



## **Defamation over the Internet: The Difficult Question of Jurisdiction**

By

[Marko Vesely](#)

*This paper was presented to The Advocates Club  
March 15, 2004*

*This is a general overview of the subject matter and should not be relied upon as legal advice or opinion.  
For specific legal advice on the information provided and related topics,  
please contact the author or any member of the Defamation and Media Law Group.*

*Copyright © 2004, Lawson Lundell LLP  
All Rights Reserved*

## DEFAMATION OVER THE INTERNET: THE DIFFICULT QUESTION OF JURISDICTION

*Marko Vesely*  
*Lawson Lundell*

**Presented to the Advocates Club  
March 15, 2004**

Courts around the world have struggled in recent years to come to terms with the question of when they should assume jurisdiction to hear an action alleging defamation over the Internet brought against a defendant not resident or carrying on business in their jurisdiction. This paper examines five decisions – two Canadian, two American and one Australian – that have considered this question. Courts in these cases have struggled to balance two competing values: (1) providing a remedy to plaintiffs who have been injured by defamatory material posted on the Internet; and (2) ensuring that defendants do not face jeopardy in jurisdictions which lack any real or substantial connection to their activities and business.

### ***Braintech Inc. v. Kostiuk* (B.C.C.A., 1999)**

*Braintech Inc. v. Kostiuk*,<sup>1</sup> is the starting point in this province on the question of the court's jurisdiction over defamatory statements published over the Internet. Braintech, a technology start-up company, alleged that the defendant, Kostiuk, had published defamatory information about the company on an Internet bulletin board entitled "Silicon Investor". Braintech sued Kostiuk in the State of Texas, where it obtained default judgment. Though Braintech had once had a presence in Texas, neither it nor Kostiuk were residents of Texas at the time of the action. Braintech then sued on the Texas judgment in British Columbia. Braintech was successful at trial, and Kostiuk appealed that decision to the Court of Appeal.

In allowing the appeal and dismissing the action, the Court held that the trial judge had erred in finding a real and substantial connection to Texas. Citing a leading American authority,<sup>2</sup> the Court

---

<sup>1</sup> (1999), 63 B.C.L.R. (3d) 156, 1999 BCCA 0169, leave to appeal refused, [1999] S.C.C.A. 236

<sup>2</sup> *Zippo Manufacturing Company v. Zippo DotCom, Inc.* 952 F.Supp 1119 (W.D.Pa. 1997)

of Appeal characterized the case as being one of “passive” posting of information to the Internet where that information then becomes accessible to users who chose to access it. The Court held:

In these circumstances the complainant must offer better proof that the defendant has entered Texas than the mere possibility that someone in that jurisdiction might have reached out to cyberspace to bring the defamatory material to a screen in Texas. There is no allegation or evidence Kostiuk had a commercial purpose that utilized the highway provided by Internet to enter any particular jurisdiction.

It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin could be obtained.

...

In the circumstance of no purposeful commercial activity alleged on the part of Kostiuk and the equally material absence of any person in that jurisdiction having "read" the alleged libel all that has been deemed to have been demonstrated was Kostiuk's passive use of an out of state electronic bulletin. The allegation of publication fails as it rests on the mere transitory, passive presence in cyberspace of the alleged defamatory material. Such a contact does not constitute a real and substantial presence. On the American authorities this is an insufficient basis for the exercise of an *in personam* jurisdiction over a non-resident.<sup>3</sup>

Notable about the decision are (1) its finding that passive posting on the Internet, without more, is insufficient to ground *in personam* jurisdiction over a non-resident; (2) its arguable approval of the American “sliding scale” approach to jurisdiction; and (3) its focus on the defendant’s conduct and the need to show some “commercial purpose” directed at a particular jurisdiction.

### ***Dow Jones & Company Inc. v. Gutnick* (Aust. H.C., 2002)**

The month of December of 2002 saw three significant decisions handed down on the issue from courts around the world, the first being the High Court of Australia’s decision in *Dow Jones & Company Inc. v. Gutnick*.<sup>4</sup> Gutnick, a resident of the State of Victoria, alleged that Dow Jones had defamed him in statements published on its subscription-based Internet site, *Barron’s Online*. He commenced an action in Victoria and served Dow Jones in the United States. Gutnick sued only for damage caused to his reputation in Victoria as a consequence of the publication that occurred in that state. Dow Jones applied for an order setting aside service and permanently staying the action. The

---

<sup>3</sup> *Braintech, supra*, at para. 62-63, 65

<sup>4</sup> [2002] HCA 56

case made its way to the High Court, which dismissed Dow Jones's appeal and affirmed the jurisdiction of the Victoria courts to hear the action.

