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Defamation on the Internet under Australian and Jewish Law - The Loshon Hora Show

By

The Hon Justice Kenneth Martin,
Supreme Court of Western Australia

Under the common law which reached New South Wales with Captain Arthur Phillip in 1788, there existed civil wrongs (torts) in libel and slander. These causes of action were recognised as actionable, even if there was no intention to inflict injury.

The common law wrongs of libel and slander distinguish between written and oral publications (s 7(1) of the *Defamation Act 2005* (WA) abolishes the distinction). They comprise part of the law of defamation. Defamation concerns injury which damages a living person's reputation.

Under the common law, there is no obligation to establish a good character or reputation (see *Gatley on Libel and Slander* (11th ed, 2008) at [34.60]). The learned authors say:

> It is submitted that an accurate statement of the law is that evidence of the plaintiff's good character or reputation is generally unnecessary, but not irrelevant.

If a defendant has impugned the character of a plaintiff as being bad, then a plaintiff can respond by adducing evidence of general good character. As the *Gatley* authors say in [34]:

> … but just as a defendant cannot cite particular instances of the claimant's misconduct to diminish the damages, so the claimant cannot give evidence of particular facts in support of his claim to have a good character.

The grave significance under the common law of an injury to a person's good reputation, their 'good name', was captured by Shakespeare around 1604 in

Act III Scene III of *Othello*. In that part of the play, Othello's servant Iago says to his master:

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls:
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.

Whilst no doubt there are parallels to be drawn, the common law of defamation seems to be significantly narrower than what has been referred to as a prohibition under Jewish law against telling or listening to gossip, sometimes referred to as *Lashon Hara* (or *Loshon Hora*). Whilst I am certainly no expert in relation to Jewish law, from what I have read, *Lashon Hara* seems to diverge from the common law of defamation in that the focus of *Lashon Hara* is more upon the use of true speech (gossip or 'evil tongue') to achieve a wrongful purpose. For defamation, the focus is upon the publication of a false statement and the consequent injury (damage) to reputation arising (if any).

There may be a contrast with defamation to another prohibitive concept under Jewish law, by the injunction against *Motzi Shem Ra* ('spreading a bad name'). That principle seems to have more to do with making untrue remarks. Accordingly, that concept presents as more akin to common law defamation.

The law of defamation was significantly altered across Australia at the end of 2005 by uniform Defamation Acts that were enacted and became law in each State or Territory. Therefore, in Western Australia the law of defamation is now first ascertained in the *Defamation Act 2005* (which commenced operation on 1 January 2006). However, the uniform Defamation Acts do not repeal the common law (s 6(2) *Defamation Act 2005* (WA)).

Truth or justification

Under the common law, truth was a complete defence to the defamation. There is a conceptual distinction in defamation law as between the meaning of

the defamatory statement, evaluated against a number of defences which may be raised to defamation. These defences may be absolute or qualified. Qualified defences can be defeated by proving an existence of malice in the defamer.

The most well known common law defence to defamation is that of substantial 'truth', more correctly, 'justification'. That position was not uniform across Australia before 2006. Truth was a complete defence to defamation in Western Australia. In some Australian jurisdictions such as Queensland, Tasmania and the ACT, showing the truth of what was said or written, was not enough. Truth needed to be combined with a further ingredient, namely 'public benefit'. This was a sticking point against reform for many years across the various Australian jurisdictions seeking to agree on uniform defamation laws. In days of national broadcasts by radio and television networks across the States and Territories, divergences between the different Australian jurisdictions was something of a defamation lawyer's nightmare. A degree of uniformity was finally achieved from the commencement of 2006.

As regards a defence of justification, the position across Australia now finds common expression. In Western Australia it is found under s 25 of the *Defamation Act* which reads:

> It is a defence to the publication of defamatory matter if the defendant proves that the defamatory imputations carried by the matter of which the plaintiff complains are substantially true.

