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Cover Page Footnote

The author dedicates this comment to parents Maryanne and Dennis, for their support and love, and to Brian and Mariah for their unwavering confidence. Author thanks Dan Shafer for his editorial assistance and encouragement.

COMMENT

Irving v. Penguin: Historians on Trial and the Determination of Truth Under English Libel Law

Dennise Mulvihill*

INTRODUCTION

The *Irving v. Penguin*² libel judgment, which denounced revisionist historian David Irving, was welcomed and heralded around the world. The public could have been deprived of this ruling if Irving had originally brought this action in the United States, where constitutionally-mandated protections of free speech would have likely prevented him from surviving a summary judgment motion. Irving, however, brought suit in England, where plaintiffs can easily establish a *prima facie* case, and the burden of proof is on the defendant. In spite of the pro-plaintiff libel laws favoring Irving, the truth prevailed. Irving was branded a liar, and Deborah Lipstadt, the author whom Irving sued for libel, was vindicated through English libel law.

Many critics have denounced English libel law, noting the chilling effect of libel judgments on the media and free speech.³ In numerous cases, American courts have refused to enforce English libel judgments rendered against American defendants on public policy grounds.⁴ The European Court of Human Rights also has

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² *Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478 (Q.B. Apr. 11, 2000).

³ See, e.g., ERIC BARENDT ET AL., LIBEL AND THE MEDIA: THE CHILLING EFFECT (1997); Russell L. Weaver & Geoffrey Bennett, *Is the New York Times "Actual Malice" Standard Really Necessary? A Comparative Perspective*, 53 LA. L. REV. 1153, 1169 (1993); Douglas W. Vick & Linda Macpherson, *An Opportunity Lost: The United Kingdom's Failed Reform of Defamation Law*, 49 FED. COMM. L.J. 621, 623-36 (1997).

⁴ See, e.g., *Bachchan v. India Abroad Publ'n's Inc.*, 585 N.Y.S.2d 661 (1992) (holding an English libel judgment could not be recognized, since the court did not have adequate safeguards to protect freedom of speech and press, which are required by the

criticized English libel law.⁵ Anthony Julius, Lipstadt's solicitor, noted that *Irving v. Penguin* was "a sparkling vindication of the English libel laws."⁶ Part I of this Comment will discuss the *Irving v. Penguin* decision and English libel law. Part II will examine *Irving v. Penguin* under U.S. libel law and will argue that protections of free speech in U.S. libel law would have prevented Irving from surviving a summary judgment motion had he brought suit in the United States. Part III will compare U.S. and English libel law in light of the *Irving* judgment.

I. *IRVING V. PENGUIN*

David Irving brought suit against Penguin Books and Deborah Lipstadt for libel in the High Court in London in 1994. Justice Gray found that statements in Lipstadt's book were libelous of Irving. The Defendants chose to assert the defense of justification, or truth. Because English libel law places the burden of proof on the defendant, Penguin and Lipstadt had to prove that the data and evidence available to Irving when he was writing his books could not support Irving's historical conclusions, and that Irving deliberately made false statements about history. The Defendants won the case by proving the truth of the statements in *Denying the Holocaust: The Growing Assault on Truth and Memory*⁷ ("*Denying the Holocaust*") through the testimony and reports of five World War II and Holocaust historians who examined Irving's writings and speeches and the evidence used to support Irving's statements.

A. *The Origins of the Case*

In 1993, Penguin Books Ltd. published Professor Deborah Lipstadt's book in which she accused David Irving of manipulating historical data and denying the occurrence of the Holocaust. David

First Amendment); *Matusевич v. Telnikoff*, 877 F. Supp 1 (D. D.C. 1995) (holding that English libel judgment was contrary to public policy and would be denied recognition under the principles of comity).

⁵ See, e.g., *Miloslavsky v. U.K.*, 20 Eur. H.R. Rep. 442 (1995) (holding that a UK£1.5 million damage award infringed Defendant's rights under Article 10 of the European Convention on Human Rights).

⁶ Anthony Julius & James Libson, *Losing was Unthinkable*, INDEP. (London), Apr. 18, 2000, at 11.

⁷ DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST* (Penguin Books, 1994).

Irving, an English author and self-professed expert on the Third Reich, sued Penguin Books and Lipstadt for libel in England. The High Court found for the Defendants, holding that the Defendants had substantially justified the truth of Lipstadt's statements.

