

Mini-Symposium: Critical Book Reviews & Academic Freedom

Book Reviews, The Common Law Tort of Defamation, and the Suppression of Scholarly Debate

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Abstract

Professor Joseph Weiler will soon stand trial for criminal libel in France for refusing to remove a book review from a website associated with an academic journal for which he serves as editor. His case has disturbing implications for all those who write, edit, and publish critical scholarly work. In this article, I explore those implications for Canadian scholars at home and as members of a global scholarly community. I assess the likelihood of success of a similar complaint under Canadian defamation law, and I consider the impact of libel chill and libel tourism. I conclude that although the defendant in such a case would have a good chance of prevailing under Canadian law through the defense of fair comment, a threat to academic freedom remains that requires action on the part of individuals and institutions committed to its preservation and enhancement.

A. Introduction

Professor Joseph Weiler will stand trial before a Paris Criminal Tribunal on 25 June 2010 for refusing to remove a book review from GlobalLawBooks.org, a site associated with *The European Journal of International Law* for which he serves as Editor-in-Chief. The review, written by German criminal law Professor Thomas Weigend, is of a 2006 book on the International Criminal Court by Dr. Karin N. Calvo-Goller, a senior lecturer at the Academic Center of Law and Business. Dr. Calvo-Goller objected to the review and requested that it be deleted from the site. After a re-examination of the review convinced Professor Weiler that its critical content in no way exceeded the norms of academic discourse, he refused Dr. Calvo-Goller's request. To do otherwise would, he felt, "have dealt a very serious blow to notions of freedom of speech, free academic exchange and the very important institution of Book Reviewing."¹ He offered Dr. Calvo-Goller an opportunity to post a response to the review, but she declined this offer. Instead, she filed a complaint of criminal libel in France that led to Professor Weiler's impending trial.

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¹ Joseph H.H. Weiler, *Editorial: Book Reviewing and Academic Freedom*, 20 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 967, 974 (2009).

My immediate concern is for the fate of Professor Weiler in the French courts. More broadly though, I am disturbed by the implications of this case for all those who write, edit, and publish critical scholarly work. So too are the editors of the *German Law Journal* who have convened this mini-Symposium on Critical Book Reviews. Their request for contributions exploring the intersection of different models of libel law with academic freedom prompted me to inquire into the question of how a defamation complaint such as that brought against Professor Weiler would fare in Canadian courts and, further, into the implications of his case for Canadian scholars as members of a global scholarly community.

In Canada, an author aggrieved by a critical review of his or her book would have to seek a remedy against the reviewer, or the editor or publisher of the review, in tort rather than criminal law.² I have not located any published decisions of Canadian courts in which book reviews were alleged to be defamatory, and so cannot predict the outcome of such an action with certainty. But I can weigh the threat such an action poses to the academic freedom of Canadian scholars through a consideration of the likelihood of success of a hypothetical complaint that mirrors the facts of Professor Weiler's case.

B. The Tort of Defamation and Book Reviews

1. The Plaintiff's Prima Facie Case

Under Canadian law, to make out a *prima facie* case for the tort of defamation, the plaintiff need only show (1) that the words at issue were defamatory; (2) that they referred to the plaintiff; and, (3) that they were published. An author aggrieved by a critical review would have no trouble establishing the second and third elements. But what of the first? For the words to count as defamatory, they must be such that "they would tend to lower the plaintiff's reputation in the eyes of a reasonable person."³ In making this determination, the context in which the words are communicated must be considered.⁴

The ideal scenario for the defendant reviewer, editor or publisher would be for the norms of academic discourse to be taken into account as part of the context at this stage so that the content of a book review that meets those norms would not be considered defamatory. Some U.S. jurisdictions have taken this approach. For example, in *Dilworth v.*

² Canada's Criminal Code does contain an offence of "defamatory libel" (CRIMINAL CODE, R.S.C. 1985, chapter C-46, section 298) which the Supreme Court of Canada upheld as constitutional in the case of *R. v. Lucas* [1998] 1 S.C.R. 439. But it is rarely invoked, and it is difficult to imagine prosecution under it of a critical book review such as the one at issue in Professor Weiler's case.

