Defamation in Academia: A Legal and Practical Limit on Academic Freedom

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Defamation actions against academics, or the threat of such actions, impose both legal and practical limits on the freedom of expression that is integral to the exercise of academic freedom within the employment context. Claims can be brought by the subjects of research, by other faculty members in relation to internal reviews, complaints or discipline proceedings, and by individuals or entities subjected to critical commentary in online forums. Defamation law in Canada has tended to become weighted in favour of the protection of reputation over the protection of free expression. While the courts have elaborated a number of defences to claims that may be applicable to academics, the prospect of civil litigation, with its attendant burdens of time and expense, nevertheless has a chilling effect on academic freedom by suppressing scholarly debate and discouraging academics from engaging in open discussion on matters of public concern. The authors identify a number of measures that parties can take to mitigate against the risk of defamation claims. In particular, they emphasize the need for robust indemnification and defence obligations to be written into employment contracts and collective agreements, and for institutions to provide defamation insurance that clearly applies to staff who face legal action for statements or activities undertaken in the course of their work. The paper also addresses two areas requiring legislative reform, namely, amendments to anti-SLAPP legislation to ensure that it meets its objective of preventing unmeritorious lawsuits aimed at silencing debate, and the development of a peer-review privilege defence.

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1. INTRODUCTION

> [T]hreats of lawsuits, or even just the fear of threats of lawsuits, can suppress scholarly debate and thereby compromise academic freedom.[1]

Researchers and academics are routinely required to defend statements they have made in the course of their work — at conferences of their peers, in the context of internal reviews, in complaint and discipline proceedings, and in peer-reviewed publications. But the prospect of defending the same statements in a court when faced with a defamation claim (or even the dark threat of a defamation claim) is another beast entirely — one that can have the devastating effect of inhibiting academic freedom.

Academic freedom has been defined as the freedom to teach, discuss, research, and publish works without institutional censorship or other unreasonable interference. Without academic freedom, post-secondary institutions cannot achieve their goals of conducting independent research, disseminating knowledge, or fostering independent thinking and expression.[2] Defamation law is meant to protect reputations against harmful false statements. In Canada, defamation law places a heavy burden on defendants to justify their statements (i.e. prove their truth) or otherwise defend them. Moreover, the time, expense, and emotional toll of litigating a defamation claim can, and does, intimidate academics into silence, sometimes even inhibiting them from entering a field of inquiry. Settlement of defamation claims can result in agreements that restrict expression by including confidentiality and non-disparagement clauses.

This paper will explore the legal and practical limits placed on academic freedom in the context of a defamation claim in Canada.[3] It will begin by providing an overview of the concept of academic freedom, the law of defamation, and the defences that have developed which are most pertinent in the academic context. The paper will then address how allegations of

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[1] Kate Sutherland, "Book Reviews, the Common Law Tort of Defamation, and the Suppression of Scholarly Debate" (2010) 11:6 German LJ 656 at 667.

[2] Canadian Association of University Teachers, "Academic Freedom: CAUT Policy Statement" (November 2018), online: <www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom> [CAUT Policy Statement].

[3] Other legal limits on academic freedom and freedom of expression such as prohibitions on hate speech are beyond the scope of this paper.

defamation most commonly arise in a post-secondary environment and the ways in which these claims can impact academic freedom. It will go on to suggest practical measures that academics and institutions can take to counteract the chilling effect of defamation allegations on academic freedom, such as ensuring robust indemnification and defence obligations and providing defamation insurance which clearly applies to academics acting within the scope of their work, defined broadly. The paper will close by reviewing recent legislative reforms in the area, including legislation addressing strategic lawsuits against public participation (SLAPP) and the development of a peer-review privilege defence.

2. DEFINING ACADEMIC FREEDOM AND DEFAMATION, AND THEIR LEGAL RELATIONSHIP

(a) Academic Freedom

It is important at the outset to understand the contours of academic freedom and the values at stake. La Forest J. in *McKinney v. University of Guelph* described academic freedom as a "free and fearless search for knowledge and the propagation of ideas" that is "essential to our continuance as a lively democracy."[4]

Academic freedom is "a negotiated employment right . . . unique to universities (and, increasingly, to community colleges) in Canada."[5] Four components of academic freedom have been endorsed by the Canadian Association of University Teachers (an association of Canadian faculty unions, known as the CAUT) and are found in most university collective agreements across Canada:

(i) freedom to teach,

(ii) freedom to research and publish,

(iii) freedom of intramural expression, and

[4] [1990] 3 SCR 229 at 282, 286–287, [1990] SCJ No 122.
[5] Michael Lynk, "Academic Freedom and Labour Law in Canada and the Scope of Intra-Mural Expression" (2020) 29:2 Const Forum Const 45 at 49 [Lynk].

(iv) freedom of extramural expression.[6]

Intramural expression includes the "freedom to express one's opinion about the institution, its administration, and the system in which one works."[7] Freedom of extramural expression permits expression beyond the confines of campus in the public realm, including in relation to matters that are outside a faculty member's area of academic expertise. The CAUT states that without academic freedom, post-secondary institutions cannot achieve the goals of "searching for, and disseminating knowledge, and understanding and . . . fostering independent thinking and expression in academic staff and students."[8]

(b) Defamation and Defences to Defamation Claims

Defamation is an umbrella term covering both libel (written defamation) and slander (spoken defamation). The law of defamation balances two values that are sometimes in tension with each other: freedom of expression and reputation.[9] In the *Grant* case, the Supreme Court of Canada succinctly explained the elements of the cause of action and burden of proof in a defamation claim:

> A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism . . . . (The only exception is that slander requires proof of special damages, unless the impugned words were slanderous *per se* . . . .) The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.
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> If the plaintiff proves the required elements, the onus then shifts to the defendant to advance a defence in order to escape liability.[10]

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[6] *Ibid.*
[7] CAUT Policy Statement, *supra* note 2, art 2.
[8] *Ibid*, art 1.
[9] *Grant v Torstar Corp*, 2009 SCC 61 at para 3 [*Grant*].
[10] *Ibid* at paras 28–29.

Compared to other jurisdictions like the United States where, for instance, plaintiffs are required to plead and prove the falsity of the allegedly defamatory statement,[11] Canadian defamation law has been described as "plaintiff-friendly."[12] Canadian courts have imported and developed various defences to defamation, including justification, fair comment, qualified privilege, absolute privilege, and responsible communication.[13]

(i) *Justification*, or truth, is a complete defence to a defamation claim.[14] The defence of justification will succeed if the defendant proves, on a balance of probabilities, the truth of "every injurious imputation which the jury find to be conveyed by the publication."[15] However, it is difficult to prove truth in a courtroom. A plea of justification followed by a failure to make out the defence at trial can also lead to an increased damages award. As a consequence, defendants may be dissuaded from pleading this defence.

