

Unmarried fathers therefore remain subject to differential treatment under both the Convention and domestic law.

BRIAN SLOAN

LIBEL TOURIST ORDERED TO PAY 8,000 EUROS

IT is unusual for this journal to carry a note on a first instance case at all, let alone a French one. But the facts of *Ministère public cl Weiler* are so astonishing, and the underlying issues so important, that a note on the judgment of the 17th Chamber of the *Tribunal correctionnel de Paris* of 3 March 2011 (case 078523043) seems fully justified.

Joseph Weiler is a professor at Harvard, where he edits the *European Journal of International Law*, which is published on the internet. In 2007 this carried a review by Professor Thomas Weigend, of Cologne, of a book about the International Criminal Court. The review, though expressed in moderate language, was unfavourable. The book, said the reviewer, was heavy on description and light on analysis. This “exercise in rehashing the existing legal set-up”, he said, was “particularly unproductive since a large part of the volume consists in a reprint of the ICC Statute and its Rules of Procedure (the Court’s Regulations are consistently ignored).” He also criticised the book as being sloppily edited, uncorrected errors including a reference to “the trail (sic) process”. By implication, at a price of \$155 he did not see it as the bargain of the month.

The author of the book, one Karine Calvo-Goller, took exception to this review, and wrote to Weiler, demanding that he remove it from his journal’s website. Weiler, who thought the review was fair, refused to suppress it, but told the author that, if she wished to write a riposte, he would publish it. Instead of accepting this offer, however, Dr Calvo-Goller instituted proceedings against Weiler in France for defamation. As Dr Calvo-Goller was an Israeli academic, Weiler an American, the reviewer German, the publisher Dutch and the language of the alleged libel English, the choice of France looked, to put it mildly, a little odd. The venue occurred to her, however, because she holds French as well as Israeli nationality, and had at some point studied law in France.

In France, defamation is criminal as well as civil, and it was the criminal route that Dr Calvo-Goller chose, constituting herself a *partie civile*, and so putting in train the French equivalent of a private prosecution. In consequence Weiler was summoned to appear before a *juge d’instruction* in Paris, and – after a long series of adjournments – in January 2011 he eventually stood trial before the 17th Division of the *Tribunal correctionnel de Paris*, a criminal court composed of three

professional judges, who specialise in defamation cases, and sit without a jury.

Two months later this court dismissed the case.

The central ground for the decision was that the French courts had no jurisdiction. For a French court to be competent in such a case the defamation must have been published in France, and to prove publication it was not enough to show that someone could have accessed the publication there, but an identifiable person must be shown to have done so: a fact which Dr Calvo-Goller had failed to prove. Though the *Code pénal* gives the French criminal courts extra-territorial jurisdiction in certain situations, one of which is where the victim of the offence is a French national, this only applies where the offence in question is *un crime*. In France, *crimes* are offences of the utmost gravity, a category into which the crime of libel does not fall.

Having let Weiler out of the dock on this account, the *Tribunal correctionnel* then (in effect) put Dr Calvo-Goller into it. Under French law, a *partie civile* who has made abusive use of her right to start a prosecution is liable in damages at the suit of the acquitted defendant, and by article 472 of the *Code de procédure pénal* these can be awarded by the criminal court before which the prosecution failed. Accepting Weiler's argument that he had been the victim of an abusive prosecution, the court ordered Calvo-Goller to pay him 8,000 euros in compensation.

The proceedings were abusive, it said, for two reasons. First, the complainant had in her evidence "accepted that she had practised what it is convenient to call *forum-shopping*": searching the world for the legal system that she thought would put her in the strongest position, and her adversary in the weakest one, even though it had no genuine connection with the case. And secondly, she had tried to prosecute for a statement which manifestly failed to satisfy the test of defamation in French law, because the review "... contains nothing that is harmful to her honour or her reputation and only expresses, in moderate language, a scientific opinion on the book, without exceeding the limits of free criticism to which every author of a work is exposed."

What would have happened if Dr Calvo-Goller had tried to use the English courts to suppress her book's unfavourable review?

The criminal courts would have been closed to her, because criminal libel, long in a vegetative state, was quietly put out of its misery by section 73 of the Coroners and Justice Act 2009. To sue civilly she would have had to show, as in France, that someone had actually accessed the review. Though our courts presume that newspapers are read, they do not make the same assumption about publications on the internet. But had she overcome this hurdle, her case would almost certainly have been dismissed without a hearing. The defence of fair

comment would have been so obviously applicable that Weiler would probably have persuaded the court to give him summary judgment.

The judgment would have come together with an award of costs, but the English court would not have awarded Weiler damages. Though abuse of civil process is a tort, at least in theory, it is subject to the same stringent limitations as its more famous cousin, malicious prosecution: limitations which normally ensure that claimants lose. So although Weiler would have won, his victory, when it came, would have been rather less dramatic.

Dramatic or otherwise, Weiler's victory is one at which all academics should rejoice – whether they write honest book reviews, or smart under them.

J.R. SPENCER