³ *Grant v. Torstar Corp.* [2009] 3 S.C.R. 640, para. 28 [hereinafter *Grant*].

⁴ RAYMOND E. BROWN, DEFAMATION LAW: A PRIMER 35-38 (2003).

Dudley, Judge Posner concluded that “crank” was not a term capable of defamatory meaning in the context of academic debate. “This is especially clear,” he wrote, “where, as in this case, the word is used in a work of scholarship. As we emphasized in the *Underwager* case, judges are not well equipped to resolve academic controversies, [...] and scholars have their own remedies for unfair criticisms of their work—the publication of a rebuttal. Unlike the ordinary citizen, a scholar generally has ready access to the same media by which he is allegedly defamed.”⁵

Unfortunately, this approach is unlikely to prevail in Canada given the notoriously low threshold our courts have set for establishing defamatory meaning.⁶ In a partial dissent in *WIC Radio Ltd. v. Simpson*, Justice LeBel indicated amenability to heightening this threshold when he cautioned that “courts should not be too quick to find defamatory meaning - particularly where expressions of opinion are concerned.”⁷ He reasoned that people evaluate opinions differently than they do statements of fact and that consequently it ought not to be presumed that the airing of critical opinions will harm a plaintiff’s reputation.⁸ However, Justice LeBel was alone on this point. The rest of the Court endorsed as “plainly correct” the trial judge’s finding that the expressions of opinion at issue in the case were defamatory.⁹ So there is little hope of an imminent heightening of the threshold for what qualifies as defamatory in Canadian law.

It seems likely then that an author aggrieved by a negative review would be able to make out a *prima facie* case of defamation against the reviewer, editor, or publisher quite easily, at which point the burden of proof would shift to the defendant to establish one of a number of available defenses including fair comment, justification, and responsible communication on matters of public interest.

II. The Available Defenses

1. Fair Comment

The defense of fair comment is the most promising option for the defendant in the book review scenario. It has long been touted as the primary safeguard of freedom of expression in defamation law, and its scope was recently expanded by the Supreme Court

⁵ *Dilworth v. Dudley*, 75 F.3d 307, 310 (7th cir. 1996) [hereinafter *Dilworth*].

⁶ *WIC Radio Ltd. v. Simpson* [2008] 2 S.C.R. 420, paras. 68-69 [hereinafter *WIC Radio*].

⁷ *Id.*, para. 69.

⁸ *Id.*, paras. 70 & 72.

⁹ *Id.*, para. 56.

of Canada in *WIC Radio* to better serve this goal. Justice Binnie, writing for the majority, noted that “‘comment’ includes a ‘deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof,’” and indicated that “commentators are allowed broad latitude” under the law.¹⁰ He listed the elements of the defense as follows:

“(a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognizable as comment; (d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proven facts? (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice.”¹¹

a) Public Interest

In *Grant v. Torstar Corp.*, Chief Justice McLachlin defined the public interest that lies at the heart of the fair comment defense as follows: “To be of public interest, the subject matter ‘must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.’”¹² Further, she noted that “the case law on fair comment ‘is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews.’”¹³

While books may be concerned with esoteric topics and may not typically generate notoriety, the very fact of their publication is deemed to invite public attention and hence to render them of public interest. A passage from an Australian case cited with approval by Judge MacLeod in *Sara's Pyrohy Hut v. Brooker* is illuminating on this point: “A person exposes himself to comment if (*inter alia*) he invites the acceptance or approval by the public of his literary or artistic productions. This applies to authors, artists or sculptors who offer or display their work to the public, and to musicians, singers or actors who perform in public. In these cases, since the persons concerned have invited the public to interest itself in their work, they cannot be heard to say that its quality is not a matter of public

¹⁰ *Id.*, paras. 26 & 25.

¹¹ *Id.*, para. 28.

¹² *Grant*, (note 3), para. 105.