1. *The Parties*

In 1993 Deborah Lipstadt, a professor of Modern Jewish and Holocaust Studies at Emory University, wrote *Denying the Holocaust*.⁸ In her book, Lipstadt examined the origins and subsequent growth of "Holocaust Denial."⁹ She identified several adherents of this revisionist movement (or "deniers") and examined the basis for their beliefs, their methodology, and the manner in which they deploy their arguments.¹⁰ Lipstadt argued that the deniers represent a clear and present danger since future generations must learn from the terrible events of the 1930s and 1940s.¹¹ She also discussed the work of David Irving, whom she considered one of the "most dangerous spokespersons for Holocaust denial."¹²

David Irving has authored over thirty books about World War II.¹³ He also has lectured in Australia, Canada, Europe, and the United States and has participated in numerous radio and television broadcasts.¹⁴ Some scholars have praised Irving for his thoroughness of research and eloquence of writing.¹⁵ Irving, however, has been criticized in the media and in academic circles for denying the existence of gas chambers at the Auschwitz

⁸ See LIPSTADT, *supra* note 7.

⁹ See *id.*

¹⁰ See *Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478, ¶ 2.1 (Q.B. Apr. 11, 2000).

¹¹ See *id.*

¹² *Irving*, 2000 WL 362478, ¶ 2.4.

¹³ *Id.* ¶ 1.4.

¹⁴ See *id.* ¶ 1.6.

¹⁵ See, e.g., *Slugging Through the Mud*, *ECONOMIST* (London), Apr. 15, 2000, at 55. The article stated, in part, that Donald Cameron Watt, a former professor of international history at London University, wrote of the admiration he had formed for Mr. Irving's professionalism when collaborating with him on some research many years previously. "No book of his ever failed to come up with new evidence," Mr. Watt was quoted as saying. John Keegan, a much-respected military historian, also praised Mr. Irving's "extraordinary ability to describe and analyse Hitler's conduct of military operations." *Id.*

concentration camp and alleging that the Holocaust is a Jewish conspiracy.¹⁶

David Irving considers himself an expert on Hitler and Nazi leaders.¹⁷ “A central tenet of Irving’s historical writing about the Nazi era is that Hitler was not [a] . . . ruthless persecutor of Jews.”¹⁸ Irving has asserted that Hitler lost interest in anti-Semitism in 1933. He claimed that Hitler never authorized and indeed was ignorant of the persecution and systematic killing of the Jews.¹⁹ Rather, Irving claimed that Hitler intervened to protect the Jews from other Nazis.²⁰

2. *The Cause of Action*

After Penguin Books published *Denying the Holocaust* in England, David Irving sued Penguin Books and Deborah Lipstadt for libel.²¹ He asserted that certain passages in Lipstadt’s book “accuse him of being a Nazi apologist and an admirer of Hitler.”²² Irving also alleged that passages indicated that he distorted facts and manipulated documents “to support his contention that the Holocaust did not take place.”²³

The High Court ruled against David Irving in a scathing judgment, finding that the Defendants had substantially justified Lipstadt’s statements.²⁴ The court stated that the Defendants proved that Irving was a racist, an anti-Semite, and a Holocaust denier who deliberately misrepresented historical evidence to exonerate Hitler.²⁵ Irving is now faced with the cost of the defense bill, which is in excess of UK£3 million.²⁶

¹⁶ See, e.g., Frank Rich, *Hitler’s Spin Artist*, N.Y. TIMES, April 3, 1996, at A15.

¹⁷ See *Irving*, 2000 WL 362478, ¶ 1.5.

¹⁸ *Id.* ¶ 5.1.

¹⁹ See *id.* (maintaining that Hitler lost interest in his former views when he gained control in 1933).

²⁰ See *id.*

²¹ See *id.* ¶ 1.1.

²² *Id.* ¶ 1.2.

²³ *Id.*

²⁴ See *id.* ¶¶ 13.165–14.1.

²⁵ See *id.* ¶ 13.167.

²⁶ See Roy Ulrich, *Going Broke to Defend Yourself*, NAT’L L.J., June 12, 2000, at A21.