(ii) *The defence of fair comment* requires that the comment be made on a matter of public interest, based on a "substratum" of true facts and recognizable as comment, which any person could honestly make on the proved facts.[16] The facts relied on must either be notorious or stated in the publication containing the comment. The rationale is that, by basing the comment on a particular substratum of facts, readers can decide to agree or disagree.

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[11] Vincent R Johnson, "Comparative Defamation Law: England and the United States" (2017) 24:1 U Miami Int'l & Comp L Rev 1 at 24: "[I]n the United States, there is generally no presumption that a defamatory statement is false. Rather, the falsity of the charge must be proved by the plaintiff. This makes it difficult for a libel or slander plaintiff to prevail under American law."

[12] Dean Jobb, "Responsible Communication on Matters of Public Interest: A New Defense Updates Canada's Defamation Laws" (2010) 3:2 J Int'l Media & Entertainment L 195 at 201: "This feature of Canada's libel laws — a low threshold for establishing defamation, coupled with shifting the burden from the accuser to the defendant — has been criticized as making Canada's libel laws, like Britain's, too plaintiff-friendly."

[13] Other defences such as consent exist. See Raymond E Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2d ed (Toronto: Thomson Reuters, 2022), ss 9–16 [*Brown on Defamation*].

[14] *Ibid*, s 10:1.

[15] *Ibid*, s 10:4, citing *Price v Chicoutimi Pulp Co* (1915), 51 SCR 179 at 199–200, 23 DLR 116.

[16] *WIC Radio Ltd v Simpson*, 2008 SCC 40 at paras 26, 59.

Commentary, the courts have found, includes "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof."[17] A finding that the dominant purpose of conveying the defamatory remark was malice defeats the defence.[18] In *Hill v. Church of Scientology of Toronto*, Cory J. of the Supreme Court of Canada explained the concept of malice as follows:

> Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes . . . "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created . . . . Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth.[19]

(iii) *The defence of qualified privilege* is a situational protection. Essentially, a statement will be immunized from a defamation claim if there is a duty or interest in communicating the information and a corresponding interest in receiving that information.[20] It is the occasion that is privileged and once an occasion is shown to be privileged, "the defendant is free to publish, with impunity, remarks which may be defamatory and untrue about the plaintiff."[21] This privilege is what allows investigators, for example, to report on their suspicions in the furtherance of an investigation. However, a "publication must not exceed the limits of the duty or interest created by the occasion," for instance, by including individuals who do not have a legitimate interest in receiving the communication.[22] As with fair comment, a finding of malice defeats the defence.[23]

(iv) *Absolute privilege*, or immunity, also attaches to the occasion. Specifically, it attaches to "communications which take place in the course of, during, incidental to, and in the processing and furtherance of, judicial or quasi-judicial proceedings"[24] and to statements made in

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[17] *Ibid* at paras 26–28, citing with approval *Ross v New Brunswick Teachers' Ass'n*, 2001 NBCA 62 at para 56.
[18] *Ibid* at para 106.
[19] [1995] 2 SCR 1130, CarswellOnt 396 at para 145 [*Hill*].
[20] *Brown on Defamation*, *supra* note 13, § 13:1.
[21] *Hill*, *supra* note 19 at para 147.
[22] *Brown on Defamation*, *supra* note 13, § 13:144.
[23] *RTC Engineering Consultants Ltd v Ontario*, [2002] OJ No 1001, 2002 CanLII 14179 (ONCA) at para 18.
[24] *Brown on Defamation*, *supra* note 13, § 12:17 [footnotes omitted].

Parliament and provincial and territorial legislatures.[25] The purpose of this privilege is to protect the administration of justice and allow participants in the legislatures and in judicial or quasi-judicial proceedings to speak freely. This privilege is absolute and cannot be defeated by a finding of malice (hence the name).[26]

(v) *The defence of responsible communication on a matter of public interest* was recognized by the Supreme Court of Canada in *Grant*.[27] Acknowledging that justification may be difficult to prove, and that democratic society benefits from free expression on matters of public interest, the Court recognized a more recent defamation defence.[28] Two requirements must be met for a publication to be protected by the defence of responsible communication. First, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible — or duly diligent — in trying to verify the allegation(s), having regard to all the relevant circumstances.[29] While developed in the journalism context, the Supreme Court did not limit the defence to members of the press, which is why the Supreme Court of Canada refers to "responsible communication," as opposed to the English formulation of "responsible journalism."[30]

It is for a judge to decide whether the impugned statement relates to a matter of public interest, broadly defined. If the public interest criterion is established, the trier of fact must decide whether the defendant was duly diligent, taking into account the following non-exhaustive factors:

(a) the seriousness of the allegation;

(b) the public importance of the matter;

(c) the urgency of the matter;

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[25] *Ibid*, § 12:12.
[26] *Ibid*, § 12:17.
[27] *Grant*, *supra* note 9.
[28] *Ibid* at paras 33, 65.
[29] *Ibid* at para 98, citing *Cusson v Quan*, 2007 ONCA 771.
[30] *Ibid* at para 126.

(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.[31]

The Supreme Court held that the defence of responsible communication "obviates the need for a separate inquiry into malice," as "[a] defendant who has acted with malice in publishing defamatory allegations has by definition not acted responsibly."[32]

(c) The Legal Relationship between Academic Freedom and Defamation

As noted above, academic freedom is a negotiated contractual right of faculty and staff at many post-secondary institutions.[33] The protection of that contractual right is, therefore, not an obligation that falls on those outside the employment relationship. As this paper will demonstrate, the use of defamation claims against (and by) faculty and staff presents a practical limit on the expressive freedom that is integral to the exercise of academic freedom within the employment context. While expression underpinning the exercise of academic freedom ought to be protected by an institution as a contractual right, that expression can still be subject to a defamation claim by a third party to the employment relationship who has no obligation to protect academic freedom.

3. EXAMPLES OF DEFAMATION CLAIMS IN ACADEMIA AND THEIR IMPACT ON ACADEMIC FREEDOM

[31] *Ibid* at paras 108–121, 126.
[32] *Ibid* at para 125.
[33] Lynk, *supra* note 5.

Defamation claims can arise in various scenarios in an academic environment — both within and outside the walls of a post-secondary institution — in a manner that places practical and legal limits on academic freedom. What follows are common examples of defamation claims in an academic context, including claims by the subjects of research or commentary, claims arising from internal review and disciplinary proceedings, claims arising from online discourse, and claims that fall to be determined through the grievance and arbitration procedures under a collective agreement.