¹³ *Id.*

interest.”¹⁴ Thus book reviews fall squarely within the purview of the fair comment defense.

b) Based on Fact

The requirement of a factual foundation has been interpreted as follows: “the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made.”¹⁵ When the comment takes the form of a book review, the text of the book, which is publicly available for the reader of the review to consult, constitutes “the facts on which the comment is being made.”¹⁶ Consequently, so long as the focus of the review is on the text of the book, this requirement should be easily met.

c) Recognizable as Comment

Reviews of all kinds including those of books, plays, movies, and restaurants have been acknowledged as “the well recognized home of opinion and comment.”¹⁷ The way in which the context shapes readers’ expectations is central here. As the English Court of Appeal noted in *Associated Newspapers v. Burstein*, a case in which a newspaper review of an opera was at issue, “the words complained of were contained in a review by a critic, as any reader would appreciate, and which the reader would expect to contain a subjective commentary by the critic.”¹⁸

But, if the text of the book constitutes the factual foundation upon which the reviewer’s comment is based, what of the reviewer’s representations of the content of the book? Does the interpretation of the text put forward by the reviewer still fall within the realm of opinion, or could an author who takes issue with the reviewer’s interpretation argue that it is a statement of fact that falls outside the protection of the fair comment defense? This seems unlikely given Justice Binnie’s acknowledgment in *WIC Radio* of the “ample

¹⁴ *Gardiner v. John Fairfax & Sons Pty Ltd*, [1942] State Reports (N.S.W.) 171, 173, cited in *Sara’s Pyrohy Hut v. Brooker*, (1991) 83 Alta. L.R. (2d) 131 (Alta. Q.B.) [hereinafter *Sara’s Pyrohy Hut*].

¹⁵ *WIC Radio*, *supra*, note 6, para. 31.

¹⁶ *Thornton v. Telegraph Media Group Ltd*. [2009] EWHC 2863 (Q.B.), para. 19 [hereinafter *Thornton*].

¹⁷ *Mr. Chow of New York v. Ste. Jour Azur S.A.* 759 F.2d 219 (2nd cir. 1985), cited in *Sara’s Pyrohy Hut*, (note 14). See also David C. Vogel, *You Have the Right to Criticize this Casenote: Protecting Negative Reviews within the Law of Defamation and the First Amendment*, 60 MISSOURI LAW REVIEW 445 (1995). Also, more generally, see Richard D. Sluder and Victor E. Kappeler, *Scholarly Criticism and Defamation: Are There New Limits for Book Reviewers?* 6 JOURNAL OF CRIMINAL JUSTICE EDUCATION 193 (1995).

¹⁸ *Associated Newspapers Limited v. Keith Burstein* [2007] 4 All. E.R. 319 (C.A.), para. 23 [hereinafter *Burstein*].

authority” that exists “for the proposition that words that may appear to be statements of fact may, in pith and substance, be properly construed as comment,” and his assertion that: “This is particularly so in an editorial context where loose, figurative or hyperbolic language is used [...] in the context of political debate, commentary, media campaigns and public discourse.”¹⁹

Although the defenses to defamation are formulated very differently in U.S. law, the resolution of the confusion surrounding the opinion/fact distinction within book reviews in the case of *Moldea v. New York Times Co.* is instructive on this point.²⁰ The District of Columbia Court of Appeals there described book reviews as “a genre in which readers expect to find spirited critiques of literary works that they understand to be the reviewer’s description and assessment of texts that are capable of a number of possible interpretations.”²¹ The Court ultimately concluded that, although in some circumstances book reviews could form a legitimate basis for a defamation claim, “when a reviewer offers commentary that is [1] tied to the work being reviewed, and [2] ... is a supportable interpretation of the author’s work, that interpretation does not present a verifiable issue of fact that can be actionable in defamation.”²² This approach would leave book reviewers with a fair bit of room to maneuver without falling afoul of the law.²³

However, a worrying counterpoint can be found in a recent English case. In *Thornton v. Telegraph Media Group Ltd.*, the judge found that, for the most part, the content of the book review in question constituted opinion, but was nevertheless persuaded to strike out the defense of fair comment on the basis of a couple of sentences critical of the author’s methodology: “It appears to me that, in order for the defense of fair comment to stand, it was incumbent on Ms Barber to indicate in her review for the benefit of readers, at least in general terms, how Dr. Thornton claimed to deal with interview material incorporated in the Book and why Ms Barber was skeptical about her claim. Having done so, Ms Barber would be free to comment on the validity of Dr. Thornton’s practice. It appears to me that the review, as it stands, significantly misdescribes what Dr. Thornton says in her Book about the way she deals with interviewees.”²⁴

¹⁹ *WIC Radio* (note 6), para. 26.