B. English Defamation Law

Under English defamation law, plaintiffs easily can establish a *prima facie* case of libel. Once a plaintiff establishes a *prima facie* case, the burden of proof is on the defendant. As a result, libel plaintiffs around the world seek to take advantage of the plaintiff-friendly libel laws in England. The law, however, provides that defendants may choose to assert privilege or the defenses of justification or fair comment in order to avoid a libel judgment.

1. Establishing a Cause of Action

In England, the modern tort of defamation remains rooted in long-established common law principles that make it easy for plaintiffs to establish a *prima facie* case.²⁷ As a result, many international libel plaintiffs choose to bring suit in England, and thereby take advantage of the plaintiff-friendly defamation laws.²⁸ These cases are tried in England because, under English law, the High Court has jurisdiction to hear libel claims arising over any work published in England.²⁹

In order to establish a *prima facie* case of libel in England, the plaintiff must prove: 1) that the defendant published the allegedly defamatory statements; 2) that the statement refers to the plaintiff; and, 3) that the words in question have a defamatory meaning.³⁰

Upon establishing a *prima facie* case, the plaintiff benefits from a rebuttable presumption that the defamatory statement is false and therefore does not need to introduce evidence to demonstrate the statement's falsity.³¹ In England there is a no fault requirement, making libel a strict liability tort.³² Therefore, if a statement is libelous, the plaintiff can recover damages for reputational harm

²⁷ See Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law in the European Union*, 36 VA. J. INT'L L. 933, 939 (1996).

²⁸ DAVID HOOPER, REPUTATIONS UNDER FIRE 428 (2000).

²⁹ See BARENDT ET AL., *supra* note 3, at 16 (noting that London is known as the "libel capital of the world").

³⁰ See CATHERINE ELLIOT & FRANCES QUINN, TORT LAW 149-52 (1999) (noting that a statement is defamatory if it "tends to lower the plaintiff in the estimation of right thinking members of society").

³¹ See RODNEY A. SMOLLA, LAW OF DEFAMATION § 1:9 (2d ed. 2000); see also DAVID HOOPER, REPUTATIONS UNDER FIRE 4 (2000).

³² See R.W.M. DIAS & B.S. MARKESINIS, THE ENGLISH LAW OF TORTS 160 (1976).

without proof of actual damages.³³ General damages are presumed to result from false publications.³⁴

2. Defenses

English law recognizes the interests of free speech and free press through several defenses to defamation. For example, defendants may assert the defenses of justification or fair comment. In addition, defendants may claim that a particular statement was privileged.

Justification is an absolute defense to a defamation claim.³⁵ Although a defamatory statement is presumed to be false, a defendant may avoid liability by proving that the statement is justified or substantially true.³⁶ Section 5 of the Defamation Act of 1952 does not require defendants to prove that each defamatory statement is true.³⁷ Section 5, however, does require that the unproven allegations must not materially injure the plaintiff's reputation.³⁸ Thus, the unproven statements must not cause any additional injury to the plaintiff's reputation.³⁹ Nonetheless, there is some risk to asserting the justification defense, since refusing to admit that the statement was false or continuing to publish it provides grounds for aggravated damages.⁴⁰

Defendants may also choose to assert the defense of fair comment. Fair comment protects expression of opinions

³³ See Vick & MacPherson, *supra* note 27, at 939-40.

³⁴ See W.V.H. ROGERS, WINFIELD AND JOLOWICZ ON TORT 298 (12th ed. 1984).

³⁵ See CLERK AND LINDSELL ON TORTS ¶ 21-76 (Brazier et al. eds., 17th ed. 1995).

³⁶ See BARENDT ET AL., *supra* note 3, at 10.

³⁷ Defamation Act of 1952, c. 66, § 5 (Eng.).

Section 5 states:

In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defense of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

Id.

³⁸ See BARENDT ET AL., *supra* note 3, at 10.

³⁹ See CLERK AND LINDSELL ON TORT, *supra* note 35, ¶ 21-80.

