

HOW REAL ARE FEARS CONCERNING THE
POTENTIAL OF INTERNET PUBLICATION OF
MASS MEDIA TO REDUCE FREEDOM OF
SPEECH?

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Introduction

Courts have been evaluating the issue of personal jurisdiction based on Internet or “network-mediated” contracts for some time.¹ The concept of jurisdiction in law, in theory is reasonably straight forward, a criminal act is committed in a state, and state law enforcement has the jurisdiction to bring the matter towards a court. Even in civil disputes the traditional jurisdiction allows for a plaintiff to sue a defendant for a civil action such as the tort of defamation, if both parties are within the same jurisdiction.

However cyber law or internet based laws, is different than traditional methods. As of June 2014, 14.72 million Australians had access to the internet in their own home² and as of May 2014, 12.07 million people used a smartphone³ to access the internet. With such a high demand of Australian users accessing the internet, the majority of the content that an internet user now has access to is outside the Australian jurisdiction, located on servers throughout the world, in other countries jurisdictions, that may or may not be similar to Australian law.

With an increase of internet popularity and in more particular the popularity of social media platforms, such as Facebook, Twitter and Instagram, it was only a matter of time, before libel situations such as the tort of defamation would be challenged in Australian courts in relation to jurisdiction.

The popularity of e-commerce or online shopping sites such as eBay and Gumtree, has also questioned the legal binding of an online contract, when a purchase from an internet user has

¹ Benjamin Spencer, ‘Jurisdiction and the Internet: Returning to Traditional Principles to analyze Network-Mediated Contacts’ [2006] *University of Illinois Law Review* 71.

² Australian Communications and Media Authority, *Australians hungry for everything the internet has to offer* (03 December 2014) < <http://www.acma.gov.au/theACMA/Library/Corporate-library/Corporate-publications/australians-hungry-for-everything-the-internet-has-to-offer> >.

³ Ibid.

been made outside their home jurisdiction.

Dow Jones and Company Inc v Gutnick (2002) HCA 210 CLR 575

The first real test and authority on Australian jurisdiction of an internet case and if Australian jurisdiction could be used was seen in *Dow Jones and Company Inc v Gutnick* (2002) HCA 56 210 CLR 575. The case regarding the tort of defamation, where Gutnick alleged that comments that were published on an online article defamed stating that “*some of his business dealings with religious charities raise uncomfortable questions*”⁴

Although the initial comments were made in print media, an online version was also available on the internet, which allowed users anywhere in the world the ability to download the material. The matter of jurisdiction was argued in the High Court of Australia. The major point of law that was argued, was whether the material (the online publication) being located on a server in New Jersey in the United States, fell into United States of America jurisdiction as the United States defamation laws are stronger in Victoria than that of the United States of America. *Dow Jones and Company* case was fought on the basis of the most significant relationship test, stating that there was no significant relationship with the material on the server and the internet user in Australia and as such Australian Law should not apply.

In the unanimous High Court decision, the High Court using the four step model, it was decided that Gutnick had the right to sue for defamation as he resided in Victoria and Victoria was the place where damage to his reputation occurred. The High Court ruled that the defamation did not occur at the time of publishing, but as soon as a third party read the publication and thought less of the individual who was defamed.⁵

⁴ *Dow Jones and Company Inc v Gutnick* (2002) HCA 56 210 CLR 575

⁵ *Ibid.*

This allowed for Australian plaintiffs in defamation the ability to sue an "internet defendant".

Callinan J stated that

*"If people wish to do business in, or indeed travel to, or live in, or utilize the infrastructure of different countries, they can hardly expect to be absolved from compliance with the laws of those countries. The fact that publication might occur everywhere does not mean that it occurs nowhere."*⁶

The matter was subsequently appealed by Dow Jones, however was settled with Dow Jones agreeing to pay some of Gutnick's legal fees.⁷

How real are the fears reducing freedom of speech?

The fears are extremely real. As seen in the Gutnick case, you can no longer hide behind the internet or the publication of material being in another jurisdiction, to protect you from a libel suit such as defamation.