Dow Jones argued that articles published on *Barron's Online* were published in New Jersey, the place at which they were "uploaded" onto Dow Jones's web servers. The company argued that there ought to be a single law governing the conduct of a person who chooses to make material available on the World Wide Web, and that that law ought to be the law of the place where the web server was located, unless that place was merely adventitious or opportunistic.

The majority of the court rejected Dow Jones' argument that publication is necessarily a singular event located by reference only to the publisher's conduct and focused instead on where the damage to reputation occurs:

In defamation, the same considerations that require rejection of locating the tort by reference only to the publisher's conduct, lead to the conclusion that, ordinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. 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 principal 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 to 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.<sup>5</sup>

With respect to the Internet as a medium, the majority noted that "those who make information accessible by a particular method do so knowing of the reach that their information may have", and in particular that "those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographical restriction."<sup>6</sup>

The *Gutnick* decision differs from that in *Braintech* (and from the next two discussed below) by focusing its analysis on the plaintiff, and specifically the damage suffered by the plaintiff, rather than

---

<sup>5</sup> *Ibid.*, at para. 44

<sup>6</sup> *Ibid.*, at para. 39

on the actions or commercial purpose of the defendant. This analysis would broaden a plaintiff's access to local courts to vindicate his or her reputation with respect to defamatory material on the Internet.

***Young v. New Haven Advocate* (U.S. 4<sup>th</sup> Cir., 2002)**

Just three days after the High Court's decision in *Gutnick*, the U.S. Court of Appeals for the Fourth Circuit handed down judgment in *Young v. New Haven Advocate*.<sup>7</sup> In the late 1990s, a political controversy had arisen in Connecticut over that State's policy of housing its prisoners in Virginia correctional facilities. Articles published in two local Connecticut newspapers were critical of prison conditions in Virginia generally and were critical of the actions of the plaintiff, the warden of one institution, specifically. The articles were posted to the newspapers' Internet websites, and the plaintiff sued the newspapers in Virginia for defamation. The defendants' motion to dismiss the action for lack of personal jurisdiction was initially denied. The Court of Appeals allowed the defendants' appeal and dismissed the action.

The plaintiff, Young, argued that: (1) the newspapers, knowing he was a Virginia resident, had discussed and defamed him in their articles; (2) the newspapers had posted the articles on their websites, which were accessible in Virginia; and (3) the primary effects of the defamatory statements were felt in Virginia. Young emphasized that he was not arguing that jurisdiction would be proper anywhere in the world where the defamatory Internet content can be accessed; rather, jurisdiction was proper in Virginia because the newspapers understood that their defamatory articles would be accessible to residents there and would expose him to public hatred, contempt and ridicule in Virginia, where he lived and worked.

The Court of Appeals rejected Young's argument, focusing its analysis on whether the offending material had been "directed" or "targeted" at a Virginia audience specifically. The Court held that the two websites were decidedly local in content and were aimed at a Connecticut audience. They covered local news, traffic and weather, and they did not contain advertisements aimed at a Virginia audience. The articles, though discussing events and individuals in Virginia, were also found to be

---

<sup>7</sup> 315 F.3d 256 (4<sup>th</sup> Cir., 2002)

aimed at a Connecticut audience and the debate over that State's prisoner transfer policy. The court concluded that:

The facts of this case establish that the newspapers' websites, as well as the articles in question, were aimed at a Connecticut audience. The newspapers did not post materials on the Internet with the manifest intent of targeting Virginia readers. Accordingly, the newspapers could not have "reasonably anticipated being haled in court [in Virginia] to answer for the truth of the statements made in their articles" ... In sum, the newspapers do not have sufficient Internet contacts with Virginia to permit the district court to exercise specific jurisdiction over them.<sup>8</sup>

The Court's summary of Young's argument in favour of finding jurisdiction, which was rejected, is strikingly similar to that advanced by Gutnick, which was accepted by the Australian High Court just days before.<sup>9</sup> The focus of the analysis in *Young* on the defendant, and the question of whether its actions were "directed" at the forum jurisdiction, is also markedly different from the focus of the analysis in *Gutnick* on the plaintiff, and the question of whether he has suffered harm in the forum jurisdiction.