There is another defence of contextual truth, which I will explain (see s 26 of the *Defamation Act*). It is important to remember, however, that the defences provided under the uniform Defamation Acts across Australia supplement the common law. They do not remove it (s 6(2) and s 24(1)).

There are some other statutory defences under Division 2 of the West Australian Act. They include absolute privilege (s 27), defence of fair report of proceedings of public concern (s 29) and a defence of honest opinion (s 31). There is also a defence of innocent dissemination under s 32 (applicable to persons such as booksellers, newsagents, news vendors, librarians or

broadcasters of live programmes, say on television, radio or otherwise where a broadcaster has no effective control over the person who makes statements that comprise the matter complained of). Passing on a rumour or gossip about someone which is false, for gossip's sake, is however unlikely to qualify as an innocent dissemination. Under s 35(1) of the *Defamation Act* the remedy for non-economic loss sustained by somebody defamed is capped at the amount of $324,000 (as of 1 July 2011) (see s 35(1)).

Social media and the Internet

It is clear that living persons (the position in relation to corporations being heavily restricted by the *Defamation Act 2005* s 9(1)) are capable of being defamed by publications made over the Internet, including by email.

Australian Jurisprudence in this area owes an enormous debt to a plaintiff, Rabbi Joseph Gutnick, a former President of the Melbourne Football Club, and businessman well known in Western Australia for his association with the Murrin Murrin nickel extraction project.

Joseph Gutnick claimed that he was defamed in a publication made over the Internet in a magazine that was published at the time by the publishers of the *Wall Street Journal*, Dow Jones Company Inc. *Barron's* magazine was published in hard copy and mainly circulated throughout the United States. However, a few hard copies did reach Australia, indeed the State of Victoria. Importantly, however, *Barron's* magazine was also published electronically over the Internet. Subscribers who paid a subscription were entitled to access *Barron's* business news reports on the World Wide Web. Rabbi Gutnick was particularly concerned about a publication in 2000 which essentially linked him to the activities of someone engaged in the business of money laundering. The World Wide Web is capable of being accessed by anyone with a computer capable of accessing and downloading material from the Internet.

Rabbi Gutnick was a resident of Victoria. However, his business tentacles reached not only all across Australia, but extended worldwide,

including to the United States. He commenced proceedings for defamation by reference to the *Barron's* publication against Dow Jones out of the Supreme Court of Victoria. He sought to proceed under the 'long arm' jurisdiction of the Victorian Court, on the basis that he had suffered damage to his reputation, by reason of being libelled in Victoria to readers who had downloaded the *Barron's* article from the Internet in that State.

Jurisdictional challenges by Dow Jones to the Victorian Court's jurisdiction at first instance, then on appeal to the Court of Appeal of Victoria, then finally (by special leave) to the High Court of Australia, were all unanimously rejected.

The ***Dow Jones*** case is a significant decision in many respects. But as regards the Internet, it stands as clear authority by Australian law for the proposition that even though a defamatory article has been uploaded to the Internet by a server located outside Australia (in that case in the American State of New Jersey), this feature is insufficient to protect the publication from an exposure to being assessed by reference to Australian defamation law, if it is downloaded in an Australian State or Territory and accessed from that place.

Rabbi Gutnick asserted that damage to his reputation occurred in his place of residence in the State of Victoria, where persons had downloaded the *Barron's* article which was so critical of him. An important tactical part of his case was to limit the reputational damage he was claiming solely to damage sustained in the State of Victoria. Therefore, Victoria was the only jurisdiction he claimed in for damage to his reputation.

It takes little imagination to see that under Australian defamation law persons who have worldwide international reputations (say for instance, Sir Richard Branson and Bill Gates) would have the theoretical capability of claiming that an Internet publication had caused them damage in many jurisdictions where they had a reputation.

Further observations concerning *Dow Jones v Gutnick*

What is also interesting in this decision is the differing stances expressed concerning how revolutionary was the arrival of the Internet as regards its future interface with defamation law. There is a stark divergence of views, particularly as between Justice Michael Kirby, who was greatly impressed by the revolutionary features of the Internet, in contrast to Justice Ian Callinan, who was far less moved. I refer to some of the Court's observations below.

