dealt with internet use in which it was stated: "Using the internet ... is as much knowingly 'sending' ... as it is a telex, mail or telephonic transmission; ... ATI 'knows' that its website reaches residents ... who choose to access it, just as surely as it 'knows' any lateral telephone call is likely to reach its destination" – para 38.

- Hedigan J questioned the value of the decision in *Macquarie Bank v Berg.*
- *Lee Teck Chee v Merrill Lynch International Bank* [1998] CLJ 188, High Court of Malaya – Nathan J held publication had not taken place in Malaya where the alleged defamatory words were published on a Singapore server. However, there was no evidence any person in Malaya had accessed the web site.
- in *Kitakufe v Oloya Ltd* (unreported) the Ontario Court assumed jurisdiction for a defamatory statement made in a Ugandan newspaper republished on the internet. Notwithstanding a multitude of connections with Uganda, Hume J assumed jurisdiction on the basis of access to the website and downloading.
- in *Godfrey v Demon Internet Ltd* [1999] 4 All ER 343 Moreland J considered an internet bulletin board amounted to publishing postings to subscribers.
- Hedigan J cited *Calder v Jones* with approval. The US Supreme Court held "jurisdiction may be exercised over a foreign defendant who directs his or her defamatory message at the forum and the plaintiff suffers harm there."

From these cases Hedigan J concluded the place of defamation is "the jurisdiction where the defamatory material was published and received by the plaintiff, rather than where it was spoken or written," – so the Dow Jones article was published in Victoria when downloaded by Dow Jones subscribers who had met Dow Jones's payment conditions and used their passwords.

The defendant's argument that it would be unfair for the publisher to have to litigate in the multitude of jurisdictions in which its statements are downloaded and read "must be balanced against the world-wide inconvenience caused to litigants, from Outer Mongolia to the Outer Barcoo."

The judge said: "if you do publish a libel justiciable in another country with its own laws ... then you may be liable to pay damages for indulging that freedom" – para 75.

Hedigan J considered the following significant:

- downloading the publication in Victoria
- the plaintiff's residence, business headquarters, family, social and business life are in Victoria
- the plaintiff seeks to have his Victorian reputation vindicated by the courts of the state in which he lives
- the plaintiff undertook not to sue in any other place.

The judge concluded that the most significant factor favoring a Victorian jurisdiction is that "the proceeding has been commenced by a Victorian resident conducting his business and social affairs in this state in respect of a defamatory publication published in this state, suing only upon publication in this state and disclaiming any form of damages in any other place... it would be verging on the extraordinary to suggest that Mr Gutnick's action in respect of that part of the publication on which he sues should be removed for determination to the state of New Jersey" – para 131.

## Time Out

BBC radio on the internet
http://www.bbc.co.uk/

***Notes***

1 Chapter 16 Turner's Australian Commercial, 23rd ed, 2001.

# Email, confidentiality and legal professional privilege

**THE USE OF EMAIL** for professional communications requires practitioners to consider issues of confidentiality and legal professional privilege that are not significant with other modes of communication.

An email can, without the knowledge of sender or receiver, be intercepted during transmission and its contents read, saved, amended or copied. Practically, this is not so with facsimiles or ordinary correspondence.

This risk attracts most attention in the context of credit card and banking transactions but the same hazard is present in professional communications.

It is only a matter of time before a client suffers loss by an email being intercepted.

The privilege in the communication is that of the client, not of the legal practitioner. Prudence suggests practitioners should protect themselves from attack on the ground that, by using email, they jeopardized a client's privilege and exposed the client to loss.

Steps to be taken include:

- a warning notice on confidentiality and privilege, like those commonly used on fax cover sheets, may be included in the email. Some firms use such notices on emails but the practice is not universal.

It is possible to configure a computer network's email software so the default outgoing email form provided across the system carries a specified text. For standard-alone PCs some email software allows

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the user to design an email standard form which includes such a notice. For example, in Microsoft Outlook Express 5 the downward-pointing arrow right of the 'new mail' button leads to a menu which includes 'select stationery'. Clicking that, then 'create new' allows one to do just that.

An objective in using such a notice is to provide the basis for grant of relief against an unintended reader of the email – it seeks to manage a problem once it occurs. It does not deal with the problem of the client complaining about the risk being taken – "Why did you email it? This would not have happened if you had faxed it."

- a practitioner may obtain the client's informed consent to use email, notwithstanding the risks to confidentiality and privilege. Given the advantages of email and the apparent low risk of a particular email being intercepted, consent is likely to be given. It may conveniently be done at the outset of a retainer or, for a regular client, by general letter of consent. The cost of such a preventative step is minimal.

In framing the terms of the consent, the parties to whom, and the documents to which, it applies may be considered.

It is prudent to ensure the letter covers not only the solicitor but also others with whom the solicitor might have dealings in acting for the client. Examples include retained counsel and expert witnesses. It would be ridiculous if the consent allowed the solicitor to communicate with counsel by email but not authorize counsel to reply by email.

The client may limit the nature of documents sent by email. For example, in a litigious matter, the client may consent to the use of email between counsel and solicitor for draft court documents or correspondence, but not advice on prospects. There may also be a desire to prevent another party obtaining documents in digital format because they are then more readily misused, stored, indexed or searched. For the solicitor a standard, wide-ranging consent may be safest.

- if a communication is urgent but too sensitive for email then use the fax. If a digital format is required, use a CD or disk.
- one may encrypt email for sensitive matters. Encryption software is available at a modest cost and can be set up so the recipient does not need the same software, only knowledge of a 'key' communicated separately from the email.

Implications are: facilitating an aggrieved client's argument that failure to encrypt means failure to take reasonable care to preserve confidentiality and privilege; use of encryption software is likely to become more common; there is advantage to solicitors in ensuring a client's consent expressly sanctions the use of email, even if not encrypted. ■

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