Moving Targets: Defamation over the internet

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Background

A Canadian defamation judgment against an American publisher has sounded alarm bells for media publishers worldwide. The concern is that it will lead to incalculable liability for internet defamation as publishers may be faced with the near-impossible task of obtaining legal advice in every country in which articles may be downloaded and read.

The judgment at the centre of the controversy is *Bangoura v Washington Post & Ors*. 235 D.L.R. (4th) 564[1] (***Bangoura***). In January 2004, the Ontario Superior Court ruled that it had jurisdiction to hear an internet defamation case against the Washington Post, an American publisher. In its decision, the Ontario Superior Court referred with approval to the judgment of the High Court of Australia in *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575 (***Gutnick***), which held that, for the purpose of Australian defamation law, material is published on the internet at the place where the material is downloaded. Thus, Mr Gutnick could continue an action for defamation in the Supreme Court of Victoria against Dow Jones in relation to an article on its web site that had been downloaded in Victoria and had allegedly damaged Mr Gutnick's reputation in that state, notwithstanding that the article was posted onto the internet in America.

However *Bangoura* had an important difference – the plaintiff developed his reputation in Ontario years after the material was first published there by the Washington Post.

The decision

The plaintiff, Mr Cheickh Bangoura had been employed by the United Nations (**UN**) from 1987 to 1997 and had lived in a number of different countries in the course of his employment. Mr Bangoura emigrated to Canada in 1997 and had resided in Ontario for two years at the time of the hearing.

In January 1997, while Mr Bangoura was stationed in Kenya, the Washington Post published three articles claiming he had been the subject of UN investigations over allegations by his colleagues of sexual harassment, financial improprieties and nepotism.

At the time the articles first appeared, there were only seven paid subscribers of the Washington Post in the Ontario area. However the articles were also posted on the Washington Post's web site where they had since appeared continuously.

Mr Bangoura commenced legal action for defamation against the Washington Post and various reporters and agents of the Washington Post in Ontario, based on the publication of the three articles in the newspaper and on its web site.

In response, the defendants applied for the case to be stayed and for an order setting aside service of the claim. The defendants' main arguments were that the Ontario Superior Court did not have jurisdiction because there was no real and substantial connection between the action and Ontario and that Ontario was not the most convenient forum for the action.

The Ontario Superior Court dismissed the defendants' application. On the issue of jurisdiction, the Court found that, despite the fact that the defendants had no connection with Ontario, there was a real and substantial connection between the action and Ontario.

The decision was heavily influenced by the High Court's analysis in *Gutnick*. The Ontario Superior Court stated that the location of the plaintiff is the key factor in determining whether a defamation action has a real and substantial connection with a jurisdiction. The place where the plaintiff resides is generally the place where the plaintiff will suffer the most damage to his or her reputation as a result of a defamatory statement. Thus, as the articles on the Washington Post web site could be accessed in Ontario where Mr Bangoura resided and where damage to his reputation would have the greatest impact, the Court concluded that the action had a real and substantial connection with Ontario.

In its judgment, the Ontario Superior Court echoed the statements of the High Court in *Gutnick* that with the advantage of audience reach that the internet provides, comes responsibility. Particular thought needs to be given to the legal consequences of publishing material in the jurisdiction in which the subjects of articles live. Further, the Court considered that, having regard to the international profile of the Washington Post, the Washington Post should have reasonably foreseen that the story would follow the plaintiff wherever he resided. That the plaintiff did not reside in Ontario when the articles were first published was of no consequence.

The implications

The Australian High Court and the Ontario Superior Court both emphasised that defamatory material will only be actionable in a jurisdiction where it is published and damage is suffered to a person's reputation. As a person will generally suffer damage to reputation in the jurisdiction in which he or she resides or has resided, publishers are likely to be able to identify those jurisdictions in which they may face potential liability prior to placing material online.

In *Gutnick*, Mr Gutnick had lived in Victoria for many years and was living in Victoria at the time the defamatory material was first published. The circumstances in *Bangoura* were different. Nevertheless, despite the fact that Mr Bangoura was not living in Ontario

when the article was first published, and that Ontario had been his place of residence for only two years at the time of the hearing, the Court decided that it had jurisdiction to hear the claim.

Online publishers may be concerned about the application of *Gutnick* to the facts of *Bangoura*. Arguably, *Bangoura* indicates that publishers may be required to foresee that damage to a person's reputation could occur in a jurisdiction to which that person has relocated sometime after the article was first made available on the internet. It is feared that if liability for defamation follows the prospective plaintiff, publishers may be faced with the near-impossible task of obtaining legal advice in relation to every jurisdiction prior to placing potentially defamatory material on the internet.[2] It has also been suggested that the fear of defamation actions in multiple jurisdictions may force online publishers to restrict accessibility of information from certain jurisdictions, especially from those seen to be more 'plaintiff-friendly'.[3]

Scope of potential liability

The potential reach of *Bangoura* may in fact be overstated. It is not unusual for publishers to have to consider the possibility of being sued in multiple jurisdictions in relation to material published internationally using television, radio and newspapers. The concepts involved are not novel. The fact that the same rules have been extended to the relatively new medium of the internet suggests that publishers may need to adopt similar cautions to materials uploaded onto their web sites and to consider carefully whether to obtain legal advice in that regard. In what may be an indication of the future likelihood of internet defamation actions, Australian courts have not been flooded with defamation actions against foreign publishers, despite the fears at the time *Gutnick* was handed down.

As mentioned previously, the High Court in *Gutnick* reasoned that, prior to first publishing articles, online publishers will usually know the defamation law to which the subject person may resort by reference to the location of the subject person. *Bangoura* confirms that this may not always be the case. However, other barriers may limit the number of jurisdictions that online publishers may need to consider prior to publication. For example, plaintiffs are more likely to sue in jurisdictions where a judgment can be enforced against the media organisation's assets in that jurisdiction. Further, if the online material is limited to subscribers, the number of jurisdictions in which the material is downloaded (and therefore published) would be less than if the material was freely available online. In that scenario, media organisations would be able to determine in which jurisdictions publication is most likely to occur.

With regard to the perceived threat of defamation actions in multiple jurisdictions, the expense and inconvenience of doing so is likely to discourage most potential plaintiffs. The fact that courts may refuse to exercise jurisdiction if they decide that another jurisdiction is a more appropriate forum to determine the dispute is a further legal barrier likely to limit the number of actions available.

It remains to be seen how courts in other jurisdictions will react to *Bangoura*, and whether *Bangoura* will survive appeal. For now, perhaps the most practical course of action that media organisations can take in the light of the decision is to consider regularly monitoring their online publications with regard to changing factual circumstances, including any relocation of subject persons after material is first placed on the internet.

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1 At the time of writing this article the judgment was on appeal, scheduled to be heard on 8 March 2005.

2 See Dan Tench, 'Anyone in any country could read this article....', Olswang, 24 May 2004. <http://www.olswang.com/news.asp?page=newssing&sid=125&aid=667> (accessed 17 November 2004).

3 See Michael Cameron, 'Web in a tangle over court case', The Australian, 23 September 2004 <http://www.theaustralian.news.com.au/printpage/0,5942,10847430,00.html> (accessed 17 November 2004).