



A WEEKLY COMMENTARY

ON TARGET

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The price of Freedom is eternal vigilance –

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THOUGHT FOR THE WEEK: "Democracy is the root of power, not judgement. It is power which should be drawn from the elector's will, not judgement from his intellect. That is the common ground where, in real fact, men do meet. It is in our aspirations, our objectives, our ruling policy that we find unity. The mind of each one of us is like a stream cumbered with the refuse of the uncomfortable times in which we live. But underneath, the stream is always flowing to the sea. All of us alike, whether housewife or student, business man or labourer, want for ourselves the same results, the freedom to do this or that, security as an atmosphere for those activities, and the use of 'plenty' as the solid base on which these may persist.

The root of power is there, in the public will, and it is the function of the elector to express that power in a demand for the objectives he desires – for, as Douglass puts it, the *results*."

– "The Emergence of a Dynamic" by Hewlett Edwards in *"The Fig Tree"*, September, 1936

DEFAMATION AS A POLITICAL WEAPON by Ian Wilson, LL.B.

The Dangers of Internet Publication:-

"It is our right as relatively powerless and anonymous human beings to criticise the rich and powerful, a right of which we should not be deprived."

– Terry Lane, Australian Journalist.

A truly free and democratic society must have a free press. The *Charter for a Free Press*, adopted by the Australian Press Council, states:

- Freedom of opinion and expression is an inalienable right of a free people.
- A free press is a symbol of a free people.
- In a truly democratic society open debate, discussion, criticism and dissent are central to the process of generating informed and considered choices.
- It is the responsibility of the press to protect the people's right to know and to contest encroachments upon that right by government, groups or individuals.

The orthodox presses across the Western world hopelessly fail in this so-called calling of preserving free speech. On the contrary, numerous writers, both of the left and right, have seen the establishment media as merely the propaganda wing of the ruling elites.

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An article by Eric Beecher, "Trust Us, We're from the Media", *The Independent*, 3-9/10/04, states that in a series of Roy Morgan opinion polls, a majority of the Australians sampled say that the media is unreliable in using "facts" and "invade people's privacy unnecessarily."

A poll conducted by RMIT University found that 80 per cent of journalists and editors sampled admitted that they are Left-wing and that media proprietors "use their outlets as vehicles of influence."

Beecher says that people are cynical about the media because "much is either wrong, distorted, exaggerated or nuanced out of reality."

ENTER DEFAMATION LAW: Even so, the establishment media faces a problem of its own – defamation. The very limited role which this media plays in presenting the truth is constrained by Australia's defamation laws, which are quite strict relative to the United States.

Australia lacks an *explicit* Constitutional right to free speech by contrast to the United States First Amendment. The Founding Fathers felt that common law traditions would protect the traditional rights inherited from English legal traditions, primarily the *Magna Carta* and the *Bill of Rights*. But such rights were always constrained by the law of defamation which originally was devised as a tort to protect the reputation of noblemen.

The High Court of Australia in *Lange v Australian Broadcasting Corporation* [1997] 189 CLR 520 found an *implied* Constitutional right to freedom of communication on matters relating to politics and government, based upon the Constitutionally grounded system of representative government. Unfortunately this gives us no "private rights" but only places a limit upon parliamentary and executive power to the extent necessary for the operation of representative democracy.

Unlike the US First Amendment, this does not protect free speech in the media, literature or art.

Consequently Australian defamation law is used as a political weapon by the rich and powerful who typically have something to hide: it is a shield for rich crooks. It is often said that defamation law protects the poor and weak from the tyranny of the press: it does not. Defamation law is for the rich because only they can afford the massive costs associated with defamation suits which usually take years to be decided.

THE INTERNET A 'FREE TRADE ZONE' IN IDEAS: The Federal government is at present attempting to present uniform defamation laws for Australia. However, the basic problem posed by defamation and media power is not addressed by this legal reform. How can freedom of speech be preserved – or more cynically established in Australia? How can the weak be protected from the tyranny of the media? Those are important questions which need to be addressed.

The view of this writer is that a truly free press needs to be created by breaking up the media monopolies and allowing the free flourishing of the internet. The internet must be a free trade zone in ideas.

The law of defamation needs to be abolished and replaced by a tort (a legal "wrong") of malicious falsehood: the *intentional* or *reckless* statement of *known* falsehoods about persons (living only and not corporations) calculated to cause harm and which causes harm. The onus of proof of all elements of the tort is squarely upon the plaintiff's shoulders.

FREEDOM OF SPEECH ON THE INTERNET: In the remainder of this essay I will focus on one important aspect of freedom of speech – freedom of the internet.

We will focus upon one vitally important High Court of Australia decision which has had a major impact upon Internet publication: *Dow Jones and Company v Gutnick* [2002] 194 ALR 433. This is a case of defamatory material about an Australian plaintiff published on the Internet, a case does not need to be made where the "centre of gravity" of the publication lie, but the plaintiff could sue in the

Australian home court. This in effect has forced the restrictive domestic defamation laws of Australia upon the whole world.

ENTER DIAMOND JOE: Joseph ("Joe") Gutnick is a well-known Australian Jew. He has been very successful in the diamond trade – giving him his nickname "Diamond Joe".

