



Does world wide web mean world-wide liability for cyber libel?

Canadian and Commonwealth courts apply old rules to new technologies

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In a recent decision, the Supreme Court described internet liability as “a vast field where the legal harvest is only beginning to ripen”.¹

The internet’s nature as a medium that is at once everywhere and nowhere leads to difficulties in applying traditional tests for jurisdiction. Someone sitting at a computer anywhere in the world can post defamatory comments that can be read everywhere in the world. Does that mean that this person may be haled before courts anywhere the message is read?

In a series of recent decisions, courts in Canada and the Commonwealth have rejected suggestions that special, and more restrictive, rules be applied to jurisdiction over cyber libel. Instead, they have adapted the traditional rules for defamation and jurisdiction to defamation on the internet.

Downloading constitutes “publication”. Thus, in general, Canadian and Commonwealth courts will take jurisdiction if the defamatory materials were downloaded to any significant extent within the jurisdiction, provided that the plaintiff has a sufficient connection with the jurisdiction. As a result, foreign publications with online readers in Canada can be liable in Canada for defaming someone in Canada.

Ubiquity, universality and utility

In October 2000, the US magazine *Barron’s Online* published an article referring to Joseph Gutnick, a resident of the Australian state of Victoria. Gutnick sued in Victoria. *Barron’s* publisher, Dow Jones & Co., moved to set aside service *ex juris*. The case

was ultimately appealed to the High Court of Australia.

In its December 2002 decision, the High Court held that Victorian courts had jurisdiction over the alleged libel.² The majority applied the precept that publication occurs when defamatory material is read or heard, and the tort of defamation occurs where damage to reputation occurs. They rejected the US single publication rule, according to which publication occurs where the person publishing the words acts. Publication is not a unilateral act by the publisher; it is a bilateral act whereby a publisher makes material available to another for his or her comprehension. This bilateral nature “underpins the long-established common law rule that every communication of defamatory material founds a separate cause of action”. This rule goes back to an 1849 English case, *Duke of Brunswick v. Harmer*.³

The court concluded that:

- Defamation occurs where damage to reputation occurs;
- Damage to reputation occurs when defamatory material is available in comprehensible form;
- In the case of the internet, defamatory material is available in comprehensible form when it is downloaded;
- Consequently, the place where defamatory material is downloaded is the place where damage to reputation occurs, and thus also the place where the tort is committed.

In a concurring judgment, Gaudron J. referred to the “ubiquity, universality and utility” of the internet

and discussed at some length the policy arguments for and against adopting a single publication rule for the internet, based on the place of uploading. She concluded against such a rule. She noted that the common law of defamation is deeply entrenched. As well, legal rules should be technology-neutral. A rule based on a particular technology may be short-lived as new technologies over-take it.

Distinctive capacity to damage reputation

In its June, 2004, decision in *Barrick Gold Corporation v. Lopenhandia*,⁴ the Ontario Court of Appeal asked itself whether there was something about cyber libel that distinguishes it, for the purpose of damages, from defamation in another medium. The court answered: yes.

Mr. Lopenhandia, a Vancouver businessman, conducted a one-man campaign of defamation against Barrick and its top executives. In numerous postings to mining industry bulletin boards, he alleged that he, not Barrick, owned a mine in Chile, and accused Barrick of various fraudulent and criminal acts.

Mr. Lopenhandia's postings were read in Ontario and elsewhere, prompting inquiries to Barrick from shareholders, financial analysts, and regulatory agencies, including the Toronto Stock Exchange.

Barrick sued Mr. Lopenhandia in Ontario, and when he failed to defend, moved for judgment. Swinton J. granted judgment, but only awarded \$15,000 for damages to reputation, and no punitive damages. Swinton J. viewed Mr. Lopenhandia's postings as rantings that would not be taken seriously by a reasonable reader. As a result, they did not cause serious damage to Barrick's reputation, she concluded.

Blair J.A. wrote for the majority in allowing Barrick's appeal. He examined the special nature of internet communications. Following *Gutnick*, he noticed the "ubiquity, universality and utility" of the internet and described internet communications as "instantaneous, seamless, interactive, blunt, borderless and far-reaching". Because internet communications are impersonal and may be anonymous, there is a greater risk that they will be believed. Moreover provocative messages tend to be replicated and spread on the internet. The

internet has a "distinctive capacity ... to cause instantaneous and irreparable damage to the business reputation of an individual or corporation by reason of its interactive and globally all-pervasive nature".⁵

The nature of the internet, together with evidence that Mr. Lopenhandia's lies acquired an audience and provoked inquiries, Mr. Lopenhandia's attacks on the integrity of Barrick executives, and Mr. Lopenhandia's refusal to apologize all led the court to increase the damage award to \$75,000.

The court also awarded punitive damages of \$50,000, citing a number of reasons. Among them was one peculiar to internet communications. Blair J.A. commented that Barrick was not, in the context of the internet, the powerful party. Mr. Lopenhandia was. The internet neutralizes the power of the powerful in a communications battle. Barrick was vulnerable to publications like those of Mr. Lopenhandia.

The question of whether Ontario had jurisdiction over Mr. Lopenhandia's cyber libel did not arise in this case, perhaps because Mr. Lopenhandia did not defend the action. It was clear, however, that Mr. Lopenhandia's defamatory postings had been downloaded in Ontario.