### ***Revell v. Lidov* (U.S. 5<sup>th</sup> Cir., 2002)**

The analysis in *Young* was followed just weeks later by the Court of Appeals for the Fifth Circuit in *Revell v. Lidov*.<sup>10</sup> In that case, the personal defendant (Lidov) had posted an article on an Internet bulletin board maintained by the defendant, Columbia University's School of Journalism. The article alleged that a broad, politically-motivated conspiracy existed among senior members of the Reagan administration to willfully refrain from stopping the bombing of Pan Am Flight 103, which exploded over Lockerbie, Scotland in 1983, despite having clear advance warnings of the bombing. The article also alleged a subsequent government cover-up in which the plaintiff, Revell (then Associate Deputy Director of the FBI), was said to be complicit. Revell, a resident of Texas, sued Lidov and Columbia University in the Northern District Court of Texas. On appeal, the Court affirmed the judgment below dismissing the action for lack of personal jurisdiction.

---

<sup>8</sup> *Ibid.*, at p. 264

<sup>9</sup> Interestingly, Dow Jones and Company Inc., the unsuccessful defendant in *Gutnick*, was one of many media *amici* successfully supporting the defendants in the *Young* appeal.

<sup>10</sup> 317 F.3d 467 (5<sup>th</sup> Cir., 2002)

The Court noted that the article contained no reference to Texas or to activities in Texas, and it was not directed at Texas readers as distinguished from readers in other states. The Court placed particular emphasis on the fact that, at the time he posted the article, Lidov did not even know that Revell was a resident of Texas. The Court concluded:

Lidov must have known that the harm of the article would hit home wherever Revell resided. But that is the case with virtually any defamation. A more direct aim is required than we have here. In short, this was not about Texas. If the article had a geographic focus it was Washington, D.C.

Our ultimate inquiry is rooted in the limits imposed on states by the Due Process Clause of the Fourteenth Amendment. It is fairness judged by the reasonableness of Texas exercising its power over residents of Massachusetts and New York. This inquiry into fairness captures the reasonableness of hauling a defendant from his home state before the court of a sister state; in the main a pragmatic account of reasonable expectations – if you are going to pick a fight in Texas, it is reasonable to expect that it be settled there.<sup>11</sup>

With respect, whether the defendant had actual knowledge of where the plaintiff resided should be irrelevant. Lidov knew that Revell was an individual who lived and worked somewhere, and there was no suggestion in the case that he could not have easily obtained this information, had he wished. As the Court noted in *Gutnick*, in all but the most unusual cases, a person who publishes material on the Internet will be able to determine in advance (if they chose) where they would likely be sued and what jurisdiction’s defamation law would likely apply by asking themselves: who could potentially claim to be defamed by the material and where does that person live or work?<sup>12</sup>

### ***Bangoura v. Washington Post* (Ont. S.C.J., 2004)**

*Bangoura v. Washington Post*,<sup>13</sup> is the most recent judicial opinion on this topic from Canada.

Bangoura, a lawyer by profession, had been an international public servant employed by the United Nations in a variety of countries over the years. Since 1996, he had lived in Canada, becoming a

---

<sup>11</sup> *Ibid.*, at p. 18

<sup>12</sup> *Gutnick, supra*, at para. 54. The majority made these observations in rejecting the “spectre” conjured up by Dow Jones of a publisher being forced to consider each article it posts on the Internet against the defamation laws of “every country from Afghanistan to Zimbabwe”.

<sup>13</sup> [2004] O.J. No. 284 (S.C.J.)

citizen of Canada in 2001. In 1997, while Bangoura was living in Kenya, the Washington Post published three articles on its website discussing complaints of sexual harassment, financial improprieties and nepotism against Bangoura. He sued the newspaper in Ontario for defamation. The Ontario Superior Court dismissed the defendants' motion for an order setting aside service *ex juris*.

