Libel on the Internet

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What laws apply to the Internet? Is there to be a global standard or, is regulation to take place on a territory by territory basis, with the attendant uncertainty for international business providers? These larger questions arise from the ubiquitous nature of the Internet and its all-encompassing reach. The focus of this article is to explore these issues in the context of the law of defamation and specifically, in the context of the recent judgment of the High Court in Australia in *Dow Jones v. Gutnick*[1]. This case marks the first time that the difficult question of internet jurisdiction has been tackled by a final Court of Appeal in any country.

The central question confronted by the High Court of Australia in *Dow Jones v. Gutnick* was where does publication take place in the case of material displayed on the Internet? Can material be said to be to be "published" in each jurisdiction in which it may be viewed? Or is it "published" for the purposes of the law of defamation where the material is uploaded by the producer, or, where the material is stored on a server for dissemination on the world wide web?

The fundamental thrust of the appellant, Dow Jones' argument, put forward by Geoffrey Robertson Q.C.[2] was that the common law of defamation should be reformulated in so far as it applies to publication on the Internet. Essentially, this argument was an attack on the rule that every publication of defamatory material constitutes a new and separate tort[3]. In so far as the Internet was concerned, it was argued that the common law should treat defamation as one global tort, rather than a multiple wrong committed by every single publication and every Internet hit. It was contended that this would facilitate the use and expansion of the web by business providers, for it would clarify what law governed the content of Internet sites, thereby facilitating self-regulation by service providers and ensuring free speech.

The Facts

Dow Jones publish for profit *The Wall Street Journal*, a daily financial newspaper and *Barron's*, a weekly financial magazine. The magazine edition of *Barron's* dated the 30th October, 2000 contained an article by a journalist headed "Unholy Gains", sub-headed "When stock promoters cross paths with religious charities, investors had best be on guard". This article was available publicly two days earlier on the website *WSJ.com* and *Barrons.com*. A large photograph of the respondent, Mr Gutnick, appeared in the first page of the magazine. The article of about 7,000 words, also contained photographs of other persons including Mr Nachum Goldberg, who had recently been imprisoned for tax evasion and money laundering.

Barron's has a large circulation in the United States where approximately 306,563 copies of the magazine are sold. A small number of these magazines entered Australia, some of which were sold in the State of Victoria. Subscribers to the Internet address *WSJ.com* were also able to obtain access to the article. The site had about 550,000 subscribers. Of those who paid subscription fees by credit cards, 1,700 had Australian addresses.

Dow Jones has its editorial offices for *Barron's Online* and *WSJ.com* in the city of New York. Material for publication on *Barron's Online*, when prepared by its author, is transferred to a computer located in the editorial offices in New York City. From there, it is transferred either directly or indirectly to computers at Dow Jones's premises in New Jersey. It is then loaded on to six servers maintained by Dow Jones at its New Jersey premises for distribution on the worldwide web.

The respondent, Mr Gutnick lived in the State of Victoria. He had his business headquarters there. He also conducted business outside Australia, including in the United States of America. However, it was agreed that much of his social and business life, could be said, to be focused in the State of Victoria.

The act of "Publishing"

At the outset, in determining *where* something is published, a clear distinction was drawn by the majority of the court, between the publisher's act of publication and the fact of publication to a third party. In rejecting the argument put forward by Dow Jones, Gleeson CJ, for the majority, felt it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. He held it to be a bilateral act - where the publisher makes it available and a third party has it available for his or her comprehension[4]. It is only when a third party reads and comprehends the publication, be it on the Internet or otherwise, that publication is held to have taken place.

Single Publication versus Multiple Publication

The argument put forward by Dow Jones was that the articles published on *Barron's Online* were published in New Jersey, and became available on the servers that it maintained at that base, for the worldwide web. It was argued that the publisher of material on the worldwide web should be able to govern its conduct according to the law of the place where it maintained its web server, unless that place was merely adventitious or opportunistic. Several other parties, who by leave, intervened in support of Dow Jones such as Amazon, Yahoo!, Time, Inc. Guardian Newspapers Ltd. & The New York Times generally supported that contention. The alternative, it was submitted, was that a publisher would be bound to take account of all the laws of every country on earth, there being no boundaries in the Internet world.

This approach is based upon the United States "single publication" rule, whereby legislation has deemed one edition of a book, newspaper, radio or television broadcast to be a single publication. This was the approach put forward on behalf of Dow Jones and the other media companies.

1. [2002]HCA 56(10th December 2002)
2. of Robertson and Nicholl, Media Law
3. *Duke of Brunswick v. Harner* (1849) 14 U B 185
4. at paragraph 26

This approach contrasts with the view in the rest of the common law world, most recently reiterated by the English Court of Appeal, in *Loutchansky v. Times Newspapers (Nos 2 - 5)*[5]. In the context of an Internet defamation case, the court held that each individual publication of a libel gave rise to a separate cause of action. Thus, publication could ultimately take place in more than one jurisdiction. In the context of the Internet, this potentially gave jurisdiction to each and every legal jurisdiction in which the web page containing the material could be accessed.