In ***Dow Jones & Company Inc v Gutnick*** [2002] HCA 56; (2002) 210 CLR 575, Kirby J said at paragraph 66 (adopting some earlier UK observations of Lord Bingham of Cornhill) that:

> … in its impact on the law of defamation, the internet will require 'almost every concept and rule in the field … to be reconsidered in the light of the unique medium of instant world wide communication'.

On the other hand, Callinan J seemed unimpressed by the ramifications of the modern phenomenon. He said at paragraph 180:

> The Internet, which is no more than a means of communication by a set of interconnected computers, was described, not very convincingly, as a communication system entirely different from pre-existing technology. The nature and operation of the Internet and the World Wide Web were explained by [two highly qualified experts in the case] … They described the Internet as a set of interconnexions among computers all over the world to facilitate an exchange of messages. Using their computers, people can communicate with one another, and gain access to information. They claimed that it was a unique telecommunications system defying analogy with pre-existing technology.

Callinan J said at paragraph 186:

> The Court was much pressed with arguments about the ubiquity of the Internet. That ubiquity, it was said, distinguished the Internet from practically any other form of human endeavour. Implicit in the appellant's assertions was more than a suggestion that any attempt to control, regulate, or even inhibit its operation, no matter the irresponsibility or malevolence of a user, would be futile, and that therefore no jurisdiction should trouble to try to do so. I would reject these claims. Some brands of motor cars are ubiquitous but their manufacturers, if they wish to sell them in different jurisdictions, must comply with the laws and standards of those jurisdictions. There is nothing unique about multinational business, and it is in that that this appellant chooses to be engaged. If people wish to do business in, or indeed travel to, or live in, or utilise 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. Multiple publication in different jurisdictions is certainly no novelty in a federation such as Australia.

All judges rejected Dow Jones' objections to the jurisdiction of the Supreme Court of Victoria to hear Rabbi Gutnick's defamation action against Dow Jones. In dismissing the challenge in the High Court, Callinan J concluded at 200 (CLR 653):

> I agree with the respondent's submission that what the appellant seeks to do, is to impose upon Australian residents for the purposes of this and many other cases, an American legal hegemony in relation to Internet publications. The consequence, if the appellant's submission were to be accepted would be to confer upon one country, and one notably more benevolent to the commercial and other media than this one, an effective domain over the law of defamation, to the financial advantage of publishers in the United States, and the serious disadvantage of those unfortunate enough to be reputationally damaged outside the United States.

Freedom of expression

In ***Dow Jones v Gutnick***, the plurality (Gleeson CJ, McHugh, Gummow and Hayne JJ) at paragraph 23 (CLR 599) said:

> It is necessary to begin by making the obvious point that the law of defamation seeks to strike a balance between, on the one hand, society's interest in freedom of speech and the free exchange of information and ideas (whether or not that information and those ideas find favour with any particular part of society) and, on the other hand, an individual's interest in maintaining his or her reputation in society free from unwanted slur or damage. The way in which those interests are balanced differs from society to society.

The law of defamation proceeds on the premise that no person needs to prove that they have a good reputation. The common law effectively proceeds on the basis of accepting that a person is of good reputation, unless proved to the contrary. Rarely will a defence of bad character be available as a sufficient antidote to a claim of defamation. Reputation goes beyond character. It extends to embrace conduct by action or inaction, lawful or unlawful.

Sundry observations

There is now a very truncated period (usually 12 months unless extended by the court to a maximum of three years from publication) to commence a defamation suit under the *Limitation Act 2005* (WA). The *Limitation Act* is to be read hand in hand with the *Defamation Act*. See my reasons for decision in ***Wookey v Quigley [No 2]*** [2010] WASC 209.

The law of defamation relates to imputations in a publication. This is well illustrated by a decision of the New Zealand Court of Appeal in ***Templeton v Jones*** [1984] 1 NZLR 448. That was a famous case arising out of strong criticisms spoken publicly against a candidate at the 1984 New Zealand general election, by the sitting member against his rival.