A defamation claim brought by the subject of an academic's research or commentary (whether published in a journal, spoken at a conference, or shared online) has a direct impact on academic freedom, as it seeks to use the courts to determine the boundaries of what an academic may or may not say. Similarly, defamation allegations in the context of internal reviews, complaints, and disciplinary proceedings directly impinge upon the ability of university community members to critique the system in which they work.

(a) Defamation Claims by a Subject of Research or Commentary

Academics should be mindful of the possibility that the subjects of academic research or commentary could commence a defamation claim. Defamation claims relating to peer-reviewed articles, research, and commentary directly impact academic freedom by utilizing the courts (or threatening to do so) to attempt to circumscribe what academics can say in the course of their work. While the defences of fair comment and responsible communication on a matter of public interest may be applicable, the realities of defending a claim can still create a chilling effect on scholarly debate and thereby restrict academic freedom. Daniel Hemel and Ariel Porat, while noting that comprehensive data on the frequency of defamation claims or threats against peer-reviewed journals is scant, cite the American Psychological Association's longtime publisher, who reports receiving approximately one lawsuit threat per year over the course of his career.[34]

[34] Daniel Hemel & Ariel Porat, "Free Speech and Cheap Talk" (2019) Coase-Sandor Institute for Law and Economics Working Paper No 906, at 84–85, n 36.

A high-profile example of a claim in respect of a peer-reviewed article occurred in the United States in *Hi-Tech Pharmaceuticals Inc. v. Cohen et al*.[35] Hi-Tech Pharmaceuticals sued Harvard University professor Pieter A. Cohen for, among other things, libel, slander, and product disparagement, in relation to an article he published in the peer-reviewed journal *Drug Testing and Analysis* and his subsequent statements in the media. Cohen's article was about an ingredient in nutritional supplements manufactured and distributed by Hi-Tech. After various pre-trial motions, the case ultimately proceeded to a jury trial in which Cohen was successful and costs were awarded against Hi-Tech.[36]

Despite the result, the process was taxing on Cohen personally and professionally. Harvard University reportedly agreed to cover up to $5 million in damages; however, Hi-Tech's claim was initially for a much larger sum, which meant Cohen would not be covered if an award of damages ultimately exceeded $5 million. In addition to the stress this caused, Cohen was required to undergo six hours of questioning and to provide Hi-Tech with copies of his research materials, notes, and correspondence.[37] These disclosure obligations are equally applicable to civil litigation in Canada. STAT, a science journalism publication, reported in 2017 that Hi-Tech's chief executive officer was "openly hopeful that the long and costly legal battle will scare away other academics from investigating the supplement industry."[38]

A Canadian example of a defamation claim brought by a research subject is *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*.[39] This case involved a broadcast of an investigative report on the CBC's show *Marketplace*. The subject of the report was a comparison of the chicken sandwiches sold by Subway and four other Canadian fast-food chains. The *Marketplace* report stated that Subway's chicken sandwiches — unlike those of its

[35] 277 F Supp (3d) 236, 2016 US Dist LEXIS 149108 (D Mass 2016) and 208 F Supp (3d) 350, 2016 US Dist LEXIS 130038 (D Mass 2016).
[36] Elizabeth Hall-Lipsy & Sarah Malanga, "Defamation Lawsuits: Academic Sword or Shield?" (2017) 9:12 EMBO Molecular Medicine 1623 at 1623.
[37] *Ibid*.
[38] Rebecca Robbins, "A supplement maker tried to silence this Harvard doctor – and put academic freedom on trial," *STAT* (10 January 2017), online: <www.statnews.com/2017/01/10/supplement-harvard-pieter-cohen/>.
[39] 2019 ONSC 6758 [*Subway*].

competitors, whose sandwich meats were made nearly entirely of chicken — were made of "only slightly more than 50% chicken." The products were tested for *Marketplace* by an independent DNA testing laboratory run by Trent University. Subway has brought a $210 million action against CBC and Trent in respect of the broadcasting and publication of the report, claiming in defamation and negligence (in respect of Trent's testing process). The defamation claim against Trent related to the participation of Trent personnel in the *Marketpla*ce report and the reporting of test results.[40]

Another area of research that participants acknowledge "could be particularly prone to legal action" in defamation are "reproducibility initiatives," wherein researchers attempt to replicate well-known experiments to determine whether they can reproduce the results.[41] As this type of study implicates and impugns the original researchers' methodology and claims, it can lead to imputations of dishonesty.

Direct criticism by one academic of another academic's methods and research has also led to defamation claims. In 2017, cancer researcher Carlo Croce commenced a defamation claim against David Sanders, a virologist and associate professor at Purdue University, who was quoted in a *New York Times* article criticizing some of Croce's papers. Sanders later commented on the impact of the litigation: "People are being inhibited from exposing [alleged] misconduct because of the fear that it will damage their careers . . . . Invoking the legal system to fight scientific battles is a generally pusillanimous approach . . . . [It is a] strategy employed by those who wish to evade directly confronting the scientific evidence."[42] In addition, Professor Sanders raised the concern that the threat of defamation claims against publishers of academic journals "may have implications for the reliability of the scientific record," stating that "[i]n most cases, the correction and retraction notices for articles are obfuscatory, probably with the goal of

[40] Employing what was described as "an unusual legal strategy," Trent brought a motion to dismiss the negligence claim only — leaving the defamation claim to be decided at a later date (See *Subway*, *supra* note 39 at para 99). Trent's motion was dismissed at first instance and allowed on appeal (See 2021 ONCA 25).
[41] Jack Grove, "Are Legal Concerns stifling Scientific Debate?" *Times Higher Education* (7 November 2019), online: <http://www.timeshighereducation.com/features/are-legal-concerns-stifling-scientific-debate>.
[42] *Ibid.*

reducing the legal liability of the publishers."[43] The fear is that publishers may be exposed to a defamation claim by the authors of an article if the reason for a correction or retraction is clearly explained — particularly where the correction or retraction is due to allegations of academic misconduct.

It is no secret that civil litigation is a costly, time-consuming, and emotionally taxing process.[44] Various stages of the litigation process impose practical and legal limits on academic freedom. Disclosure obligations can force academics to turn over research, drafts, and communications that they otherwise would not have been required to share (as occurred in Cohen's case). The prospect of opening up one's research to this type of scrutiny is understandably daunting.