²⁰ *Moldea v. New York Times Co.* 22 F. 3d 310 (D.C. cir. 1994) [hereinafter *Moldea*]. For a thorough discussion of the case and the circumstances leading up to it, see Vogel (note 17).

²¹ *Moldea* (note 20), 311.

²² *Id.*, 313.

²³ But see AMY GADJA, *THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION* 172 (2009) who cautions that even in the U.S., “the breathing space created by the exemption for opinion is less sweeping that might be imagined.”

²⁴ *Thornton* (note 16), para. 48.

My own view of the case is that the reviewer's description was a legitimate, though not very charitable, interpretation of the author's account of her methodology, and that the publisher of the review ought not to have been denied the opportunity to argue fair comment at trial. My hope then, in the interests of the preservation of a vibrant culture of criticism, is that Canadian courts, if faced with a defamation case focused on a book review, would not go that route, but opt instead for an approach akin to that taken in *Moldea* thereby maintaining a broader scope for the defense of fair comment.

d) Objective Honest Opinion Test

This is the element that marked the *WIC Radio* decision as an expansion of the defense of fair comment in Canada. The previously governing case, *Cherneskey v. Armadale Publishers Ltd.*, required a subjective honest belief on the part of defendants, thereby denying the defense to editors or publishers who provide forums for views that they do not themselves embrace.²⁵ That injustice has been rectified by the shift to an objective test.

Further, in fleshing out that objective test, Justice Binnie took care to stress that "the addition of a qualitative standard such as 'fair minded' should be resisted. [...] The trier of fact is not required to assess whether the comment is a reasonable and proportional response to the stated or understood facts."²⁶ In a subsequent decision, Chief Justice McLachlin summed up the shift as follows: "*WIC Radio* expanded the fair comment defense by changing the traditional requirement that the opinion be one that a 'fair-minded' person could honestly hold, to a requirement that it be one that 'anyone could honestly have expressed,' which allows for robust debate. As Binnie J. put it, '[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones.'"²⁷

The new objective formulation means that the defense of fair comment will be available to editors such as Professor Weiler who explicitly assert that they do not necessarily agree with the assessments of the reviews that they publish. And the abolition of a requirement of "reasonableness" or "fair-mindedness" in connection with the defense should enhance the protection of freedom of expression and thereby better serve a lively culture of critical review.

²⁵ *Cherneskey v. Armadale Publishers Ltd.* [1979] 1 S.C.R. 1067.

²⁶ *WIC Radio* (note 6), para. 28.

²⁷ *Grant* (note 3), para. 31.

e) Malice

The final element to be considered is malice. Even if the defendant is able to meet the above four requirements, the defense will be defeated if the plaintiff can show the defendant "was [subjectively] actuated by express malice."²⁸ Does this mean that reviewers must be cautious about the tone that they adopt, lest the way that they express their views be pointed to as evidence of malice? I think this unlikely. Again, courts have taken context into consideration here. An often-cited passage from Lord Nicholls' decision in *Tse Wai Chun Paul v. Cheng* pithily sums up this point: "a critic need not be mealy-mouthed in denouncing what he disagrees with. He is entitled to dip his pen in gall for the purposes of legitimate criticism."²⁹

2. Justification

Clearly book reviews fall primarily within the purview of comment or opinion rather than fact. But if a court takes issue with the factual foundation of a review, or if, as in the *Thornton* decision described above, a court deems portions of the review to be statements of fact, the defendant will need to put forward the defense of justification or truth. Under Canadian law, once it has been established that the statements at issue are defamatory, the plaintiff need not also prove them false. Falsity is presumed; if the defendant asserts their truth, the onus is on him or her to prove truth at the defense stage.³⁰ This is a difficult undertaking with a limited prospect of success.³¹

3. Responsible Communication on Matters of Public Interest

Defendants who are unsuccessful in establishing the defenses of fair comment or justification may seek to argue for the application of the defense of responsible communication on matters of public interest. This defense, newly created by the Supreme Court of Canada in the *Grant* decision,³² is inspired by the "public interest responsible journalism" defense that the House of Lords developed in *Reynolds*.³³ The change in name

²⁸ *WIC Radio* (note 6), para. 28.

