



Wigley & Company

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**INTERNATIONAL WEB RISK:
GUTNICK COMES TO NEW ZEALAND**

AUGUST 2004

On 17 August 2004, the High Court in New Zealand decided that the pivotal decision of Australia's highest Court (the High Court of Australia), in relation to international liability for on-line defamation, applies in New Zealand. We address the implications, risks and solutions

The general rule of thumb for minimising defamation risk is to be reasonably careful to make sure statements are true (true statements don't always eliminate defamation risk in other countries, but they go a long way). One of the problems that website operators have is in relation to chat sites and the like. The host of the website can end up being liable for material posted by third parties, by analogy with the liability of radio stations for statements made by people phoning in during live talkback sessions.

These defamation cases are unlikely to lead to a flood of new litigation because they are expensive to run and don't necessarily achieve sufficiently strong outcomes to justify the cost and hassle involved. But website operators should still be mindful of international risk generally

1. On 17 August 2004, the High Court in New Zealand decided that the pivotal decision of Australia's highest Court (the High Court of Australia), in relation to international liability for on-line defamation, applies in New Zealand.
2. *The Australian* is of course a newspaper published in Australia, which also has a website that is an on-line version of that newspaper. The website published an article called "*Wannabe Unis*", talking about "*degree mills*" that "*confer degrees based on life experiences*".
3. A business called *The University of Newlands*, based out of Wellington, was named as one of these "*degree mills*". *The University of Newlands* and one of its directors and shareholders sued the owners of *The Australian* for defamation, based on New Zealand people downloading this information from *The Australian* website.
4. For some time there was an unresolved issue around whether publication on a website overseas could be defamation in the country where the information is read, under the laws of that country (because generally defamation is governed by the relevant country's law).
5. In *Gutnick*, information said to be defamatory of Mr Gutnick was published on the Wall Street Journal's on-line subscriber service, and read by Australian readers. The Courts there accepted that this could be sufficient to base a claim in defamation in Australia, even though the website was in New Jersey.
6. The New Zealand Court in this new case has applied that decision, going further and saying that it applied not only to on-line paid subscriber services but also to on-line services available generally (eg: those that are available for free).

7. The New Zealand Court had to consider some threshold technical issues arising out of whether the plaintiffs could serve these proceedings out of the country. The Court concluded that it could, and that, on the merits, there was a sufficiently strong enough case (but only just) for it to go ahead.
8. It also addressed the question (common in international litigation) of which Court would be most appropriate for the hearing of this case (an Australian or a New Zealand Court). It concluded that New Zealand would be best, given that New Zealand law applies, and at issue are statements said to be defamatory and made to New Zealand people.
9. This case confirms the widespread acceptance of the *Gutnick* decision, and the risk of publishing on the internet and of being caught under offshore laws, whether for defamation or some other breach.
10. The general rule of thumb for minimising defamation risk is to be reasonably careful to make sure statements are true (true statements don't always eliminate defamation risk in other countries, but they go a long way). One of the problems that website operators have is in relation to chat sites and the like. The host of the website can end up being liable for material posted by third parties, by analogy with the liability of radio stations for statements made by people phoning in during live talkback sessions.
11. These defamation cases are unlikely to lead to a flood of new litigation because they are expensive to run and don't necessarily achieve sufficiently strong outcomes to justify the cost and hassle involved. But website operators should still be mindful of international risk generally.

Wigley & Company is a specialist technology (including IT and telecommunications), procurement and marketing law firm founded 11 years ago. With broad experience in acting for both vendors and purchasers, Wigley & Company understands the issues on "both sides of the fence", and so assists its clients in achieving win-win outcomes.

While the firm acts extensively in the commercial sector, it also has a large public sector agency client base, and understands the unique needs of the public sector. While mostly we work for large organisations, we also act for SMEs.

With a strong combination of commercial, legal, technical and strategic smarts, Wigley & Company provides genuinely innovative and pragmatic solutions.

The firm is actively involved in professional organisations (for example, Michael is President of the Technology Law Society and Stuart van Rij its secretary).

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