The vast majority of civil lawsuits in Canada do not proceed to trial.[45] Most are resolved out of court, and settlement agreements often contain confidentiality and non-disparagement clauses.[46] These types of clauses can place legal limits on what academics may say in respect of the subject matter of a claim. If a matter is not settled by the parties, it can take years and tens of thousands of dollars to proceed to trial.[47] Given these realities, it is not uncommon for those faced with a defamation claim, or the threat of one, to limit their expression on the subject at hand. The implementation of legislation in various jurisdictions to prevent so-called "strategic lawsuits against public participation" — SLAPP suits[48] — is itself a recognition that such actions

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[43] *Ibid*.
[44] See Byron Sheldrick, *Blocking Public Participation: The Use of Strategic Litigation to Silence Political Expression* (Waterloo: Wilfrid Laurier University Press, 2014).
[45] Archie Zariski, "Judicial Dispute Resolution in Canada: Towards Accessible Dispute Resolution" (2018) 35 Windsor YB Access Just 433 at 435.
[46] Sheldrick, *supra* note 44 at 21.
[47] Kevin LaRoche, M Laurentius Marais & David Salter, "The Length of Civil Trials and Time to Judgment in Canada: A Case for Time-Limited Trials" (2021) 99:2 Can B Rev 286 at 288, n 2. See also *Hryniak v Mauldin*, 2014 SCC 7 at paras 24–27; Chief Justice Richard Wagner, "Access to Justice: A Societal Imperative" (2018 Address for 7th National Pro Bono Conference delivered at Vancouver, BC, 4 October 2018), online: <http://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx>.
[48] Anti-SLAPP legislation is in place in the following Canadian jurisdictions: Ontario (s 137.1 of the *Courts of Justice Act*, RSO 1990, c C-43); British Columbia (*Protection of Public Participation Act*, SBC 2019, c 3); and Quebec (*Code of Civil Procedure*, CQLR c C-25.01, arts 51–54). Anti-SLAPP legislation will be discussed in further detail later on in this paper.

often have the effect of silencing debate on matters of public interest. Defamation claims are particularly susceptible to abuse, in view of the low burden of proof on the plaintiff and the relatively high burden on the defendant.[49]

(b) Defamation Claims in Internal Reviews, Complaints, and Discipline Proceedings

Internal reviews, complaints, and discipline proceedings are fertile ground for allegations of defamation, given the critical nature of these proceedings in relation to individuals. These types of claims have an impact on the freedom of intramural expression crucial to the exercise of academic freedom because they tend to curtail criticism of colleagues and institutions.

While the defences of absolute and qualified privilege can protect statements made in the course of reviews, complaints, and discipline proceedings at post-secondary institutions, the threat of a defamation claim can nonetheless cause academics to limit legitimate expression due to the pressures of having to defend a claim. Moreover, as noted by Adam Wolkoff, defamation claims relating to statements made in the context of complaints and discipline proceedings "put the parties in the position of relitigating the merits of a matter ordinarily reserved for the institution."[50]

For example, *Safty v. Carey* involved a defamation claim commenced by an assistant professor who was being considered for tenure and promotion.[51] His claim in defamation was based upon a confidential letter written by the dean of the Faculty of Education to the president of the University of British Columbia as part of the tenure and promotion process. The claim was

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[49] See Ontario, Ministry of the Attorney General, Anti-SLAPP Advisory Panel, "Anti-Slapp Advisory Panel Report to the Attorney General" (2010) (Chair: Dean Mayo Moran) at para 69: "At the heart of many lawsuits brought against those involved in public participation is the tort of defamation, which is the key civil cause of action over harmful expression. It may be argued that this tort is uniquely suited to SLAPPs since it imposes strict liability. Once the plaintiff establishes that defamatory words were published by the defendant to others, both falsity and damage are presumed; the plaintiff is not required to prove an intention to harm or even negligence. The onus then shifts to the defendant to establish a defence in order to escape liability."

[50] Adam Jacob Wolkoff, "A Privilege to Speak without Fear: Defamation Claims on Higher Education" (2021) 46:1 JC & UL 121.

[51] 1998 CanLII 6480 (BC CA) at paras 31–53, 110 BCAC 242.

ultimately found to be time-barred and, in the alternative, was dismissed on the basis of the application of the defence of qualified privilege. The British Columbia Court of Appeal held that "[t]he law is clear that this defence is available to a faculty member engaged in the tenure and promotion process at a university who is acting without malice."[52]

Academic misconduct allegations have also led to defamation claims. In *Lipczynska-Kochany v. Gillham*, the plaintiff was an associate professor at the University of Waterloo who was alleged to have misappropriated research and ideas from a researcher at the United States Environmental Protection Agency.[53] One of her colleagues at the University of Waterloo became aware of this allegation and informed a senior staff member, who in turn informed another senior staff member, the provost, and the dean of the science department. The plaintiff sued two senior staff members for, among other things, defamation in relation to relaying the allegation that she had misappropriated research.

In *Lipczynska-Kochany*, the Ontario Superior Court ruled that the sharing of information regarding academic misconduct was likewise covered by the defence of qualified privilege, taking into account "the individuals involved in the alleged defamation and their respective positions at the University."[54] Ultimately, the Court held that the defendant professors were under a duty to disclose the allegations of academic misconduct and that all staff members who received the information had a corresponding interest in receiving it.[55] The Court declined to make a finding of malice, despite evidence of a strained relationship between the plaintiff and one of the defendants.[56]

On other occasions, courts have concluded that complaints about a faculty member were *not* covered by qualified privilege. In *Seguin v. Brooker*, for instance, the defendant chair of an institute owned by the University of Alberta had made a complaint about the plaintiff university professor to the Vice-President, Research, and copied the complaint to the university

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[52] *Ibid* at para 40.
[53] 2001 CanLII 28313 (ON SC) at para 84, [2001] OJ No 3509 [*Lipczynska-Kochany*], aff'd on appeal, 30 CCEL (3d) 69, 2003 CanLII 64225 (ON CA).
[54] *Lipczynska-Kochany*, *supra* note 53 at paras 73–74.
[55] *Ibid* at paras 67–78.
[56] *Ibid* at paras 79–84.

chancellor.[57] The Court held that the scope of the qualified privilege defence had been exceeded in this case because the chancellor had no specific connection to the institute or to disciplinary matters at the university. While the complaint to the Vice-President, Research was within the scope of the privilege, the publication to the chancellor was not.[58]

Misconduct allegations may also be subject to the defence of absolute privilege. For instance, in *Said v. University of Ottawa*, after having been found guilty in an internal administrative proceeding of sexually harassing a student, a university professor commenced a civil action against the university, the complainant, and the faculty members who had given evidence at that proceeding.[59] The Court struck out the plaintiff's claim, holding that the statements made against the professor were protected by the defence of absolute privilege.[60]