In the case of *Mickle v Farley* [2013] NSWDC 295 a case where a former High School student in Orange, New South Wales, wrote defamatory comments on social media sites twitter and Facebook in 2012 about Christine Mickle a music teacher at his former school. The comments were false allegations regarding the defendant's father who was also a teacher, leaving the school, with the defendant believing that the plaintiff had something to do with the defendant's father's employment ending.

⁶ Ibid.

⁷ ABC News Victoria, Dow Jones settles Gutnick action (12 Nov 2004) ABC News < <http://www.abc.net.au/news/2004-11-12/dow-jones-settles-gutnick-action/584404> >.

Judge Elkaim stated

*"The effect of the publication on the plaintiff was devastating."*⁸

The defendant was ordered to pay the plaintiff \$105,000 in damages.⁹

Like the Gutnick case the content was placed on the Facebook and twitter servers which are outside jurisdiction to Australia. Facebook servers are located on 4 sites across the United States of America¹⁰, with the twitter servers based in Atlanta, USA.¹¹ So the fact that the plaintiff read the comments in New South Wales, it damaged her reputation in New South Wales, allowing the case be heard in New South Wales. If the matter for instance had the defendant in an outside jurisdiction whether it is Australia or abroad, applying the four step model would have also allowed for the plaintiff to sue the defendant.

Internet users should be aware that the consequence for a few keystrokes is uncertain and possibly severe.¹²

Australia in defamation law in the world environment, is reasonably tougher than some other countries, such as the United States of America, however other countries such as France where the lowest common denominator of defamation rules apply and where France's privacy law is often described as the toughest in the world.¹³ In particular the

⁸ *Mickle v Farley* [2013] NSWDC 295

⁹ *Ibid.*

¹⁰ Jeff Morrison, *Where are the Facebook servers located worldwide?* (20 Dec 2011) Quora < <http://www.quora.com/Where-are-the-Facebook-servers-located-worldwide> >.

¹¹ Rich Miller *Twitter Adding More Data Center Space (Again)* (September 19, 2011) Data Center Knowledge < <http://www.datacenterknowledge.com/archives/2011/09/19/twitter-adding-more-data-center-space-again/> >

¹² Stephan Wilske, and Teresa Schiller, "International Jurisdiction in Cyberspace: Which States May Regulate the Internet?" (1997) 50 Federal Communications Law Journal Issue. 1, Article 5

¹³ Index on Censorship "France: Strict defamation and privacy laws limit free expression" (19 August, 2013) Xindex the voice of free

publication of private details of someone's life without their consent is a punishable offence, with limited public interest defences available.¹⁴ The reason this point is raised, it shows that it would be easy for an Australian to post comment about a French national on a social media site such as Facebook and/or Twitter defaming that French national. Although the defamation may not constitute defamation in Australia, it may in some countries such as France for example. This goes to the heart of the fears concerning freedom of speech for someone living in Australia, as they may not even know that they have committed an offence and could be sued in another country that they may never have even been to.

Practical considerations and principles of private international law

Private international law governs civil and commercial law transactions and disputes that contain international elements.¹⁵

Jurisdiction as a principle of public and private international law, operates in a context of reasonableness,¹⁶ it brings an order to the regulation of transnational activities. It provides a coordination mechanism for determining the process of litigation. Without this concept of jurisdiction, any event, incident or thing could be litigated anywhere.¹⁷

How do we mitigate or control the damage in the cyber world of being sued for breach of contract when an online purchase goes bad or be sued for a defamatory social media

expression < <http://www.indexoncensorship.org/2013/08/france-faces-restrictions-on-free-expression/> >

¹⁴ Ibid.

¹⁵ Attorney-General's Department, *Private international law* < <http://www.ag.gov.au/Internationalrelations/PrivateInternationalLaw/Pages/default.aspx> >

¹⁶ Brian Fitzgerald, *Negotiating American Legal Hegemony' In the Transnational World of Cyberspace* (2003) Melbourne University Law Review MelbULawRw 21 < [>](http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MelbULawRw/2003/21.html?stem=0&synonyms=0&query=title(gutnick%20and%20jones%20))

¹⁷ Ibid

post.

