

# High Court delivers internet defamation judgment

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On 10 December 2002, the Full Court of the High Court of Australia unanimously upheld an earlier decision of the Supreme Court of Victoria allowing Joseph Gutnick to bring a defamation action against United States publisher, Dow Jones & Co Inc in Victoria.<sup>1</sup>

In dismissing Dow Jones' appeal to the High Court, the Court held that an online document is published in the jurisdiction where it is downloaded and viewed, irrespective of where it was uploaded or where its web servers reside.

Dow Jones prints and publishes the Wall Street Journal newspaper and Barron's magazine and operates the website [wsj.com](http://wsj.com), an online subscription news site which includes articles published in the printed edition of Barron's.

Mr Gutnick alleged that several references to him in an internet version of an article entitled 'Unholy Gains' (available to subscribers at [wsj.com](http://wsj.com)) defamed him and brought an action in the Supreme Court of Victoria against Dow Jones claiming damages for defamation.

Dow Jones argued that the action should be stayed on the grounds that the Supreme Court of Victoria was a 'clearly inappropriate' forum for determining the action and sought instead for the action to be heard in the United States (where publishers are afforded freedom-of-speech protections under the First Amendment).

In the case of the tort of defamation in Australia, it is the publication of the allegedly defamatory material, not the actual material itself, which is the actionable wrong. The High Court confirmed that publication is not a unilateral act on the part of the publisher alone. It is a bi-lateral act –

in which the publisher makes the material available and the third party has it available for his or her comprehension.

In this case, the reading of the 'Unholy Gains' article by several subscribers to [wsj.com](http://wsj.com) in Victoria occurred only after the document had been downloaded from the Dow Jones' servers in New Jersey onto the subscribers' local computers in Victoria. Without the action of downloading in Victoria, the subscribers in Victoria would have been unable to view the article.

The principal issue considered in the High Court appeal was where the material which Mr Gutnick had complained of had been published – either in New Jersey, where Dow Jones' web servers are located, or in Victoria where several subscribers had read the article.

The primary judge concluded that the statements in question were 'published in the State of Victoria when downloaded by Dow Jones subscribers who had met Dow Jones' payment and performance conditions and by the use of their passwords'. He rejected Dow Jones' contention that publication had occurred at the servers maintained by Dow Jones in New Jersey in the United States. Therefore Victoria was not a 'clearly inappropriate' forum for trial of the procedure. On appeal, the High Court confirmed the principle that an Australian court will decline to exercise jurisdiction only when it is shown that the exercise of such jurisdiction is 'clearly inappropriate' but held this was not the case here.

The judgment of the High Court is relevant for internet publishing worldwide and during the hearing, the Court allowed 18 organisations to make submissions, including AOL Time Warner Inc, Amazon.Com Inc,

the Associated Press, Bloomberg LP, CNN, News Corporations Ltd, Reuters Group Plc and Yahoo! Inc.

There is concern that the judgment may now expose internet publishers to defamation actions in multiple jurisdictions, some of which may have much tighter laws in relation to the publication of defamatory material. The Court considered this issue, however, concluded that the risk of actions for publications in several places was low because:

- damages for defamation are usually only awarded if the plaintiff has a reputation in the place where the publication is made;
- judgments hold little value if obtained in jurisdictions where the defendant holds no assets; and
- subsequent legal action could be found to be vexatious.

The High Court decision means, however, that any business which places potentially defamatory material on its website will need to consider whether:

- it should block access to certain jurisdictions or subscribers; or
- it should have the material reviewed by lawyers not just in the jurisdiction where its web servers reside or it conducts business, but also in the jurisdictions where the person who may have been defamed could have a reputation and hence an action for defamation.

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<sup>1</sup> *Dow Jones & Company Inc v Gutnick* [2002] HCA 56.