(c) Online Defamation Claims

The Internet is increasingly used as a venue by academics to discuss and debate ideas — and it is one where discourse can become notoriously harsh. Indeed, Morgan J. of the Ontario Superior Court of Justice recently queried: "can one who freely wades into the choppy waters of Twitter complain about getting splashed?"[61] Specific online forums have developed in academic circles to allow for anonymous criticism of research, such as PubPeer.com. The tenor, pace, relative anonymity, and frequent lack of nuance in online discussions create an environment conducive to defamation claims.[62]

For instance, in 2019, Marcelle Kosman, an instructor and research assistant in English and Film Studies at the University of Alberta, was sued (along with a number of others) by Steven Galloway, formerly a tenured professor and chair of the creative writing program at the

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[57] 1998 ABQB 84 [*Seguin*].
[58] *Ibid* at paras 149–164.
[59] 2013 ONSC 7186 [*Said*]. Sexual assault and harassment complaints on campus in particular have led to defamation claims. See also *MacFarlane v Canadian Universities Reciprocal Insurance Exchange*, 2019 ONSC 4631 [*MacFarlane*]; *Galloway v AB*, 2021 BCSC 2344 [*Galloway*].
[60] *Said*, *supra* note 59 at paras 41, 45.
[61] *Mondal v Evans-Bitten*, 2022 ONSC 809 at para 1.
[62] See Law Commission of Ontario, "Defamation Law in the Internet Age: Final Report" (March 2020) at 3-4.

University of British Columbia.[63] Galloway was removed from his position in November 2015 after "serious allegations" were made against him, and UBC terminated his employment in June 2016. In the claim, Galloway asserted that the defendants made statements about him that meant, and were understood to mean, that he had assaulted one of the defendants, a graduate student and teaching assistant at UBC in the creative writing program. The claim against Kosman related to two of her tweets regarding the allegations about Galloway and whether his writings should be included and taught as part of the UBC curriculum.[64]

In her defence, Kosman argued that Galloway's defamation claim limited her academic freedom. In her affidavit in support of a motion to strike the claim under British Columbia's anti-SLAPP legislation, she testified in part as follows:

> For a long time, I have been interested in discussing and interrogating societal and institutional responses to allegations of sexual violence by women . . . .
>
> As a woman, as an academic, and as a feminist, I strongly believe that we must publicly discuss the pervasiveness of sexual violence and assault experienced by women and girls and that we as a society must interrogate how we respond to such incidences. I have used Twitter as a tool for public discourse to engage in these topics and to participate in debates and discussions on these issues.[65]

Kosman asked the Court to consider the impact of the lawsuit on her exercise of academic freedom. In particular, she pointed to "her genuine interest and history of activism on issues around sexual misconduct, her use of Twitter as an important forum for public dialogues of this type, the chilling effect she has experienced due to the litigation and the importance of her expressions in the context of academic freedom."[66] However, the Court was not persuaded that the goal of Galloway's claim was to silence Kosman or to limit her academic freedom. Rather, the Court found, the goal was to encourage her and others to "tailor their expressions so as to avoid needlessly defaming an individual in Galloway's position."[67] In any event, this case

[63] *Galloway*, *supra* note 59 at paras 781–786.
[64] *Ibid*, Appendix L.
[65] *Ibid* at para 45.
[66] *Ibid* at para 782.
[67] *Ibid* at para 784.

illustrates the potential chilling effect of defamation claims on expression tied to academic interests and pursuits.

In another recent case, four academics (among numerous other defendants) were sued for comments made on Twitter about an Ontario physician in relation to her public statements about the COVID-19 pandemic.[68] The academic defendants were Andrew Fraser, a tenured professor at the University of Toronto Donnelly Centre for Cellular and Biomedical Research, Marco Prado, a professor at Western University with an expertise in biochemistry and immunology, Timothy Caulfield, a health policy and health sciences professor at the University of Alberta's Faculty of Law and School of Public Health, and Sajjad Fazel, a post-doctoral associate at the University of Calgary. The allegedly defamatory comments challenged the veracity of public statements by Kulvinder Gill regarding the pandemic, which the defendants considered to contain misinformation. The Court dismissed the claims against the academics under Ontario's anti-SLAPP legislation, finding that the tweets were expressions on a matter of public interest and that the public interest in protecting the expressions outweighed the harm to the plaintiff.[69]

It should be noted that academics may themselves launch defamation claims as a tool with which to defend their work and reputation against attack by other academics. For example, in *Weaver v. Ball*,[70] the plaintiff was Andrew Weaver, a professor in the School of Earth and Ocean Sciences at the University of Victoria and well-known voice on the subject of climate change. The defendant was Timothy Ball, a retired professor at the Department of Geography at the University of Winnipeg with a Ph.D. in climatology, whom the lower court described as a "climate change sceptic." Ball had written an article, published in the Canadian Press, which the British Columbia Court of Appeal ultimately found "convey[ed] that Dr. Weaver is not professionally competent in his profession, teaches from a biased perspective, and is not qualified to participate (as he has done) in a multi-disciplinary panel on climate science."[71]

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[68] *Gill v Maciver*, 2022 ONSC 1279 [*Gill*].
[69] *Ibid* at paras 196–241.
[70] 2020 BCCA 119 [*Weaver*].
[71] *Ibid* at para 72. Ultimately, the British Columbia Court of Appeal in *Weaver* overturned the finding in the Court below that the article written by Ball was not defamatory and remitted the

Jack Grove explains the value of using defamation claims in this way, as a sword:

> For many, such lawsuits are an aggressive attempt to intimidate critics into silence, chilling debate that is vital for scientific progress. For others, however, legal redress has become a necessary part of a scholar's armoury when protecting their hard-won reputations, particularly against accusations from "data vigilantes" operating outside the traditional avenues of post-publication review, often anonymously on websites where scurrilous stories can go viral and wreck careers.[72]

Grove is referring to online forums such as PubPeer.com, which offer a venue to comment on and criticize academic publications anonymously.[73] While this type of forum can be an important vehicle for extramural expression and scholarly debate, it can also lead to allegations that may be defamatory.

It is clear that extramural expression takes place in online forums, and academics may be faced with defamation claims as a result of comments made in such forums relating to research or misconduct (academic and otherwise) at universities. In the online context, given the wide-reaching nature of the publication, the defence of qualified privilege is more challenging to maintain.[74] In these circumstances, the defence of fair comment would be more applicable, assuming the statements can be understood as commentary rather than as statements of fact. Academic freedom includes the right to publicly discuss and debate ideas. However, with respect to allegations of online defamation (as opposed to statements made in a peer-reviewed publication, at a conference, or in the context of a complaint or discipline proceeding), it is less clear whether an academic can look to their institution for assistance in defending a claim.[75]

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matter to the court on several issues, including whether Weaver had proved that publication took place in British Columbia, the applicability of the fair comment defence, and damages.