²⁹ *Tse Wai Chun Paul v. Cheng* [2001] E.M.L.R. 777, cited with approval in *Burstein* (note 18), para. 26.

³⁰ *Grant* (note 3), para. 28.

³¹ See Chief Justice McLachlin's remarks on the limited utility of the defence of justification in relation to journalism in *Grant* (note 3), para. 33. I believe the situation of the defendant book reviewer to be analogous to or perhaps even more difficult than that of the journalist.

³² *Id.*

³³ *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609 [H.L.].

explicitly denotes a defense with a broader scope—throughout *Grant*, Chief Justice McLachlin makes a point of referring not just to members of the traditional media but also to “others engaged in public communication on matters of public interest, like bloggers,”³⁴ or more broadly to “public communicators.”³⁵ “The new defense,” she declared, “is ‘available to anyone who publishes material of public interest in any medium.’”³⁶ Of course book reviewers may be journalists, but those who are not, for example academic reviewers, are clearly not excluded from the purview of this defense.

Chief Justice McLachlin outlined the test to be met as follows: “First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.”³⁷ She defined public interest for these purposes by reference to the case law on the fair comment defense, so book reviews would qualify as publications on matters of public interest on the same basis here as there.

In order to assess conformity with the second part of the test, Chief Justice McLachlin provided this list of “non-exhaustive but illustrative”³⁸ guidelines to consider, many of them borrowed from *Reynolds*: “(a) the seriousness of the allegation; (b) the public importance of the matter; (c) the urgency of the matter; (d) the status and reliability of the source; (e) whether the plaintiff’s side of the story was sought and accurately reported; (f) whether the inclusion of the defamatory statement was justifiable; (g) whether the defamatory statement’s public interest lay in the fact that it was made rather than its truth (‘reportage’); and (h) any other relevant circumstances.”³⁹ True to their origin in *Reynolds*, these guidelines appear to be very much tailored to journalism and hence of limited utility in reference to academic work. However, Chief Justice McLachlin did note that for non-traditional media, “applicable standards will evolve to keep pace with norms,”⁴⁰ so perhaps there is room for the defense to evolve to protect some types of scholarship. A defense that requires the diligent verification of factual allegations may only rarely be relevant to the process of writing book reviews. But I thought it worth mentioning nonetheless given its potential in relation to more sustained academic work, for example, the sort that involves challenging the work of colleagues by putting forth alternative hypotheses.

³⁴ *Grant* (note 3), para. 62.

³⁵ *Id.*, para. 38.

³⁶ *Id.*, para. 96, citing *Jameel v. Wall Street Journal Europe SPRL*, [2006] UKHL 44 [H.L.], para. 54.

³⁷ *Grant* (note 3), para. 98.

³⁸ *Id.*, para. 122.

³⁹ *Id.*, para. 126.

⁴⁰ *Id.*, para. 97.

In making a case for the evolution of this new defense to cover academic work, the sentiments expressed by Judge Easterbrook in *Underwager v. Salter* are apposite.⁴¹ One of the defendants in that case was an academic and, in response to the plaintiff's assertion that under Wisconsin law the "public figure" argument should only be available to media defendants, he wrote of the public's "strong interest in protecting scholars" and suggested that "the private need for the privilege may well be greater in the case of scholars and prosecutors than in the case of newspapers and broadcasters."⁴² He explained: "Newspapers, magazines, and broadcast stations reap considerable profits from their endeavors, and the obligation to pay damages to those they injure is unlikely to put them out of business or even substantially temper their reports. [...] Psychologists compiling monographs with the aid of research grants [...] do not receive comparable rewards. Exposing such persons to large awards of damages is more apt to lead to silence than are comparable awards against media defendants."⁴³ Given the need for protection of academic freedom not just in relation to book reviews but in all realms of scholarship, the case for expanding the defenses to defamation available to scholars is one worth making.

