



Reviews, Critiques and Recommendations: Are Professors Potentially Liable For Negative Evaluations?

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This paper considers the possibility that a professor may be sued for libel due to a critical review or a negative letter of recommendation. This question is considered from an international perspective. It evaluates different approaches to defamation law in different countries and addresses the issue of forum shopping where a plaintiff selects to sue in a jurisdiction more sympathetic to these claims. Due to the scarcity of cases, parallels are drawn to other types of suits filed in response to negative reviews.

CRITICAL REVIEWS:

It must be made clear from the onset that the type of lawsuits discussed in this paper are rare, and, even if initiated, are rarely successful. However, it is not impossible for a professor to be sued for a critical review or a negative letter of recommendation. And, to the extent these publications contain inaccurate factual statements that injure the plaintiff's reputation, the party suing could potentially win. So one should view this discussion as a cautionary tale with some practical ramifications.

There have been a number of instances that negative reviews have resulted in lawsuits. By far the most common cases (although, I repeat, these suits are uncommon!) are critical restaurant reviews published in newspapers.

Although restaurant reviews seem to generate the most defamation litigation (perhaps because they are the most likely to mix in factual statements along with the



opinion statements, and are more likely to harm the reputation of the restaurant, an iffy and precarious business to begin with; a statement in a book review, for example, claiming that an author made some mistakes, a factual statement rather than opinion, is unlikely to impact on book sales), there have been a handful of cases that arose out of different types of reviews. Additionally, the Internet, with its attendant sites that include customer reviews, have resulted in a new wave of lawsuits. Also, due to differences in defamation law, such suits are often unsuccessful in the United States but are more successful in other jurisdictions.

Going back to 1878 in England, the artist James Whistler recovered one farthing in a suit against the critic John Ruskin for claiming that Whistler engaged in an act of impudence in asking “two hundred guineas for flinging a pot of paint in the public’s face.” (Pannick) The musician Liberace successfully sued Daily Mirror Newspapers in the UK in 1957 based on an “article reviewing a concert he gave in the UK and describing his performance as: ‘deadly, winking, sniggering, snuggling, chromium-plated, scent-impregnated, luminous quivering, giggling, fruit flavored, mincing, ice-covered heap of mother love’ and calling him ‘a sugary mountain of jingling claptrap wrapped in such a preposterous clown.’” (Walshe) The actress Carlotte Cornwell recovered £ 11,500 in 1987 for libel against a critic who claimed that “(s)he can’t sing, her bum is too big and she has the sort of stage presence that jams lavatories.”

The New York real estate developer Donald Trump filed suit in New York against the publisher of an article that appeared in 1984 critiquing a proposed skyscraper that he planned to erect in downtown Manhattan. Trump claimed that the critic calling the proposed plans “an atrocious, ugly monstrosity” damaged his reputation as a developer conscious of aesthetic values and torpedoed his plans. The defendants Chicago Tribune Company and Paul Gapp (the author of the article) moved to dismiss on the grounds that the contents of the article were constitutionally protected expressions of opinion. Plaintiff asserted that even if the article expressed an opinion, it could still be defamatory unless the facts supporting the opinion are set forth. He further complained that an artist’s rendering of the proposed tower that accompanied the article did not accurately portray his plans and was in any event “an atrocious, ugly monstrosity.”

The United District Court for the Southern District of New York granted the



defendants' motion to dismiss in *Trump v. Chicago Tribune Company*. The court ruled that the statements in the article were opinions not facts, that it did lay out the facts supporting those opinions and that these facts were for the most part provided by Trump himself and that the truth of those facts were not in dispute, and that the illustration was clearly marked as the "artist's conception" of the proposed building. Finally, the court remarked that Trump's objection to the illustration's depiction as being a monstrosity was "precisely the same sort of individual, subjective aesthetic opinion which defendant Gapp expressed in the article. Plaintiff's negative opinion of the building depicted in the illustration is no more subject to factual proof than are the negative opinions of plaintiff's proposal expressed by Gapp in the article itself....Plaintiff, having sought publicity for his proposal, finds that defendants do not like his proposed structure. He, on the other hand, does not like their conception any better. The words of the Latin proverb are particularly appropriate here: *De gustibus non est disputandum*, there is no disputing about tastes."

The types of reviews that have triggered a greater number of lawsuits have been pejorative restaurant reviews. There have been a number of reported cases of restaurants suing reviewers and the newspapers that have published these reviews. In the United States, where proving defamation is more difficult than overseas due to constitutional considerations, the decisions tend to favor the defendants. In order to succeed in a defamation lawsuit in the U.S. the plaintiff must overcome a number of challenges. First of all, one is entitled to express one's opinions and such expression is constitutionally protected speech. Secondly, even though opinion protection does not extend to factual misstatements, the plaintiff would have to prove malice on the part of the defendant because often the plaintiff is deemed to be a public figure. Again, due to constitutional interpretations, in order to prove defamation against a public figure it is insufficient to just prove the statements are untrue; one must also prove that those statements were made with malice.