The court did consider, however, whether it had jurisdiction to enjoin Mr. Lopenhandia from further defamation. Swinton J. had concluded she could not grant an injunction because it was not claimed in respect of acts of Mr. Lopenhandia in Ontario. Blair J.A. disagreed. He pointed out that one of the bulletin boards Mr. Lopenhandia used is located in Ontario. As well, although he lives in British Columbia, Mr. Lopenhandia could post defamatory comments from anywhere in the world, including Ontario. Instead of "throwing up their collective hands in despair" of being able effectively to enjoin defamation, courts should protect against defamation re-occurring in their own jurisdiction.

Former UN official cannot sue in Ontario

Blair J.A.'s comments about the tremendous reach of the internet in *Barrick* would tend to support an expansive approach to jurisdiction. However, in *Bangoura v. The Washington Post*, the Ontario Court of Appeal made it clear that the mere fact

that a website can be viewed from Ontario is not enough to found jurisdiction.⁶

In January 1997, Mr. Bangoura was finishing up a contract with the UN in Africa when the *Washington Post* published two articles alleging sexual harassment, financial improprieties and nepotism. The next month Mr. Bangoura re-joined his family, who were living in Montreal. They lived there until 2000, when they moved to Ontario. In 2003, he sued the *Washington Post* in Ontario.

The *Washington Post* moved to set aside service *ex juris*. Pitt J. held that Ontario courts did have jurisdiction over the case. Mr. Bangoura was an international public servant; the *Post* should have foreseen that its story would follow him wherever he went and cause him damage there.

The Court of Appeal allowed the *Washington Post's* appeal. Applying the test laid down in *Muscutt v. Courcelles*,⁷ Armstrong J.A. noted that Mr. Bangoura did not live in Ontario when the alleged libel occurred; the connection between Ontario and the claim was "minimal at best". Moreover, the articles were not widely read in Ontario, if at all (apart from Mr. Bangoura's lawyers). Armstrong J.A. distinguished the case from *Gutnick*, where the Australian High Court took jurisdiction over a claim alleging defamation by *Barron's*. In that case, *Barron's* had 1,700 internet subscribers in Australia.

The Media Coalition intervened in the case and offered a number of different possible approaches to jurisdiction over cyber libel. However, Armstrong J.A. left for another day which, if any, the court would adopt.

Former Canuck GM can sue in BC

In February 2005, *New York Post* sports columnist Larry Brooks wrote an article accusing former Vancouver Canuck general manager Brian Burke of having "personally challenged" the Canucks to "get" Steve Moore between periods of a game on March 8, 2004. It was during that game that Todd Bertuzzi assaulted Mr. Moore, breaking his neck.

Mr. Burke sued the *New York Post* in BC. The *Post* moved to strike the claim. In a decision issued in September, 2005, the BC Supreme Court held that it had jurisdiction over the claim.⁸

Burnyeat J. quoted from *Barrick* and Pitt J.'s decision in *Bangoura* at length. He held that BC had jurisdiction *simpliciter* because publication takes place where the words are read or heard. Mr. Brooks' column had been downloaded in BC and thus "published" there. Moreover, it was foreseeable by the *Post* that a column on a matter of interest to people in BC would be read in BC.

Duke of Brunswick alive and well in UK after 150 years

Don King, a British citizen living in the US, sued in England for damages caused by articles posted on US websites that, he claimed, portrayed him as a "persistent, bigoted, and unashamed or unrepentant anti-semitic".

The English Court of Appeal held that English courts had jurisdiction over the alleged defamation.⁹ The court followed *Gutnick* in rejecting a special single publication rule for the internet, although it accepted that "in an Internet case the court's discretion will tend to be more open-textured than otherwise".

Despite being a US resident, Mr. King had strong connections with the UK: he was famous in the UK, visited the UK regularly, appeared frequently on British radio and television, and conducted his boxing promotion business there. The defamatory allegations against him became common knowledge in the boxing community.¹⁰

Reception is sufficient for jurisdiction

Although it deals with copyright, the Supreme Court of Canada's recent decision in the *SOCAN* case applies essentially the same analysis as *Gutnick*. The court noted that "receipt may be no less 'significant' a connecting factor than the point of origin". Thus, Canadian courts can take jurisdiction where Canada is the country of transmission or the country of reception.

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1 *Society of Composers, Authors and Music Publishers of Canada v. Canadian Association of Internet Providers*, [2005] 2 S.C.R. 427

2 *Dow Jones and Company Inc. v. Gutnick* (2002), 194 A.L.R. 433 (H.C.)

3 (1849) 14 Q.B. 185, 117 ER 75.

4 (2005), 71 O.R. (3d) 416 (C.A.)

5 at ¶44

6 [2005] O.J. No. 3849 (C.A.)

7 (2002), 60 O.R. (3d) 20 (C.A.). The factors to be considered are: (i) the connection between the forum and the plaintiff's claim; (ii) the connection between the forum and the defendant; (iii) unfairness to the defendant in assuming jurisdiction; (iv) unfairness to the plaintiff in not assuming jurisdiction; (v) involvement of other parties to the suit; (vi) the court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis; (vii) whether the case is interprovincial or international in nature; and (viii) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

8 [2005] B.C.J. No. 1993

9 *Lewis v. King*, [2004] EWCA Civ 1329

10 See [2004] EWHC 168 (QB).