The foregoing exercise of taking a hypothetical defamation case prompted by a critical book review through the Canadian courts leaves me cautiously optimistic. Although the plaintiff author would likely be able to make out a *prima facie* case of defamation, the defendant reviewer, editor, or publisher would likely be able to meet that case with a successful defense of fair comment. But while that prospect is of enormous importance to any actual defendant, it does not adequately counter the specter of libel chill.

C. Libel Chill in the Academy

The reality of libel chill has been acknowledged by the Supreme Court of Canada in a pair of recent cases. In *Grant*, Chief Justice McLachlin asserted: "It is simply beyond debate that the limited defenses available to press-related defendants may have the effect of inhibiting political discourse and debate on matters of public importance, and impeding the cut and thrust of discussion necessary to discovery of the truth."⁴⁴ And in *WIC Radio*, Justice Binnie stated: "When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. Of course 'chilling' false and defamatory speech is not a bad thing in itself, but chilling debate on matters of *legitimate* public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs

⁴¹ *Underwager v. Salter*, 22 F. 3d 730 (7th cir. 1994).

⁴² *Id.*, 735.

⁴³ *Id.*

⁴⁴ *Grant* (note 3), para. 57.

to accommodate its requirements.”⁴⁵ It was this concern about the chilling of public debate that prompted a change the law in each case—the expansion of the defense of fair comment in *WIC Radio* and the creation of the defense of responsible communication in *Grant*—to better balance the protection of reputation with the protection of freedom of expression within defamation law.

But uncertainty about the scope of these and other defenses remains making the contestation of a defamation suit a dicey proposition for scholars of modest means and for editors and publishers of under-funded academic journals. Indeed, there is anecdotal evidence to suggest that the prospect of the expense and stress of a defamation suit is so daunting that even defendants who are convinced that they would prevail in court may be unwilling to undergo a trial.

By way of example, I point to Canadian independent press Talonbooks, which recently halted publication of a book critical of the Canadian mining industry after being threatened with a defamation suit by Barrick Gold. Although convinced of the accuracy of the book’s content, editor Karl Siegler postponed publication after consulting a lawyer: “‘Everyone involved stood to lose millions of dollars,’ Siegler said. ‘In the publisher’s case, we stood to lose not just the company but all of the titles we have in print, roughly 500 titles dating back to the 1960s, many of which are Canadian classics.’”⁴⁶

Similar stories have emerged of libel chill in the academy in the U.S. and the UK. After publication in the University of San Francisco Law Review of an article she had written about the treatment of victims of domestic violence in international courts, Merle Weiner was threatened with a suit by the plaintiff in one of the cases she’d discussed in the article.⁴⁷ If she did not remove any reference to him in the version that was available online, he would sue her for defamation. When the administration of her home institution, the University of Oregon, informed her that they would not assist with any of the legal costs that defending such a lawsuit would entail, she reluctantly acceded to the demand; she simply could not afford to do otherwise.

When an art historian at Hebrew University took issue with a review by a professor of Arab politics at Columbia University of her book on Palestinian art, she threatened to launch a defamation action in London against the College Art Association, publisher of the journal in which the review appeared.⁴⁸ Though the review had been checked for conformity with

⁴⁵ *WIC Radio* (note 6), para. 15.

⁴⁶ *Barrick Gold moves to block mining book*, CBC ARTS (12 May 2010), available at <http://www.cbc.ca/arts/books/story/2010/05/12/barrick-gold-mining-book.html>

⁴⁷ Peter Schmidt, *Professors Are Pitched Lawsuit Protection*, 56 THE CHRONICLE OF HIGHER EDUCATION (2009).

⁴⁸ Jennifer Howard, *Scholarly Association Settles ‘Libel Tourism’ Case*, CAMPUS WATCH (18 June 2008), available online at: <http://www.campus-watch.org/article/id/5266>

U.S. libel law prior to publication, the Association was sufficiently wary of England's plaintiff-friendly libel laws that they elected to settle the suit for \$75,000 and a public apology. Linda Downs, executive director of the Association, said: "We feel very sad about this because all of our journals provide a platform for debate and we were very unhappy that this was taken into a legal realm instead of being debated on an intellectual level."⁴⁹ But she concluded that they did not have sufficient resources to cover the costs of fighting, and the risk of losing, a libel suit under English law.

