



## **LIBEL ON THE INTERNET**

### **C. Dennis Morrison Q.C., Attorney-at-law**

The phenomenon of the internet, in particular its global nature, is increasingly testing long established rules relating to the territorial jurisdiction of national courts. This is an inevitable result of the 'multi-localisation' of the behaviour of the parties involved, so that what is one of the internet's greatest attractions in fact provides one of the areas of greatest challenge. Transactions conducted by means of electronic communications are very often cross-border in nature and are now giving rise to special jurisdictional problems, though to date case law on the issue of international conflicts of jurisdiction in an internet context is sparse.

A recent judgment of the High Court of Australia seems to represent the first time that the highest court of any country has considered this issue of jurisdiction in the context of defamation on the internet. The question in the case was whether if potentially defamatory material were placed on a website in one country, a court in another country would have jurisdiction to hear an action for defamation in relation to that material, if the material has been accessed within that court's jurisdiction.

The facts of the case were that Barron's magazine, published by the well known American media firm of Dow Jones, published serious allegations against a resident of Victoria in Australia. The magazine was available online to subscribers, some 300 of whom resided and accessed the information in Victoria, as a result of which the affected resident brought an action in Victoria. Barron's challenged the

jurisdiction of the court in Victoria, arguing that the court should decline to hear the case on the basis that the article had been published in the American state of New Jersey, which was the location of the Dow Jones web server.

Publication is, of course, at the heart of every claim for defamation, whether by the written (libel) or spoken (slander) word: in other words, telling a person to his/her face that he/she is a “tiefing lawyer” is not actionable, once the statement is not ‘published’ to a third party. Given that the jurisdiction of national (or, as in the present case, provincial) courts is territorial, the main issue in the case was therefore where did publication of the Barron’s article take place - in New Jersey or Victoria? Barron’s argued, not unexpectedly, that publication took place when the offending article was uploaded onto its website in New Jersey, while the plaintiff - while perhaps not disputing that - argued that there was also publication in Victoria once, using the now established technology, the article was pulled by a searcher from the website and downloaded to his or her computer, in this case in Victoria,

The Australian High Court agreed with the plaintiff and accordingly held that the Victorian court did have jurisdiction to try the case (the actual merits of which have not yet been considered). The court rejected the argument that “exposing online publishers to the independent laws of over 180 countries would have a ‘chilling effect’ on the free flow of information”, approving the trial judge’s conclusion that this had to be “balanced against the worldwide inconvenience caused to litigants ... who would at enormous expense and inconvenience have to embark on the formidable task of suing in the U.S.A., with its different fee and cost structures and where libel laws are, in many respects, tilted in favour of defendants, or if you will, in favour of constitutional free

speech concepts and rights developed the U.S.A. ...". In cases like the one under review, the "reputation" which the plaintiff's action sought to protect was one known in Victoria, the place in which the allegedly defamatory material was downloaded, and that then was held to be where the libel took place.

This is obviously a decision of which corporations and internet publishers need to be aware, although it may hardly be regarded as surprising in the light of well established authorities on the meaning of the notion of publication in defamation cases. But it is perhaps not the end of the matter, for at least two reasons. In the first place, the Australian High Court itself recognised that in cases such as the one before it, "the court may look to the reasonableness of the publisher's conduct". Secondly, there appears to be at least two subsequent decisions of U.S. federal appellate courts which have not followed the Australian High Court and which have held that more than just the ability to access a site in a particular forum is required for that forum to have jurisdiction to hear the case. In other words, according to the U.S. courts, the publication must in some way connect with the particular jurisdiction, in the sense that there must be an intention to direct the publication at that jurisdiction. This, then, is a more restrictive approach which may conform more readily with a publisher's traditional expectations of what might attract legal action and what might not. But, as indicated at the outset, we are in brand new territory here (a brave new world?) and only time can tell.

**C. DENNIS MORRISON**  
**DUNNCOX**  
**48 Duke Street, Kingston**  
**Dennis.Morrison@dunncox.com;**

[For the text of the Australian judgment go to:

[http://www.austlii.edu.au/au/cases/cth/high\\_ct/2002/56.html](http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56.html)]