7.01(1) of the Victorian Rules provides that:

“(1) *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;*
- (ii) *the proceeding is brought in respect of damage suffered wholly or partly in Victoria and caused by a tortious act or omission wherever occurring”.*

Dow Jones had entered a conditional appearance in relation to the service of proceedings in the Supreme Court of Australia. It now sought an order setting aside service of the writ and a permanent stay on the proceedings because Victoria was not an appropriate forum for dealing with the dispute.

4. INAPPROPRIATE FORUM

Dow Jones argued that the place where allegedly defamatory material is published on the Web should be held to be the place where that material is uploaded onto an Internet server and not where the material is downloaded. Since the article was uploaded to Dow Jones Web server in South Brunswick, New Jersey the place of publication, and therefore commission, of the alleged defamation was New Jersey. The substantive issues to be tried should therefore be governed by the laws of the State of New York.

The High Court did not agree and considered that due weight must be given to the fact that a defamation action can only support substantive damages where a plaintiff has a reputation in the place where a defamatory statement is published⁶.

Although the High Court considered that Mr. Gutnick arguably has a reputation in the United States, he also has a reputation in other countries including Israel and Australia. Since he was ordinarily resident in Victoria and conducted most of his business and social activities there, Victoria was the most appropriate forum for him to raise proceedings. The fundamental consideration in Internet defamation proceedings is therefore the extent to which a plaintiff has a reputation to protect in a particular jurisdiction.

⁶ Per Gleeson CJ, McHugh, Gummow and Hayne JJ at paragraph 53

5. JURISDICTION & PUBLISHING

Damage by publication is the focus of defamation law. To succeed in a libel action a plaintiff must prove that publication in a form comprehended by a third party caused damage to reputation. Damage to reputation is presumed where the material is held to be defamatory. Accordingly, Dow Jones challenged Justice Hedigan's decision that the article was published in Victoria. His Honour, Justice Hedigan determined that the article was published in Victoria when downloaded by Dow Jones' subscribers.

He concluded that publication took place in Victoria for the following reasons:

- (a) publication for the purposes of defamation law requires delivery of defamatory content to and comprehension of that content by a recipient; and
- (b) comprehension of the defamatory content by recipients in Victoria took place in that state.

As Barron's is a subscription only site it was possible to show that downloading and, by implication, comprehension took place in Victoria.

Dow Jones' principal counter-argument was that the articles was published when it was made available to subscribers on its New Jersey Web server under what has come to be known as the "single publications rule". The High Court noted that:

"the bilateral nature of publication underpins the long-established common law rule that every communication of defamatory material founds a separate cause of action"⁷ [.

Accordingly, if a tortious act occurs in a particular jurisdiction then a cause of action arises regardless of the single publication rule.

6. THE SINGLE PUBLICATION RULE

Australian defamation law is similar to English law in that if a defamatory statement is published, each publication of that statement gives rise to a separate cause of action. In the context of defamatory statements published on the Internet, an actionable wrong occurs every time an individual accesses the statement. In many American states (including

⁷ Per Gleeson CJ, McHugh, Gummow and Hayne JJ at paragraph 27]

New York), however, liability for publishing defamatory statements is limited by what is known as the “single publication” rule⁸ The single publication rule provides that the publishing of defamatory material involves only one publication that occurs on the first publication date of the material whether or not the material is read or accessed at a later date.

Dow Jones argued that the multiple publications rule was iniquitous because it rendered Internet publishers vulnerable to multiple suits and harassment by effectively extending the period of limitations indefinitely. It tried to convince the High Court to change the law of defamation to avoid this iniquity by limiting the effect of the multiple publications rule on Internet publishers. Dow Jones asserted that the multiple publications rule had been developed by the common law which had to deal with traditional hard-copy publications and that it was not an appropriate rule to apply to Internet publishing⁹. Since the law of defamation could not predict a form of communication as new and revolutionary as the Internet, the common law had to be rewritten to accommodate it.

The High Court did not accept this argument comparing the Internet to, for example, satellite television services. The High Court acknowledged that the common law had successfully adapted to many new forms of media in the past and that the Internet was not a considerable technological

advance deserving special treatment. Further, it considered that it was desirable that common law rules remain technology neutral. In any case, any change to the multiple publications rule should be advanced by the Australian Parliament, not the Courts.