Gary Johnson, editor of *Politics and the Life Sciences*, did not give in to the demands of Frank Sulloway, a scholar who threatened legal action prior to the publication of an article in the journal that was critical of his work. Sulloway sought to negotiate revisions to the article, and Johnson felt that "it would be grossly inappropriate for any editor to negotiate—under threat of litigation—the wording of one author's manuscript with a second author whose work is criticized in that manuscript. To commence such negotiations would be to surrender a journal's editorial independence."⁵⁰ Mindful of the costs of defending a libel action, he considered canceling publication of the article and of a series of accompanying commentaries that were to have made up a special issue.⁵¹ But ultimately, with the support of his university, he stood his ground, and Sulloway did not make good on his threats.⁵² Nevertheless, the costs of resistance were high; the five years of publication delays that the episode engendered took their toll on the people involved and posed a serious threat to the financial health and continued viability of the journal.⁵³

D. Libel Tourism

Clearly then, the specifics of defamation law doctrine aside, threats of lawsuits, or even just the fear of threats of lawsuits, can suppress scholarly debate and thereby compromise academic freedom. Libel chill is further heightened by the prospect of libel tourism. Even more daunting than the idea of facing a defamation lawsuit at home is that of facing such a suit in a foreign jurisdiction that may offer less protection to academic freedom and impose more severe sanctions.

⁴⁹ *Id.*

⁵⁰ Gary R. Johnson, *Editorial: Science, Sulloway, and Birth Order: An Ordeal and an Assessment*, 19 *POLITICS AND THE LIFE SCIENCES* 211, 213 (2000).

⁵¹ *Id.*, 213-214.

⁵² *Id.*, 217.

⁵³ *Id.*, 241.

It has been suggested that Professor Weiler's case constitutes a clear example of libel tourism.⁵⁴ Gilles Cuniberti points out that Professor Weiler lives and works in New York, that his accuser, Dr Calvo-Goller, lives and works in Israel, and that the author of the offending review, Professor Weigend lives and works in Germany.⁵⁵ The site on which the review appeared, though certainly accessible online in France, is published in English. Why then, Cuniberti asks, was the action brought in France?

Sam Bayard opines: "It's hard not to posit that the complaining party chose to file a criminal complaint in France, where neither Professor Weiler nor she lives or works, in order to exert the maximum amount of pressure on him to take down the critical review."⁵⁶ If the accessibility of the review online constitutes a sufficient connection to grant French courts jurisdiction in the matter,⁵⁷ then, Peter Wood asserts, "virtually any scholarly work in the world is potentially subject to nuisance suits to be adjudicated on French soil," and France risks "becom[ing] the destination of choice for the academic version of libel tourists."⁵⁸

The undisputed libel capital of the world so far as civil rather than criminal suits are concerned is London, England. Plaintiffs from other jurisdictions are drawn there by libel laws which are notoriously plaintiff-friendly in both content and structure, and by courts that are willing to accept jurisdiction over cases with only a very tenuous connection with the UK. Neither the plaintiff nor the defendant need be resident there; "Plaintiffs need only prove that they have a reputation to defend in Britain and that the defamatory material was circulated [there] even if only over the internet."⁵⁹ For example, a British court granted a defamation judgment to Saudi billionaire Khalid bin Mahfouz against author Rachel Ehrenfeld for statements that she made in a book which was not published

⁵⁴ Sam Bayard, *Critical book review brings French criminal libel charge*, First Amendment Coalition (15 March 2010), available online at: <http://www.firstamendmentcoalition.org/2010/03/critical-book-review-brings-french-criminal-libel-charge>

⁵⁵ Gilles Cuniberti, *Book Reviews, Criminal Libel, and the Jurisdiction of French Courts*, ConflictOfLaw.net, (18 February 2010), available online at: <http://conflictflaws.net/2010/book-reviews-criminal-libel-and-the-jurisdiction-of-french-courts>.

⁵⁶ Bayard (note 54).

⁵⁷ Note that Cuniberti suggests that this may not be a sufficient connection under French law (note 55).

