

Sex assault conviction quashed

By Gary Oakes
Victoria

A man convicted of sexual assault has been acquitted on appeal because the trial judge didn't reject his assertion that the complainant was "coming on to him" and the Crown failed to prove she was incapable of consenting.

Both the complainant and the accused, "L.C.," were intoxicated at the time of the incident, and she later said she had no recollection of having sex.

B.C. Supreme Court Justice Peter Rogers held that the issue on appeal "is whether the only reasonable inference that a properly instructed jury, acting judicially, could draw from the evidence was that [the complainant] was in an automatic state on the night in question."

Although the evidence showed her drinking interfered with her

ability to retain memories, that "is not tantamount to automatism, and the fact that she is amnesiac for the events could be the consequence of a number of things, including a desire to not remember."

He found that a third party's opinion that the complainant "was 'pretty well gone' was so ambiguous as to have, in my view, no meaning other than that she was drunk. Simply being drunk is not the same as being incapable of voluntary control of one's actions. ..."

He held that since the Crown contended the complainant was incapable of consenting to sex that night, it had to prove beyond a reasonable doubt "that she was, in fact, acting as an automaton," and had failed the task.

Reasons in *R. v. L.C.*, [2002] B.C.J. No. 2413, are available from FULL TEXT: 2233-026, 5 pp.

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OPENING STATEMENT

Internet jurisdiction decisions diverge

By John Sullivan
and Daniel Tsai

December 2002 was one of the most important months ever for the developing law of jurisdiction over Internet activity.

Within three days of each other, two influential appellate courts — the High Court of Australia and the U.S. Court of Appeals (Fourth Circuit) — released groundbreaking decisions on Internet jurisdiction, with different conclusions.

The Australian decision, *Dow Jones v. Gutnick*, [2002] H.C.A. 56 appears to be the first time a national supreme court in a common law jurisdiction has rendered a detailed decision on the subject. The U.S. decision, *Young v. New Haven Advocate*, [2002] CA4 - QL 2856, is the latest in a line of influential U.S. appellate decisions dealing with this question dating back to the well-known *Zippo.com* decision of 1997. However, they demonstrate two different philosophies on Internet jurisdiction — plaintiff-focused (*Gutnick*) and defendant-focused (*Young*).

Both involved applications to dismiss defamation actions brought against out-of-state Internet publishers based on lack of personal jurisdiction. In *Gutnick*, the court held it had jurisdiction over the publisher based on the alleged harm the plaintiff suffered in his home jurisdiction. But in *Young*, that same argument was rejected, and the court held that a Virginia court could not constitutionally exercise jurisdiction over the out-of-state Internet publishers, due to a lack of "minimum contacts" between the defendants and Virginia. *Gutnick* focused on the substantive elements of the tort of defamation while *Young* gave deference to the nature of the Internet and the concept of "targeting."

Gutnick involved a defamation suit by an Australian businessman against Dow Jones & Co. over an article, "Unholy Gains," on its *Barron's Online* Internet service. *Gutnick* alleged the story defamed him, and sued in the Supreme Court of Victoria, Australia. Dow Jones argued that the appropriate jurisdiction was the State of New Jersey, where its server was located, and thus where the article had been uploaded.

Dow Jones argued that an Internet publisher should be able to choose its jurisdiction based on where it maintains its server, unless such selection is merely opportunistic. This would create certainty and clarity, and would avoid the spectre of Internet publishers being forced to consider all of the defamation laws "from Afghanistan to Zimbabwe." Dow Jones

thus advocated an approach to jurisdiction that focuses on the defendant's activities.

The High Court rejected Dow Jones' arguments. It noted that the law of defamation seeks to balance society's interest in freedom of speech and an individual's interest in maintaining his or her reputation free from unwarranted slur. The court said the Dow Jones position did not give sufficient importance to the individual's interest.

The Court noted that defamation is a "bilateral act," which requires not merely that the comments be made, but also that they be received by another. Ordinarily, the site of the defamation is the place where the damage to reputation occurs. This requires that the material be downloaded in the jurisdiction, and that the person allegedly defamed actually has some sort of reputation in that jurisdiction. The majority concluded by stating that, except in "the most unusual circumstances," an Internet publisher can determine the defamation laws that will apply to their comments by considering the person that they are commenting upon.

While international Internet publishers like Dow Jones may factor the litigation costs of foreign defamation actions into their publishing expenses, small Internet content providers may be less inclined to comment critically upon individuals who are abroad as a result of *Gutnick*.

However, the impact of *Gutnick* will be tempered by the *Young* decision, which presents an alternative approach to the issue based on due process and "targeting" considerations that would have been favourable to Dow Jones.

In *Young*, the court denied a Virginia prison warden's bid to sue Connecticut newspapers in Virginia over articles published on the Internet that, he alleged, falsely depicted him as a racist who was cruel to inmates. The Connecticut newspapers were addressing the state government's policy of housing prisoners in Virginia.

Young's argument was virtually identical to that accepted in *Gutnick*: the newspapers know I am a Virginia resident; their Internet articles are accessible in Virginia; I felt the effects of their statements in Virginia; thus, I should be able to sue in Virginia.

But the court held that this was not enough — something more was required. This was that the defendant have sufficient "minimum contacts" with Virginia to meet the due process requirement of the 13th Amendment to the U.S. Constitution.

But what does "minimum contacts" mean in cyberspace? The



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court answered this by reference to the concept of "targeting," holding that "the newspapers must, through the Internet postings, manifest an intent to target and focus on Virginia readers."

In rejecting jurisdiction, the court found that this necessary ingredient of targeting was absent — the articles were directed toward "a Connecticut audience" only, and the defendants did not live in, solicit business, or have any business contacts with Virginia.

Young demonstrates the trend of American courts toward characterising targeting activity involving commercial presence and intended presence as determinative factors for a court to take personal jurisdiction over an out-of-state Internet publisher.

What will the Canadian approach be?

There is as yet no definitive decision in Canada, although *Braintech v. Kostiuik* (1999), 63 B.C.L.R. (3d) 156 (B.C.C.A.) does provide some guidance.

Kostiuik expresses a public policy approach favourable to Internet content providers: that "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..."

There is some agreement between *Gutnick* and *Young*. Both accept that the location of the server is not, by itself, determinative of the question of jurisdiction. Further, both seem to accept that the mere transitory presence of the allegedly defamatory material in cyberspace is not sufficient to ground jurisdiction — someone must have actually downloaded the information in that state. Undoubtedly, both *Gutnick* and *Young* will be argued about in Canadian courts in the years to come.

John Sullivan is a commercial and insurance litigator with an interest in jurisdictional disputes who practises at Harper Grey Easton in Vancouver, where Daniel Tsai is an articulated student with an interest in technology and business law.