[72] Grove, *supra* note 41.

[73] See Ewen Callaway, "Pioneer behind controversial PubPeer site reveals his identity" (2015), online: Nature <www.nature.com/articles/nature.2015.18261>; Richard Van Noorden, "Peer-review website vows to fight scientist's subpoena" (2014), online: Nature <www.nature.com/articles/nature.2014.16356>.

[74] Robert Jacob Danay, "The Medium is Not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation" (2010) 56:1 McGill LJ 1 at 4.

[75] Cameron Hutchison, "What Happens if I Get Sued for Publishing My Research?" (17 March 2020), online: Slaw <www.slaw.ca/2020/03/17/what-happens-if-i-get-sued-for-publishing-my-research/>.

(d) Defamation Claims in the Labour Arbitration Context

Most university faculty members in Canada belong to a faculty association that is party to a collective agreement with the institution, and, as mentioned, specific contract language has usually been negotiated to protect academic freedom. An arbitrator has exclusive jurisdiction over any dispute, including allegations of defamation, that in its essential character arises from the interpretation, application, administration or alleged violation of a collective agreement.[76] As a result, employment-related defamation claims arising in the university context will often be required to proceed through the grievance and arbitration procedures established under the collective agreement. Where arbitration is the proper forum for a defamation claim, the arbitrator also has authority to assess and award damages (barring language to the contrary in a collective agreement, which the authors have never encountered).[77]

The defamation claims referred to arbitration have on occasion sought redress for alleged violations of the grievor's academic freedom. For instance, in *York University and York University Faculty Ass'n*, a professor alleged that the University had defamed him by publishing a media release that was critical of a flyer he had authored about what he perceived to be disciplining of pro-Palestinian activists on campus.[78] The decision presents an interesting view of the relationship between defamation and academic freedom where an academic claims to have been defamed by the employer institution. The grievor in this case argued that the University's allegedly defamatory statements failed to uphold and protect his academic freedom, as required by the collective agreement, by tarnishing his reputation and misrepresenting his work.

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[76] *Weber v Ontario Hydro*, [1995] 2 SCR 929, 1995 CanLII 108 (SCC) (labour arbitrators have exclusive jurisdiction to deal with tort claims arising under a collective agreement). See e.g. *York University and York University Faculty Ass'n (Noble)*, 2005 CarswellOnt 10914, at paras 5, 13–14, [2005] OLAA No 792 (Goodfellow); *Seneca College and OPSEU*, 2001 CarswellOnt 4815 at para 13, [2001] OLAA No 853 (PC Picher); *University of Manitoba Faculty Ass'n v University of Manitoba*, 2019 MBQB 35 at para 87; *Beaulieu v University of Alberta*, 2014 ABCA 137, paras 45–47.

[77] A recent example of the authority, and willingness, of a labour arbitrator to award significant defamation damages arising out of a collective agreement is *Civeo Corporation and UNITE HERE, Local 40*, where an employer was awarded $500,000 for damages arising from defamatory statements made by a union: 2022 CanLII 51879 (BC LA) at para 111 (Glass).

[78] 2007 CarswellOnt 9171, 2007 CanLII 50108 (ON LA) (Goodfellow).

While the arbitrator determined that media release was *not* defamatory, as it did not identify the professor to the average reader, he did find that "[t]he implied accusations of racism and bigotry, and the implicit suggestion that no student should be exposed to the kind of material which Professor Noble had produced, were a clear violation of his academic freedom."[79] However, given that the defamation claim failed on its merits, the arbitrator declined to rule on the issue of damages.[80]

4. RISK MITIGATION MEASURES

On an individual level, little can be done to eliminate the risk of a defamation claim altogether when making statements that could offend or damage another's reputation. Before wading into these treacherous waters, academics would be well advised to obtain legal advice. Furthermore, as discussed, various strategies are available to academics to bolster the defences they may seek to rely on. Academics facing the threat of a defamation claim may also consider publishing a clarification, correction, retraction, or apology to avoid a full-fledged legal action. As noted above, some commentators have expressed concerns about the state of the scientific record if corrections or retractions are routinely published.[81] However, where an academic considers a clarification, correction, or retraction to be justified, it should be made promptly.

There are also measures that post-secondary institutions can put in place to counteract the chilling effects of defamation claims, including robust indemnification and defence obligations and defamation insurance. The CAUT recommends that post-secondary institutions support staff who are accused of defamation arising out of their academic activities.[82] Certain post-secondary

[79] *Ibid* at para 51.
[80] *Ibid* at paras 54–56.
[81] Grove, *supra* note 41.
[82] Canadian Association of University Teachers, "Defamation Actions Arising out of Academic Activities" (2022), online: <www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-defamation-actions-arising-out-of-academic-activities>: "Where academic staff are accused of defamation in a legal proceeding, the institution should provide defence and legal representation."

institutions have insurance policies in place that cover defamation claims against employees.[83] However, it is not always clear when an institution will indemnify and defend university staff who face legal action because of activities undertaken in the course of their work.[84] While institutions may have insurance policies that cover defamation claims, those policies may or may not be found to extend to faculty members, depending on the facts underlying the claim.

For instance, in *Smith v. Wylie*, a 1996 Ontario Superior Court decision, Peter Wylie — then a professor at Trent University in Peterborough, Ontario — sought a declaration that the Canadian Universities Reciprocal Insurance Exchange (CURIE) was obliged, pursuant to the terms of a policy of general liability insurance between the CURIE and Trent University, to defend him in a libel action arising from press releases he had issued criticizing the construction of a parkade in the City of Peterborough.[85] The Court noted that, during a television interview, Wylie had explained that he became involved in the matter because he was a young father with a future in Peterborough and had plans to spend the next 20 years there.[86] Furthermore, Wylie admitted in cross-examination that he had not been commissioned or provided with funding by the University to prepare the offending documents or to gather the information upon which the publications were based. He further admitted that the University did not approve of the publication and never stated that he was acting on its behalf.[87] Consequently, the Court denied the motion, finding that when Wylie made the allegedly defamatory statements, he was acting as a citizen of Peterborough, not as an employee of the University.[88]

Another example of a case in which the courts considered whether a professor was covered as an additional insured under an applicable insurance policy is *MacFarlane v. Canadian Universities Reciprocal Insurance Exchange.*[89] In *MacFarlane*, the Court found that a professor *was* an additional insured under the applicable policy, which clearly covered