⁵⁸ Peter Wood, *Libel Tourism En Vacances*, National Association of Scholars, (7 May 2010), available online at: http://www.nas.org/polArticles.cfm?doc_id=1211

⁵⁹ Jon Ungoed-Thomas and Michael Gillard, *Libel tourists flock to 'easy' UK courts*, TimesOnline (1 November 2009). Available online at: <http://www.timesonline.co.uk/tol/news/uk/article6898172.ece>

or marketed in England, but which was deemed available there by virtue of 23 copies that had been ordered via the internet.⁶⁰

At a time when critical scholarship is increasingly disseminated electronically to a global audience, it is necessary to be attuned not just to the defamation laws of one's own jurisdiction but to those of a multitude of jurisdictions around the world. Defendants may only be able to rely on the degree of academic freedom provided by the most draconian of libel regimes.

E. Conclusion

In light of the uncertain protection for freedom of expression in the defamation laws of our home jurisdictions, and of the alarming prospect of being held to account for our critical scholarship under the more draconian laws of foreign jurisdictions, and of the libel chill engendered by both, what can those committed to the preservation and enhancement of academic freedom do?

First, and most obviously, we can refrain from suing one another over criticism of our scholarship. However much criticism may sting, a lawsuit does more harm to our own interests than a negative review, and at the same time does untold harm to the broader scholarly community. I am not suggesting that it is never legitimate for an academic to bring a defamation suit, but I would draw a line, as Judge Posner does, between attacks on ideas and attacks on character: "We do not suggest that scholars can never maintain a suit for defamation. [...] If a professor is falsely accused of plagiarism or sexual harassment or selling high grades or other serious misconduct, rather than of having unsound ideas, he has the same right to damages as any other victim of defamation. The case before us is one in which not the character but the ideas of the scholar are attacked."⁶¹

Criticism of ideas should be met not with lawsuits but with rebuttals. In *Underwager*, Judge Easterbrook stated: "Underwager and Wakefield cannot, simply by filing suit and crying 'character assassination!', silence those who hold divergent views, no matter how adverse those views may be to plaintiffs' interests. Scientific controversies must be settled by the methods of science rather than by the methods of litigation. [...] More papers, more discussion, better data, and more satisfactory models—not larger awards of

⁶⁰ Rachel Ehrenfeld, *U.K. Libel Laws Chill Another American Book*, *Forbes.com* (8 June 2009), available online at: <http://www.forbes.com/2009/06/08/libel-tourism-protection-act-opinions-contributors-free-speech.html>.

⁶¹ *Dilworth* (note 5), 310. See also *Lott v. Levitt* 556 F. 3d 564, 570 (7th cir. 2009): "To the extent that Lott is complaining about an attack on his ideas and not on his character, he is barking up the wrong tree. The remedy for this kind of academic dispute is the publication of a rebuttal, not an award of damages."

damages—mark the path toward superior understanding of the world around us.”⁶² I would suggest that this is true not only of scientific controversies but of scholarly debate in all fields.

Second, we can advocate for reform of those aspects of defamation law in our home countries that threaten academic freedom and the vibrancy of scholarly debate. In Canada, that would include pressing for a heightening of the threshold of what qualifies as defamatory in cases involving expressions of opinions, continued expansion of the scope of the defense of fair comment, and the evolution of the defense of responsible communication on matters of public interest to meet the needs and accord with the practices of academic research and writing. In the U.S. context, Amy Gajda puts forward a bold proposal suggesting that academics be granted immunity for defamatory words communicated while acting within the scope of employment.⁶³

Third, we can work to develop resources that would enable colleagues to resist threats of libel action. Gary Johnson suggests that one way of doing this would be through the establishment of “a multidisciplinary legal defense fund supported by a large number of scientific and scholarly organizations,” positing that: “The existence of such a fund, administered by a multidisciplinary board, might reduce the likelihood that important research, analysis or criticism will not be carried out or will remain unpublished because of potential legal complications.”⁶⁴

Finally, we can speak out in support of colleagues like Professor Weiler who are facing the consequences of such resistance and who, in standing up for themselves, have also stood up for the academic freedom upon which we all depend.

⁶² *Underwager* (note 41), 736.

⁶³ GAJDA (note 23), 179.

⁶⁴ Johnson (note 50), 241.