To mitigate the damage and to clear up any ambiguity, the best practice would be to firstly have your website hosted on an Australian server. You could add a clause in your online contract, indicating the choice of law clause and if so which law and jurisdiction would apply. This could be as simple as placing this clause in a contract either in writing when dealing with customers online, or could be a notice in fine print in the user rights on your website. The clause could state that any business conducted on this website is bound under the Australian jurisdiction.

An example of the choice of law on a website for contract law could be the online shopping website eBay. In the user agreement on the site it states that if you reside outside the USA, European Union or India that you are dealing eBay International with jurisdiction in Switzerland.¹⁸

Choice of law is broken down between contract law and tort (defamation) law, however choice of law clauses will only mitigate against contractual matters. Putting the above clause on your website will not be sufficient under tort (defamation) law.

Tort law in this instance is best defined as "*lex loci delicti*" meaning "*the law of the place where the wrong was committed*". So like the case in *Dow Jones v Gutnick*, the wrong was committed in Victoria although the information creating that wrong was held in another jurisdiction.

¹⁸ Ebay *Ebay User agreement* (2015) < <http://pages.ebay.com/help/policies/user-agreement.html#17> > states "The entity you are contracting with is eBay Inc., 2145 Hamilton Ave., San Jose, CA 95125 if you reside in the United States. It is eBay Europe S.à r.l., 22-24 Boulevard Royal, L-2449 Luxembourg if you reside in the European Union; eBay India Private Limited, 14th Floor, North Block, R-Tech Park, Western Express Highway, Goregaon (East), Mumbai 400063, Maharashtra if you reside in India; and eBay International AG, Helvetiastrasse 15/17, 3005, Bern, Switzerland if you reside in any other country."

In the tort of negligence the applicable law is at the place of the tort. Australian negligence cases such as asbestos-related injuries and overseas plaintiffs such as *James Hardie Industries v Hall* (1998) 43 NSWLR 554 has dealt with the jurisdiction matter of where the matter will be heard.

This was also defined in *Puttick v Fletcher Challenge Forests Pty Ltd* [2007] VSCA 264, when the Victorian Court of Appeal dealt with a matter to determine if Victoria (just as in the Gutnick case) was the correct jurisdiction where the plaintiff a Victorian resident sued a New Zealand company, Fletcher in a negligence case regarding the plaintiffs exposure to asbestos in factories in Belgium and Malaysia when the plaintiff visited those locations as duties of his employment.

The plaintiff was a resident of New Zealand and at the time of the law suit and was now residing in Victoria. It was determined that the negligence occurred in New Zealand and as a result in a 2:1 majority agreed that Victoria was not the appropriate jurisdiction and the matter fell under New Zealand jurisdiction.¹⁹

Conclusion

Dow Jones and Company Inc v Gutnick (2002) 210 CLR 575 has been a landmark case in Australian cyber law. It shows that there is a real fear, that a party unwillingly could be sued for defamation for online publication articles. In *Mickle v Farley* [2013] NSWDC 295 a more recent case showed that a student posting defamatory comments

¹⁹ Perry Herzfeld, *Choice of law, forum non conveniens and asbestos in the Victorian Court of Appeal* (November 29, 2007) Conflict of Laws < <http://conflictoflaws.net/2007/choice-of-law-forum-non-conveniens-and-asbestos-in-the-victorian-court-of-appeal/> >

about a past teacher was liable for the defamatory comments and was ordered to pay damages.

The real concern with private international law is that a person could without knowing commit an offence by an action on the internet that may be of defamatory comment in another part of the world and be sued for the comment. This in particular goes to the very heart of freedom of speech and could be a warning for any internet user.

There are a number of significant processes that you could put in place to mitigate any damage and in particular in contract internet law, stipulating the jurisdiction is a favorable action to take. However the choice of law does not extend to tort law and the tort law always goes back to *lex loci delicti* and cannot be changed.