The Court held that, before it can assume jurisdiction over a foreign defendant, it must be satisfied that a real and substantial connection with Ontario exists. In finding that such a connection did exist, the Court noted the following:

[The plaintiff was] an international public servant, who has found a home and work in Ontario where the damages to his reputation would have the greatest impact. ...

Admittedly, the defendants have no connection to Ontario, but the Washington Post is a major newspaper in the capital of the most powerful country in a world now made figuratively smaller by, *inter alia*, the Internet. Few well-informed North Americans (including Canadians) do not encounter, at least indirectly, views expressed in the Post. The Post is often spoken of in the same breath as the New York Times and the London Telegraph.

Frankly, the defendants should have reasonably foreseen that the story would follow the plaintiff wherever he resided. ...

While the personal defendants have no connection to Ontario, the Post is a newspaper with an international profile, and its writers influence viewpoints throughout the English speaking world. I would be surprised if it were not insured for damages for libel or defamation anywhere in the world, and if it is not, then it should be. ...

The plaintiff has no connection with any of the jurisdictions in which the defendants reside. Since Washington is the residence of only one of the defendants, the plaintiff could be faced with the same objections from the personal defendants if the action were commenced in Washington, where the defendant has no reputation to defend. ...

I can see no reason why Ontario would be unwilling to enforce a judgment of a foreign court against an Ontario newspaper with a world-wide reputation, even if the damages were limited to the foreign jurisdiction, especially where, as here, the plaintiff is an international public servant. Such a newspaper should reasonably contemplate the likelihood of such damage occurring.<sup>14</sup>

The Court cited the *Gutnick* decision at length and with approval. In response to the defendants' argument that an American court would not enforce a judgment given in such circumstances, the Court held:

---

<sup>14</sup> *Ibid.*, at para. 22



Frankly, I see the unwillingness of an American court to enforce a Canadian libel judgment as an unfortunate expression of lack of comity. This should not be allowed to have an impact on Canadian values. The Washington Post defendants' home jurisdiction's unwillingness to enforce such an order is not determinative of whether the court should assume jurisdiction.<sup>15</sup>

The *Bangoura* decision represents not only an affirmation of the harm-based analysis in *Gutnick* but also signals the Ontario courts' willingness to depart openly from the approach taken by American courts.

## Conclusion

The past two years have witnessed a growing divide between the narrower approach to jurisdiction taken in the United States (focusing on the defendant's conduct) and the broader approach taken in commonwealth cases such as *Gutnick* and *Bangoura* (focusing on where the plaintiff suffered harm). Where does that leave British Columbia? On the one hand, the Court in *Braintech* applied American authorities and cautioned against founding jurisdiction based simply on the passive posting of information to the Internet. On the other hand, that decision could be easily distinguished in future cases,<sup>16</sup> should a court wish to do so, and the thrust of recent jurisdiction in Canada and other commonwealth jurisdictions appears to be towards a broader recognition of jurisdiction than is being taken in the United States. Should fundamentally different approaches develop in Ontario and British Columbia, the issue may become one requiring clarification from the Supreme Court of Canada.

---

<sup>15</sup> *Ibid.*, at para. 23

<sup>16</sup> E.g., the lack of evidence in that case that anyone in Texas had read the defamatory material and the fact that the issue was whether the American court had properly taken jurisdiction, having regard to its own law, such that the judgment should be recognized in British Columbia.

**Vancouver**

1600 Cathedral Place  
925 West Georgia Street  
Vancouver, British Columbia  
Canada V6C 3L2  
Telephone 604.685.3456  
Facsimile 604.669.1620

**Calgary**

3700, 205-5<sup>th</sup> Avenue SW  
Bow Valley Square 2  
Calgary, Alberta  
Canada T2P 2V7  
Telephone 403.269.6900  
Facsimile 403.269.9494

**Yellowknife**

P.O. Box 818  
200, 4915 – 48 Street  
YK Centre East  
Yellowknife, Northwest Territories  
Canada X1A 2N6  
Telephone 867.669.5500  
Toll Free 1.888.465.7608  
Facsimile 867.920.2206

[genmail@lawsonlundell.com](mailto:genmail@lawsonlundell.com)  
[www.lawsonlundell.com](http://www.lawsonlundell.com)