Dow Jones is the US publisher of *The Wall Street Journal* and also of *Barrons Magazine*. *Barrons* often contains pieces of investigative journalism. An article entitled "Unholy Gains" in *Barrons* implied that Diamond Joe was involved in improper business dealings with Nachum Goldberg. This US Jewish figure had been gaoled in the US for money laundering and tax evasion. In total 305,563 hard copies of the article were published but only 14 were sold in Victoria where Diamond Joe lives. The article was available on the website www.wsj.com to 500,000 subscribers, with 300 of these being in Victoria. Dow Jones had its server in the United States.

The action before the Victorian Supreme Court *Gutnick v Dow Jones* [2001] VSC 305 was before Justice Hedigan. Geoffrey Robertson QC, civil rights lawyer and star of the TV series *Hypotheticals* defended Dow Jones. Robertson argued that "the imposition of liability on the basis of the place of publication occurring in the place of downloading would have a serious "chilling effect on free speech". Such a rule was too narrow for the information age.

These arguments were rejected. Gutnick won. Dow Jones then appealed to the High Court.

The High Court upheld the decision of the trial judge. In the case of internet publication, the damage to reputation is done at the place where the person downloads the material.

The leading judgement was delivered by Gleeson C.J., McHugh, Gummow and Hayne J.J. but even the leftist Kirby agreed.

The dispute in *Gutnick* was about the *place* of the publication of the defamatory statements. The "choice of law" to be applied i.e., Australia or the US, is governed by the law of the place of the commission of the tort. Dow Jones argued that on public policy grounds it was preferable that the publisher of the Internet material be governed by the law of the place where the servers are located. Otherwise publishers would be obliged to consider every law of every jurisdiction on earth, which would destroy Internet publishing.

The high Court disagreed. Further they rejected the single publication rule of the United States. In most US States a single communication and only one action for damages is possible. Not so in Australia: each communication constitutes a separate cause of action. Thus for a continuous electronic medium, like the Internet, there can be in principle an infinity of causes of action.

Nothing prevents a plaintiff attempting to use litigation as a political weapon to crush an opponent.

A FAILURE TO UNDERSTAND THE INTERNET: The argument of the High Court was based upon the 19th century case of *Duke of Brunswick v Harmer* [1849] 117 ER 7S. In that old case the Duke sent a servant to buy a back issue of a newspaper where years before he had been defamed. The limitation period for an action of defamation had long passed. However the English court held that the sale constituted a new tort and the time now ran on the point of sale. Such a rule was debateable even in the 19th century and is an absurd one to adopt in the digital information age. It means that electronically retrieving allegedly defamation information normally outside any limitation period, would enliven the tort of defamation. This will have a major impact upon libraries and information data bases. The rejection of a single publication rule could lead to an explosion of suits.

The High Court failed to understand the unique nature of the Internet. They viewed downloading as

similar to receiving a radio or TV broadcast. In this case there is transmission from a locality to a receiver. The Internet does not work like that. The information seeker actually electronically visits the source computer and takes back or downloads data. Geoffrey Robertson was right in his original argument that downloading is essentially a form of "self publication", much like taking a book from a library.

Instead of a book, what is taken is a package of data. Downloading then is a form of "self publication". That is one reason why downloading, say child pornography, is an offence among other things.

WHAT NOW? The decision in *Dow Jones v Gutnick* is too recent in legal terms to assess its existing impact. The consequence of the decision is that publishers of material on the Internet which could be defamatory to Australian based (potential) plaintiffs need to carefully consider whether the material is defamatory under any of the existing eight defamation laws. If the Australian decision is followed elsewhere Internet publishers could be liable for defamation actions in a large number of countries across the globe and under different systems of defamation. The international media rightly greeted the *Gutnick* decision with alarm.

ON THE BRIGHT SIDE: On the bright side the United States is reluctant to enforce foreign defamation judgements because of its First Amendment protection of free speech. It is possible that if Dow Jones had dug in their heels and if they had no Australian assets, they could have held out against the Australian judgement: US courts may not have enforced it.

Nevertheless Internet publication now has to take this decision on board. As Australian writers, in exposing our own batch of traitors, crooks and shady characters (and no corporation or person mentioned here is included in that designation) we must always be conscious of defamation and slap-suits used to silence us.

Now it seems Australia's oppressive legal culture has been forced upon the rest of the world!

WHAT IS THE VALUE OF AN AUSTRALIAN LIFE? by James Reed:

Well, what is the value of an Australian life? Not much according to the Indonesian sentencing Abu Bakar Bashir, the mastermind behind the Bali bombings. Bashir received 30 months gaol for his part in the conspiracy that led to the death of 88 Australians and 202 lives overall.

The death penalty is given to those who attempt to smuggle drugs into Bali but murder 202 people (most non-Indonesians) and you are "all smiles".

The Indonesian government is expressing its contempt for Australia – but what else is new?

IRAN'S REAL THREAT: One idea which is 'doing the rounds' on the world-wide-web is that Iran's real threat to the American empire is that Iran is planning to set up an international oil exchange in the Euro currency rather than the American dollar. If the world prices crude oil in the Euro, America being a net importer of oil will face disaster. Iran's move will be war declared on the Socialist Warfare-welfare State of America. This is an interesting hypothesis which may or may not be true. Its main proponent is William Clark and material can be found on the Lew Rockwell website (via Google search) for readers with Internet access.

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