Dow Jones also asked the High Court to consider a potential ‘floodgates’ argument in relation to Internet publications. It argued that publishers must be able to carry on business without being subject to vexatious or iniquitous claims. The basis for this argument was the fact that defamation laws are very different from country to country. It is certainly true that in many countries the laws governing publications are much stricter than the law in the United States. This imbalance, argued Dow Jones, prevents publishers from properly assessing the extent of potential civil liability for content.

The idea that American publishers were being treated unfairly outside America received fairly short shrift. As Justice Callinan pointed out in his judgment, publishers post material on the Internet to ensure that it is read by a world-wide audience. Dow Jones had chosen to conduct a multinational publishing business for no loftier purpose than to make a profit. The concerns of Internet publishers are therefore no different to the

⁸ See Paragraph 577A of the Restatement of Torts, 2d, 1977

⁹ This issue was considered recently by the English Court of Appeal in *Loutchansky -v- Times Newspapers Limited & Others No. 2* (The Times 7 December 2001) [2001] EWCA CIV 1805 (English Court of Appeal, 5 December 2001)

concerns of other businesses wishing to trade in jurisdictions other than their own.

Furthermore, the High Court took the view that the freedom to publish worldwide carries concomitant obligations to comply with the laws of the countries in which material is published¹⁰.

7. CONCLUSIONS

It is fair to say that the decision in the Gutnick case neither raises the spectre of global liability nor does it depart from existing jurisprudence in Commonwealth countries¹¹. Internet communication is no different from other forms of communication and is subject to the same laws. Defamation law, in common with intellectual property law, tax law and the law of contempt can accommodate claims arising from on-line content.

Traditional barriers to litigation will almost certainly prevent a flood of Internet defamation cases before the courts.

Publishers who want to control liability for disseminating on-line content must simply look at technological or other ways to limit liability for that content.

8. TRADITIONAL BARRIERS TO LITIGATION

The Gutnick decision will not have the chilling effect that the authors of many newspaper articles have predicted. In order to raise defamation proceedings, a potential litigant must have sufficient financial resources to dedicate to the cause. Most publishers will not consider settling defamation actions, preferring to allow the court to decide the matter. The cost of pursuing a claim against overseas publishers will accordingly deter all but the most determined and wealthy of litigants.

Once a judgment is obtained, the determined litigant must then attempt to enforce that judgment. Where a publisher has no assets against which a judgment can be enforced in the litigant's jurisdiction the publisher will probably ignore the proceedings and any subsequent judgment. It is highly unlikely, for example, that Dow Jones will settle the current proceedings as the courts in the State of New York will not enforce any judgment that could conceivably be in breach of the First Amendment of the United States Constitution.

¹⁰ Per Callinan J at paragraphs 182, 185 and 186

¹¹ Footnote: see for example, *Chadha v Dow Jones* (May 14 1999), *Berezovsky v Forbes Inc. and Another*, *Glouchkov v Same* (House of Lords, 11 May 2000) <http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/id000511/ber-1.htm>

9. BLOCKING INTERNET CONTENT

If the traditional barriers to litigation do not provide comfort for Internet publishers it is conceivable that technological protection measures can be used to limit exposure to litigation.

One of the arguments raised by Dow Jones was that it was technologically impossible to prevent access to subscribers in jurisdictions outside the United States. Although the High Court accepted this argument, it proposed that attempts to limit access to objectionable conduct would be considered favourably by courts in certain circumstances¹². The Court hinted that if Dow Jones had taken reasonable technological measures to prevent publication to Australian residents the defence of innocent dissemination might have been available to them. Furthermore, in a similar case where a publisher's conduct has all occurred outside Victoria and the publisher has taken steps to prevent publication of a defamatory article, the Victorian court may conclude that it does not have jurisdiction. Therefore, the Gutnick decision suggests that it may be possible for an Internet publisher either to run a modified common law defence or otherwise limit potential liability significantly by clever technical and legal strategies.

The courts in the Australia may well in future be analysing what steps Internet publishers have taken to stop online content having an effect on Australians in Australia. Publishers can, after all, obtain pre-publication advice from a local defamation expert to determine whether or not a publication is defamatory. If the publication is defamatory and the publisher uses technical 'road blocks' to prevent that publication being accessed in Australia it seems that such a publisher will be in an advantageous position.