One of the few that resulted in a jury award in favor of the plaintiff, *Mr. Chow of New York v. Ste. Jour Azure S.A.*, ultimately was reversed by an appeals court on the basis that the disputed statements were either opinion or lacking malice. In one other case, *Terillo v. New York Newsday*, the plaintiff managed to overcome the twin hurdles



of opinion and malice - proving the statements in the review were factual assertions (misstating ingredients used in one of the restaurant's dishes) and malicious, in that the newspaper failed to publish a correction when they were apprised of the inaccuracies – but ultimately failed in his suit because he was unable to prove that he suffered monetary damages, another requirement under American defamation law.

Restaurants have had more success in their suits against reviewers and their publishers in other countries. For example, Australia has seen a number of such lawsuits as have other UK countries. The main defenses there are truth and fair comment but the barriers to success are not as high as those in the U.S. There have been other reported cases in Malaysia and Italy. This difference in defamation laws have resulted in forum shopping and libel tourism by plaintiffs – the practice of filing suit in a country whose law is sympathetic to one's claims but only has a tangential connection to the parties or the dispute. The United States has addressed this problematic practice by adopting legislation that would make judgments obtained in this manner unenforceable against American defendants' assets in the U.S. (SPEECH Act).

More recently, defamation lawsuits have been filed by hotels and restaurants against websites such as TripAdvisor for reviews carried on the site. For example, a consortium of hotels and restaurants were considering a defamation action against TripAdvisor for its reviews on its website. Ultimately, it was investigated by UK's Advertising Standards Authority which found it to be in breach of its advertising code in 2012. TripAdvisor was sued by a bed and breakfast establishment in Scotland based on a negative review complaining about cleanliness. Although the plaintiff was successful in the initial stages of litigation on jurisdictional questions, the case was eventually dropped due to the threat of high litigation costs. A reviewer on TripAdvisor has also been personally sued in Canada based on a negative review of Hotel Quebec in Quebec City. There are also a rising incidence of suits filed against online reviewers on sites like Yelp and Angie's List reported in the news.

Perhaps the most disturbing case for academics was the criminal libel suit filed in France by Karin N. Calvo-Goller, an Israeli law professor, against Thomas Weigend of the University of Cologne, Germany, and Joseph Weiler of NYU, editor of an online publication Global Law Books, based on Weigend's mildly critical book review of her



book titled The Trial Proceedings of the International Criminal Court, published in 2006. When Calvo-Goller complained to Weiler about the review and demanded that he retract it threatening a lawsuit, Weiler refused but also warned her that such a suit would boomerang against her and damage her reputation more significantly than the innocuous critique. Calvo-Goller persisted and a trial was held in January 2011 before three judges of the Tribunal de Grande Instance de Paris.

Prof. Weiler's predictions came true. Not only did the court rule that it had no jurisdiction over the case and that the review did not rise to the level of libel, but also imposed sanctions against Calvo-Goller in the amount of €8,000 (about U.S. \$11,000) for the frivolous case. Worse, if one reads the blog comments and articles discussing the case, which were for the most part uniformly extremely critical of her decision to sue, her reputation did suffer a terrible blow.

While the outcome of the case is felicitous for the academics engaged in reviewing others' work, it may have opened a Pandora's box. Perhaps a similar case, where the plaintiff did not engage in the blatant forum shopping of Calvo-Goller and involving a scathing review containing inaccuracies and factual misstatements, could go the other way. It is therefore important for academics to be sensitive to the content of their reviews and the assertions they make therein.

DEFAMATION LIABILITY FOR LETTERS OF RECOMMENDATION:

If an academic can be sued based on a mildly critical book review, what exposure does she have for writing an unfavorable letter regarding a student or colleague?

For instance, a suit was filed against the University of New Haven with regards to a denial of tenure. One of the causes of action was brought against the plaintiff's chairman for a letter he wrote to the tenure committee recommending against tenure. The Connecticut Appellate Court granted the defendant summary judgment ruling in part that the letter was not actionable under the tort of defamation. It constituted an opinion and an exercise of academic freedom. (*Rafalko v. University of New Haven*) On



the other hand, Wendy Woodruff won a defamation case against her supervisor in a laboratory at the University of Tennessee, Memphis in 2006. She claimed that the letters sent by Dennis Ohman to her funding institution and to the Immigration and Naturalization Service (she was Canadian) were critical of her work. Ultimately the trial court ruled in her favor on a number of claims including defamation, granting her \$50,000 in compensatory damages and \$125,000 in punitive damages. On appeal, the US Court of Appeals for the Sixth Circuit affirmed. It must be noted that the court found numerous statements of facts in the letters not just expressions of opinion. (*Woodruff v. Ohman*)