[83] *MacFarlane*, *supra* note 59 at para 5. See also *Baiden v Canadian Universities Reciprocal Insurance Exchange*, 2011 ONSC 7374 at para 25.
[84] Hutchison, *supra* note 75.
[85] 1996 CarswellOnt 2950, [1996] OJ No 2804.
[86] *Ibid* at para 5.
[87] *Ibid* at para 9.
[88] *Ibid* at 12–13.
[89] *MacFarlane*, *supra* note 59.

defamation claims.[90] The case involved a faculty member, Julie MacFarlane, who warned another institution that a colleague who was being considered for recruitment had allegedly been "terminated for misconduct including sexual misconduct." When the colleague sued for libel, the University of Windsor and CURIE challenged the applicability of the policy to MacFarlane, arguing that she was not acting on behalf of the University in making the allegedly defamatory comments. The Ontario Superior Court of Justice rejected this argument, explaining as follows:

> A university is not an institution with a single voice or a single set of interests — the interests of a university will be broad and diverse and may even be in conflict with each other from time to time. While the University of Windsor may have an official position, as it did here, that does not mean that others within the institution no longer speak on its behalf just because they have a different view or perspective.[91]

In the result, the Court ordered CURIE to provide MacFarlane with legal counsel to defend the defamation claim.[92]

Language in employment contracts and collective agreements defining the activities that are carried out in the course of an academic's work should not be overly prescriptive. Academics often speak as subject-matter experts in the press and on social media, which is part of their work and an exercise of academic freedom and, as such, the speech should attract the same protections against defamation claims as published academic work. Defamation claims in respect of statements made in the course of complaint and discipline proceedings should also be clearly covered, as academics should be able to critique colleagues and their institutions. Academics ought to have the assurance that they will not be personally responsible for the legal fees required to defend a defamation claim arising from their academic activities. While the other burdens associated with a defamation claim — i.e. time, effort, discovery obligations — will remain, relief from the financial burden provides tangible assistance in counteracting the chilling effect of a defamation claim.

Academics and those who represent them should review the indemnification and defence obligations set out in employment contracts and collective agreements as well as in defamation insurance policies in order to determine whether the institution is likely to indemnify, defend,

[90] *Ibid* at paras 4–7.
[91] *Ibid* at para 43.
[92] *Ibid* at para 55.

and hold them harmless in respect of defamation claims relating to statements made in the course of their work.

5. LEGISLATIVE REFORMS

In addition to practical measures that the parties themselves may take, certain legislative reforms have been implemented to counteract the chilling effect of defamation claims on freedom of expression generally and academic freedom specifically. This paper will touch on two such legislative reforms: anti-SLAPP legislation and statutory peer-review privilege.[93]

As noted, legislatures in various provinces have passed anti-SLAPP legislation.[94] While anti-SLAPP legislation does not apply exclusively to defamation claims, it does apply to actions where the claim arises from an expression on a matter of public interest. Defamation claims — given the low burden of proof on the plaintiff — are often advanced in SLAPP suits.[95] A classic example of the mischief that anti-SLAPP legislation is intended to address is a lawsuit commenced by a large corporation against an environmental non-governmental organization (NGO) that has brought to public light the corporation's concerning environmental practices. The NGO would then be faced with the expensive, daunting task of defending a defamation claim and be silenced in the meantime.

In *Pointes*, the Supreme Court of Canada described SLAPP suits as follows:

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[93] This paper does not specifically address the directives and proposed legislation in certain Canadian jurisdictions purporting to protect freedom of speech on campus by requiring institutions to implement free speech policies in line with those enunciated by the University of Chicago. That is because, generally, the directives and proposed legislation provide that speech that violates the law would not be covered by free speech policies (that includes hate speech and defamatory speech). As such, free speech policies do not directly impact the relationship between defamation law and academic freedom. For a discussion of Ontario's directive to publicly supported colleges and universities see Alison Braley-Rattai & Kate Bezanson, "Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy" (2020) 29:2 Const Forum 65.

[94] Ontario (*Courts of Justice Act*, RSO 1990, c C-43, s 137.1); British Columbia (*Protection of Public Participation Act*, SBC 2019, c 3); and Quebec (*Code of Civil Procedure*, CQLR c C-25.01, arts 51–54).

[95] Anti-SLAPP Advisory Panel, *supra* note 48 at para 69.

> Strategic lawsuits against public participation ("SLAPPs") are a phenomenon used to describe exactly what the acronym refers to: lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest. SLAPPs are generally initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claim is merely a façade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs.[96]

Anti-SLAPP legislation was intended to provide defendants like environmentalists with a tool to secure the dismissal, at an early stage, of lawsuits aimed at silencing discourse on matters of public interest. The Court in *Pointes* went on to succinctly summarize the test under Ontario's legislation:

> In brief, s. 137.1 places an initial burden on the moving party — the defendant in a lawsuit — to satisfy the judge that the proceeding arises from an expression relating to a matter of public interest. Once that showing is made, the burden shifts to the responding party — the plaintiff — to satisfy the motion judge that there are grounds to believe the proceeding has substantial merit and the moving party has no valid defence, and that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression. If the responding party cannot satisfy the motion judge that it has met its burden, then the s. 137.1 motion will be granted and the underlying proceeding will be consequently dismissed.[97]

In Ontario, the legislation has presumptively favourable cost consequences for the moving party (by default it provides for complete recovery of costs if the moving defendant is successful).[98] Anti-SLAPP motions were designed to be dealt with expeditiously. Ontario's legislation provides that a motion shall be heard within 60 days of the notice of motion being filed with the court.[99] However, this rule is often more honoured in the breach than in the observance.

As courts have recognized, motions brought under anti-SLAPP legislation have not operated as intended. Myers J. of the Ontario Superior Court of Justice noted in *Tamming v. Paterson*:

> These motions tend to be complex and expensive proceedings. Although they are not intended to involve a deep dive into the merits or even a detailed review akin to a motion for summary judgment, they usually do represent virtually the entire trial being played out in advance. Plaintiffs are usually not willing to leave evidence in their briefcases when they risk their claims being dismissed. Defendants similarly want

[96] *1704604 Ontario Ltd v Pointes Protection Ass'n*, 2020 SCC 22 at para 2 [*Pointes*].
[97] *Ibid* at para 18.
[98] *Courts of Justice Act*, RSO 1990, c C-43, ss 137.1(7) and (8).
[99] *Ibid* at s 137.2(2).