The arguments in favour of a change to the law, advanced by Dow Jones and the other international media organisations, included the ubiquitous nature of the internet, the promotion of trade, the preservation of free speech and the ability of internet server providers to easily self-regulate their activities. The arguments against change put forward on behalf of Mr. Gutnick, were the fact that a change would confer advantages on an Internet friendly jurisdiction. It could lead to the manipulation of the place of uploading and holding of data in that a less protective location in an under-regulated jurisdiction could end up regulating the protection of reputations in other jurisdictions. It was argued that such a change could lead to damage to reputations in general. Finally, it was put forward on behalf of Mr. Gutnick that statutory intervention would be necessary, if such a change was to be adopted.

Ultimately, the High Court came down against any change in the law in this area and decided this was a matter best left for legislation. Additionally, Gleeson CJ for the majority made clear that the origin of the single publication rule was to prevent a multiplicity of hearings and to ensure that all causes of action for a widely circulated defamation be litigated in one trial. The fact that each publication must be separately pleaded and proved, had incorrectly, owing to the passage of time, came to be regarded as affecting the choice of law to be applied in deciding the action. This approach confused two separate questions. The first, was how to prevent an excessive number of actions and the vexation of parties. The second, relates to the law that must be applied to determine substantive questions arising in an action in which there are foreign elements.

The Single Publication Rule - Where should it be localised?

Central to Dow Jones's argument that a single place of publication be adopted was the premise that it should be localised in the place from which the material that was to be disseminated was stored. In this instance, this was the State of New Jersey.

The High Court of Australia and in particular Callinan J strongly disagreed. It was held that the most important event, in defamation, was the infliction of damage. That occurs at the place where the defamation is comprehended. Statements made on the Internet were neither more nor less localised than statements made on any other media or by any other process.

Rule for Internet cases - Place of Comprehension Test

Flowing from the bilateral nature of publication, it was held that damage was only suffered in the law of defamation in the place where a person comprehends the defamatory meaning of the publication. Accordingly, in the context of libel upon the internet, damage is suffered where a person comprehends the defamatory nature of the publication. Whether this occurs in a single publication or a multiple publication in different jurisdictions, a cause of action arises in each separate jurisdiction. Accordingly, there is nothing to prevent an action being brought in the current instance where the plaintiff, Mr Gutnick resided in the State of Victoria and publication occurred in the State of Victoria. It should also be mentioned that Mr Gutnick did not seek to recover damages in respect of publication in any other jurisdiction, other than the State of Victoria.

Analysis

Ultimately the notion of global regulation is quite idealistic. Courts do not like jurisdictional choice of law issues to be dealt with at the option of one party to a dispute. Despite the persuasiveness of the arguments put forward by Dow Jones, the High Court of Australia ultimately came down in favour of the decision being placed in the hands of the individual jurisdiction. This is in accordance with pre-existing principles and treats the Internet in the same manner as other media outlets, such as television or radio. If an Internet Service Provider wishes to prevent publication in an individual jurisdiction, this can be done by blocking the relevant access in that jurisdiction. An international agreement, along the lines of an addendum to Council Regulation 44/2001, on the Jurisdiction and Enforcement of Judgments within the EU arena, would be desirable to properly allocate jurisdiction in Internet related cases.

EU Versus non-EU rules

It must be made clear that there are different regimes applicable in Ireland in relation to jurisdiction regarding EU countries and non EU countries. While the decision in *Dow Jones v. Gutnick* is strictly applicable to non-EU cases, it has wider implications given its determination of the preliminary issue regarding where the tort is committed. This preliminary issue arises when determining jurisdiction within the EU in tort cases under Regulation 44/2001. In so far as *Dow Jones v. Gutnick* supports the multiple publication rule, it may have an impact on EU cases as well.

Conclusion

Old wine in new bottles! That is the story of the law and the Internet. The arguments of the proponents for change in the application of law to the Internet, are eerily reminiscent of the same arguments made at the height of the Internet boom that the arrival of the Internet had created a "new paradigm" for business. While it may be argued that established legal rules may require tweaking in so far as they react to the new medium, it is clear that root and branch change is not what is required, nor what will be countenanced.

In the arena of libel law, when attempting to strike a balance between competing interests, there may be an argument for the introduction of defences such as innocent dissemination, removal at first opportunity and all reasonable care being afforded, in assessing whether a service provider should be held liable in damages. However, a blanket immunity based upon a system of law chosen by the service provider, will not be entertained. That is the salutary lesson of *Dow Jones v. Gutnick*.[6] ●

5. [2002] Q B 783
6. The United States Supreme Court is currently being asked to rule on the issue of jurisdiction in a case arising from acts on the Internet. The case involves a Maryland publisher of adult photographs who tried to use Maryland law to pursue an Internet service provider from Georgia. A federal appeals court ruled that the case could not be brought in Maryland, because the defendant had no ties to that state. The Appeals court dismissed the notion that a mere presence on the Internet could subject a company to suit in every jurisdiction with Internet connection. A more gradated, "sliding scale" approach was adopted, which distinguished between when a website is merely passively visible from a state, from when it is actively involved with it and subject to its jurisdiction.