The criticism described the candidate, published across national New Zealand television news, as a man who despised 'bureaucrats, civil servants, politicians, women, jews and professionals'.

The candidate then brought proceedings, but claiming only that the allegation published on television that he despised jews was false, malicious and defamatory.

The plaintiff ignored all other potentially defamatory allegations in the defendant's speech. The New Zealand Court of Appeal, applying orthodox principles of defamation, held that the plaintiff candidate's tactical decision was a permissible course under the law of defamation.

Some other points can be made:

(a) Defamation is a tort of strict liability in that a defendant may be held liable, even though no injury to reputation was ever intended and even where a defendant has acted with reasonable care (see paragraph 25 of the plurality reasons in ***Gutnick***, citing ***Lee v Wilson*** (1934) 51 CLR 276 at 288 per Dixon J).

(b) It is the fact of the publication, not the composition of a libel, which is the actionable wrong (***Lee v Wilson*** at 287 per Dixon J).

(c) Harm to reputation is done when a defamatory publication is 'comprehended' by a reader, listener or observer. Until then, no harm is done by it (see paragraph 26 of the plurality reasons in ***Gutnick***).

(d) There is a long established common law rule that every communication of a defamatory matter founds a separate cause of action, applying ***Duke of Brunswick v Harmer*** (1849) 14 QB 185 [117 ER 75]. A front-on attack against that principle being applied to the Internet in ***Dow Jones*** by reference to the ubiquity of the Internet, failed miserably.

Place of downloading

Finally, at paragraph 44 (CLR 607) the plurality in ***Dow Jones*** summarised the law for Australia as regards Internet publications this way:

> It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principle focus of defamation, not any quality of the defendant's conduct. In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.

It is important to repeat, bearing in mind that an Internet publication could be downloaded anywhere and that an international personality could have a reputation in many places, that in ***Dow Jones v Gutnick***, Rabbi Gutnick had expressly confined his claim to damage he alleged he had suffered to his reputation in Victoria as a consequence of the publication that occurred in Victoria (see plurality reasons paragraph 48). His claim was therefore a claim for damages for a tort committed in Victoria, not a claim for damages upon a tort committed out of Victoria (say, in New Jersey where the uploading to the Dow Jones server occurred). Multi-state publications, however, can be very complicated (see plurality reasons paragraphs 49-54).

Social media

Nothing I have said in the preceding observations is to address issues associated with Internet-related social phenomena such as is manifested under Facebook, or by the even more recent phenomenon of Tweeting (Twitter).

With my generation, people kept diaries to privately record their inner-most thoughts. This was sometimes thought to be a therapeutic practice. But personal diaries were regarded as a highly private possession. To read someone else's diary without permission, was a grave invasion of privacy, likely to give rise to considerable offence.

However today's generation, by reference to social phenomena of now institutionalised Internet communications by Facebook and Twitter, seem to embrace communication practices which are the very antithesis of privacy.

Based on what I have seen of the phenomenon of Tweeting in action, mainly by reference to the running tape at the bottom of the screen during the ABC's Monday evening public audience debate programme, Q&A, Tweeting is a paradigm example of electronically facilitated, top of the head, gossiping.

I noticed in the Legal Affairs section of the *Australian Financial Review* for Friday 2 September 2011, that Judge Alex Kozinski, Chief Judge of the US Court of Appeals (Ninth Circuit), is currently visiting Australia. He presided over the appeal of Cameron and Tyler Winklevoss against a settlement with the founder of Facebook, Mark Zuckerberg (featured in the film *The Social Network*). Judge Kozinski is reported to have observed that there is a decline in society for respect for privacy and that a loss of privacy is difficult to reverse once 'society changes its perception of what is considered to be private'. I completely agree.

If Tweeting lasts as a phenomenon, I have no doubt that it will provide an excellent source of work for defamation lawyers!

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