> to show that there are no grounds to defeat their defences, that the plaintiff has suffered little if any actual harm, and that the dismissal of the proceeding is the just outcome.
>
> Despite the Legislature's intention to create a preliminary hurdle, the process advanced in practice is a more like a marathon. To that end, the mandatory 60-day time limit for resolving these motions is routinely ignored. Counsel on both sides usually need more time and, in Toronto at least, motion appointments are backlogged by far more than 60 days.[100]

Counsel practising in the field have suggested that anti-SLAPP legislation be amended to make the "no valid defence" test less stringent by requiring only some evidence capable of belief to show that a pleaded defence could succeed.[101] This would reorient the test applied on these motions to focus on the balance to be struck between the plaintiff's interest in protecting its reputation and the public's interest in protecting the expression at issue.

Another potential area for legislative reform, which has not been explored in Canada, is the creation of a statutory privilege specific to academic publications. For instance, the United Kingdom's *Defamation Act 2013* includes a statutory privilege for peer-reviewed statements in scientific and academic journals.[102] The explanatory notes relating to section 6 of the *Defamation Act 2013* state that the provision "creates a new defence of qualified privilege relating to peer-reviewed material in scientific or academic journals (whether published in electronic form or otherwise)."[103]

The defence applies where "the statement relates to a scientific or academic matter" and "before the statement was published in the journal, an independent review of the statement's scientific or academic merit was carried out by the editor of the journal and one or more persons with expertise in the scientific or academic matter concerned."[104] The privilege also extends to "any assessment of the scientific or academic merit of a peer-reviewed statement, provided the

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[100] 2021 ONSC 8306 at paras 7–8.
[101] Howard Winkler, "Anti-SLAPP legislation is failing. Here's a possible fix" *LegalMattersCanada* (8 February 2022), online: <legalmatterscanada.ca/anti-slapp-legislation-is-failing-heres-a-possible-fix/>.
[102] *Defamation Act 2013* (UK), c 26, s 6.
[103] UK, Ministry of Justice, "Defamation Act 2013 Explanatory Notes: Section 6: Peer-reviewed Statement in Scientific or Academic Journal etc," art 44, online: <www.legislation.gov.uk/ukpga/2013/26/notes/division/5/6?view=plain>.
[104] *Ibid*, art 45.

assessment was written by one or more of the persons who carried out the independent review of the statement, and the assessment was written in the course of that review."[105] According to the explanatory notes, the extension of the privilege in this way is intended to ensure that those who have conducted the independent review are also protected.[106]

In Canada, the defence of responsible communication on a matter of public interest may cover statements in peer-reviewed publications, but a specific statutory privilege would be a more definitive protection that could serve as a deterrent to unmeritorious claims and threatened claims. Notably, section 6 of the U.K.'s legislation has not received a great deal of judicial consideration to date. Counsel practising in the U.K. have hypothesized that the "presence [of section 6 of the *Defamation Act 2013*] on the statute books has likely deterred unattractive libel threats."[107]

6. CONCLUSION

Academic freedom — namely, the freedom to teach, discuss, research, and publish work without institutional censorship or other unreasonable interference — and freedom of expression are fundamentally connected concepts. Limitations on free expression in an academic context interfere with the expressive activities of academic discourse. The threat or anticipated threat of legal proceedings can suppress scholarly debate, compromising academic freedom.[108] Defamation actions are particularly susceptible to abuse in Canada due to the relatively light legal burden on the plaintiff, the correspondingly heavy burden on the defendant, and their ability to exact psychological and monetary pain.

Even where a defendant may have strong defences available, the prospect of civil litigation — and the time and expense it entails — has a chilling effect on freedom of expression and therefore on academic freedom. Academics are well versed in backing up their statements

[105] *Ibid*, art 46.
[106] *Ibid.*
[107] Brett Wilson LLP, "Defamation Act 2013: A Summary and Overview Six Years On" (23 January 2020), online: Brett Wilson Media and Communications Law Blog <www.brettwilson.co.uk/blog/defamation-act-2013-a-summary-and-overview-six-years-on/>.
[108] Sutherland, *supra* note 1 at 667.

and opinions with facts and thorough research but defending a statement in court is undoubtedly more taxing, both personally and professionally.

Cases like Pieter Cohen's — the Harvard professor who endured years of litigation, taking time off work to undergo lengthy questioning and disclose research materials in relation to his statements about a pharmaceutical company's nutritional supplements — are prime examples of how stressful and time-consuming defamation litigation can be (even when it is partially funded, as Cohen's litigation was).

Practically speaking, post-secondary institutions can help to counteract the chilling effect of defamation claims by making it clear to faculty and staff that they will support them in the event of litigation relating to expression made in relation to academic work, as well as intramural expression reporting academic misconduct and critiquing colleagues or the institution. Institutions and academics would benefit from ensuring that insurance policies are in place covering defamation claims against academics.

Legislative reforms would also assist in counteracting the chilling effect. Two potential areas for reform deserving of immediate attention are amendments to anti-SLAPP legislation to allow it to function as intended (i.e. as a relatively inexpensive and expedient means of disposing of a claim that seeks to stifle expression on a matter of public interest) and the implementation of a statutory peer-review privilege.

In addition, it would be useful for faculty associations, institutions, and academic journals to keep track and publish statistics on threatened and actual defamation claims in order to better understand the scope of the issue in Canada and elsewhere. In the authors' experience, most threatened defamation claims do not proceed beyond the exchange of letters. However, as discussed, even the threat of litigation can have the effect of silencing expression. It is important that academics avoid self-censorship when faced with a threat of litigation. Often, these shots across the bow are intended to intimidate the author into backing away from legitimate expressions of opinion. It should be kept in mind that the defence of fair comment will be available to the author, so long as the substratum of facts that could be a basis for the opinion is available to the reader.

Finally, it should be noted that while this paper has focused on the impact of defamation claims on academic freedom, academics have attempted to use defamation claims to protect their reputations when faced with allegedly false and damaging statements about themselves and their work, as cases like *York University* and *Weaver* show. Although defamation claims can be abused by those seeking to silence debate, they are a powerful tool for protecting reputation and vindication. It is not controversial to say that an academic's reputation plays an important role in their continued ability to engage in academic discourse. False and damaging statements about an academic or their work could conceivably lead to others being unwilling to engage with that academic's work and to a loss of funding and opportunities.

The law of defamation has been calibrated by the courts to balance the values of freedom of expression and reputation. That careful balance has become weighted towards reputation in certain jurisdictions, including Canada, requiring legislative reforms such as anti-SLAPP legislation which attempt to ensure that only meritorious defamation claims proceed and vibrant discussion on matters of public interest is encouraged. The current measures in place do not do enough to mitigate the impact of threatened and actual defamation claims on academic freedom. Post-secondary institutions and those who advocate for academics must push for additional statutory and contractual protections, so that academic freedom will continue to thrive on post-secondary campuses.