There is a growing school of thought that technology filters will become a significant form of protection for publishers. The Courts in the United States have ordered defendants to set up such filters in the past. The most famous example is the PLAYMEN trade mark infringement case, *Playboy Enterprises, Inc. v Chuckleberry Publishing, Inc.*¹³. This case concerned the infringement of Playboy's United States trademarks by an Internet publisher in Italy. The District Court of New York ordered the defendants to use filtering and blocking strategies to prevent access to the site by United States residents. The feasibility of implementing an effective information quarantine system was analysed in the PLAYMEN case and it was held that the defendants must:

¹² At paragraphs 51, 182 and 193

¹³ *Playboy Enterprises, Inc. v Chuckleberry Publishing, Inc. Tattilo Editrice SPA, Publishers Distributing Corporation, and Arcata Publications Group, Inc.* 79 CIV. 3525 (SAS) (US District Court, New York) 1996 US Dist. Lexis 8435

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- (a) either shut down the offending Internet site or refrain from accepting new subscriptions from customers in the United States;
- (b) invalidate the user names and passwords to the site allocated to existing customers in the United States; and
- (c) revise the existing Web site terms and conditions to indicate that all subscription requests from potential customers in the United States would be rejected.

Recently, the issue of filtering has been considered in the Yahoo! Nazi memorabilia case¹⁴. Yahoo! claimed that it was technologically impossible to block Internet users in France from accessing sites selling Nazi memorabilia or displaying text from Mein Kampf or the Protocols of the Elder Leaders of Zion. The French court, however, commissioned an experts' report on the topic of technology filters¹⁵. This report suggests that filtering software can differentiate between the geographic location of Internet users, and this can be used to filtering or block content to certain Internet users.

The French Court also observed that Yahoo, Inc. had used software to identify user's geographical locations in order to display appropriate advertising banners in French¹⁶. Once a user's geographical location was identified, the court considered that the user could then be asked to provide a declaration of nationality before being given access to the site. The geographical information provided by the user could then be stored as a cookie which would be caught each time the Yahoo! Inc. site was accessed or a search instructed. If the user was obviously resident in France that user could be either be denied access to offending material or re-directed to other material.

The experts in the Yahoo! case considered that combining geographical filters with statements of nationality *'the culmination of the two*

¹⁴ Licra et Uejf vs Yahoo! Inc. and Yahoo France Superior Court of Paris 22 May 2000. For unofficial English and French transcripts of the case see Daniel Lapres "Webliography on the Yahoo! Case" <<http://www.lapres.net/html/yahweb.html>>. See also Carolyn Penfold's excellent

article on technology filters and the Yahoo! case Penfold C, 'Nazis, Porn and Politics: Asserting Control Over Internet Content', Refereed article, 2001 (2) The Journal of Information, Law and Technology (JILT).<<http://elj.warwick.ac.uk/jilt/01-2/penfold.html>>] and P McRea, Bob Smart, Mark Andrews, CSIRO, Blocking Content on the Internet: A Technical Perspective June 1998; P Greenfield, P McRea, S Ran, CSIRO, page 39

¹⁵ The experts included Internet experts François Wallon, Ben Laurie and Vinton Cerf. Both Ben Laurie and Vinton Cerf have since criticised the judgment e.g. Laurie, B "An expert's apology [1]" <<http://www.apache-ssl.org/apology.html>>. For further analysis of the expert evidence in the Yahoo! case see Yaman Akdeniz's analysis at http://www.cyber-rights.org/documents/yahoo_va.pdf.

¹⁶ LICRA et UEJF –v- Yahoo! Inc and Yahoo France, Tribunal de Grande Instance de Paris (Superior Court of Paris), 20/11/2000 pages 8 & 9.

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procedures', would achieve a filtering success rate of approximately 90%¹⁷. Users who were identified as being French, or within the jurisdiction of the French courts could be prevented from searching for or accessing prohibited material.

Currently, Internet gaming companies make considerable efforts to identify and exclude users in certain jurisdictions¹⁸. Online advertisers can identify the geographical location of Internet users and provide customised content to these users. There is no reason, therefore, why online publishers should not be able to implement a system that ensures, as far as is reasonable, compliance with local laws. This is a small price to pay to ensure peace of mind for both publishers and those who have an "*interest in maintaining his or her reputation in society from unwarranted slur or damage*"¹⁹.

¹⁷ LICRA et UEJF –v- Yahoo! Inc and Yahoo France, Tribunal de Grande Instance de Paris (Superior Court of Paris), 20/11/2000 pages 8 & 9.

¹⁸ See the Australian Broadcasting Authority Interactive Gambling Industry Code <<http://www.aba.gov.au/internet/gambling/code/index.htm>>

¹⁹ Op. cit. Gleeson CJ, McHugh, Gummow and Hayne JJ at paragraph 23.