In a case involving recommendation letters for a student, a student who was applying to medical school was interviewed by his university's committee that assisted students with their applications. Based on reservations concerning his ethical standards, the committee wrote a letter expressing doubts about his suitability to become a member of the medical profession; this was forwarded to medical schools. He was denied admission to all of the schools. He sued. The trial court granted defendant's motion for summary judgment, and the appeals court affirmed, on the basis that the opinions set forth in the letter were based on true and undisputed facts. (*Goldman v. Wayne State University*)

CONCLUSION

One must bear in mind when writing reviews and recommendations that accuracy and truth are paramount. Furthermore, while cleverness in writing scathing comments may be satisfying it may also make the subject of the insults very angry. Although such suits are admittedly rare and usually unsuccessful, they are not impossible. Academics would be protected in such suits by the defenses of truth, opinion and fair comment, depending on the jurisdiction, and so would probably be ultimately successful. But one must not disregard the expense of defending such a suit or the distress that accompanies it. Therefore, the key is prevention. Writers should be extremely diligent in ensuring that the factual underpinnings for the opinions stated in their writing are true and verifiable and not unnecessarily insulting.



BIBLIOGRAPHY

“*Convery v The Irish News Ltd*, The Northern Ireland Court of Appeal [2008] NICA 14, (Transcript)

Defamed Restaurateur Wins \$100,000”, Australian Financial Review, 4 (April 21, 1989)

Dilianian, Ken, “McDonald’s Sues: A Grilling for a Critic Who Has a Beef”, The Philadelphia Inquirer, pg. A01, June 18, 2003

“French Court Tosses Ridiculous Criminal Complaint By Israeli Against An American Over Book Review By A German”,

<http://www.techdirt.com/articles/20110307/04585913385/french-court-toss>

Goldman v. Wayne State University, 151 Mich. App. 289. 390 N.W. 2d 672 (1986)

Greer v. Columbus Monthly Publishing Corp, 4 Ohio App. 3d 235; 448 N.E.2d 157 (1982)

Jouvenal, Justin, “In Yelp Suit, Free Speech on Web vs. Reputations”, The Washington Post, pg. A18, Dec. 5, 2012

Kuncewicz, Steve, “What Difference Will ASA’s TripAdvisor Ruling Make”, Caterer & Hotelkeeper, Feb. 17, 2012

Liberace v. Daily Mirror Newspapers Ltd., The Times, June 17, 18, 1959

Liptak, Adam, “From a Book Review to a Criminal Trial in France”, The New York Times, Feb. 21, 2011



Mashburn v. Collin, 355 So. 2d 879 (La. 1977)

Masnick, Mike, “French Court Tosses Ridiculous Criminal Complaint By Israeli Against An American Over Book Review By A German,”

<http://www.techdirt.com/articles/20110307/04585913385/french-court-toss> (3/7/11)

Mr. Chow of New York v. Ste. Jour Azure S.A., 759 F.2d 219 (2d Cir. 1985)

Pannick, David, “One Man’s Meat is Another Man’s Restaurant Review”, The Times (London), pg. 1, Apr. 8, 2008.

Paris, Natalie, “TripAdvisor: Can Users Be Sued for Bad Reviews?”

<http://www.telegraph.co.uk/travel/travelnews/10304208/TripAdvisor-can-users-be-sued-for-bad-reviews.html> (9/12/13)

Rafalko v. University of New Haven, 129 Conn. App. 44, 19 A.3d 215 (2010)

Securing the Protection of our Enduring and Established Constitutional Heritage Act (the SPEECH ACT), Pub. L. No. 111-123, 28 U.S.C.A. §§4101-4105

Terillo v. New York Newsday, 137 Misc. 2d 65, 519 N.Y.S.2d 914; (N.Y. Civ. Ct. 1987)

Themed Restaurants, Inc. v. Zagat Survey, LLC, 21 A.D. 3d 826, 801 N.Y.S.2d 38 (1st Dept. 2005)

Trump v. Chicago Tribune Company, 616 F. Supp. 1434 (S.D.N.Y. 1985)

Wallop. Harry, “Hoteliers’ Revenge: 400 To Sue TripAdvisor Over Reviews”, The Daily Telegraph (London), pg. 7, Sept. 11, 2010



Walshe, Patrick, “And As For The Souffle...”, Business & Finance Magazine, Apr. 20, 2007

Weigand, Thomas, “Short Review”, <http://www.globallawboods.org/detail.asp?id==298>

Woodruff v. Ohman, 166 Fed Appx. 212 (6th Cir. 2006)