⁴⁰ See *Sutcliffe v. Pressdram Ltd.* 1 All E.R. 269, 276-77 (1990). The plaintiff may request aggravated damages, which asks the jury, or in this case the judge, to take into account the "need for greater compensation because of the defendants' particularly bad behavior." See PETER KAYE, AN EXPLANATORY GUIDE TO THE ENGLISH LAW OF TORTS 650 (1996) (citing *Sutcliffe*, 1 All E.R. at 269).

concerning issues of public concern and criticism of government officials.⁴¹ To succeed with this defense, the defendant must prove that the statement was made without malice and that the facts on which the statement is based are substantially true.⁴² English law does not protect factual errors or opinions based on them.⁴³

English defamation law also provides for two types of privileges. Some statements made in certain circumstances, such as during Parliamentary debates or court proceedings, are afforded an absolute privilege.⁴⁴ Defendants may also assert a qualified privilege if they can show that they advanced “legal, social, or moral duties” by communicating their statements to those with an interest in receiving them.⁴⁵ For example, a qualified privilege attaches to a fair and accurate report of a matter of public interest. Unlike an absolute privilege, however, a plaintiff can defeat a qualified privilege by showing malice.⁴⁶

C. Analysis of *Irving v. Penguin*

Irving brought a libel suit complaining that certain passages in *Denying the Holocaust* were libelous. Justice Gray determined that Irving established a *prima facie* case of libel and set forth the defamatory meaning of the offending statements from *Denying the Holocaust*. The Defendants chose to assert the defense of justification by proving that the statements about Irving were true. To prove justification, the Defendants used the testimony of five distinguished historians who had examined Irving’s historical career, publications, and speeches. After hearing the Defendants’ evidence and Irving’s rebuttal, Justice Gray determined that the Defendants had proven the truth of most of the statements in *Denying the Holocaust* and thus had successfully asserted the defense of justification.

⁴¹ KAYE, *supra* note 40, at 640-41.

⁴² *See id.* at 642.

⁴³ *See* HOOPER, *supra* note 28, at 20.

⁴⁴ *See id.* at 21.

⁴⁵ *See* CLERK AND LINDSELL ON TORT, *supra* note 35, ¶ 21-106; *see also* HOOPER, *supra* note 28, at 22.

⁴⁶ *See* HOOPER, *supra* note 28, at 22-23.

1. *The Libel Claim*

When Penguin Books published Lipstadt's book in England, Irving alleged that *Denying the Holocaust* challenged his integrity and ruined his reputation as a historian. Irving complained that numerous passages from *Denying the Holocaust* were libelous of him. Specifically, Irving cited the following:

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The confluence between anti-Israel, anti-Semitic, and Holocaust denial forces was exemplified by a world anti-Zionist conference scheduled for Sweden in November 1992. Though cancelled at the last minute by the Swedish government, scheduled speakers included black Muslim leader Louis Farrakhan, Faurisson, Irving and Leuchter. Also scheduled to participate were representatives of a variety of anti-Semitic and anti-Israel organisations, including the Russian group Pamyat, the Iranian-backed Hezbollah, and the fundamentalist Islamic organisation Hamas.

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Nolte contended that Weizmann's official declaration at the outbreak of hostilities gave Hitler good reason "to be convinced of his enemies' determination to annihilate him much earlier than when the first information about Auschwitz came to the knowledge of the world." [. . .] When Nolte was criticized on this point in light of prewar Nazi persecution of Jews, he said that he was only quoting David Irving, the right-wing writer of historical works. How quoting Irving justified using such a historically invalid point remains unexplained [. . .] As we shall see in subsequent chapters, Irving [. . .] has become a Holocaust denier.

These works demonstrate how deniers misstate, misquote, falsify statistics and falsely attribute conclusions to reliable sources. They rely on books that directly contradict their arguments, quoting in a manner that completely distorts the authors' objectives. Deniers count on the fact that the vast

majority of readers will not have access to the documentation or make the effort to determine how they have falsified or misconstrued information.

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At the second trial Christie and Faurisson were joined by David Irving, who flew to Toronto in January 1988 to assist in the preparation of Zundel's second defense and to testify on his behalf. Scholars have described Irving as a "Hitler partisan wearing blinkers" and have accused him of distorting evidence and manipulating documents to serve his own purposes. He is best known for his thesis that Hitler did not know about the Final Solution, an idea that scholars have dismissed. The prominent British historian Hugh Trevor-Roper depicted Irving as a man who "seizes on a small and dubious particle of 'evidence'" using it to dismiss far-more substantial evidence that may not support his thesis. His work has been described as "closer to theology or mythology than to history," and he has been accused of skewing documents and misrepresenting data in order to reach historically untenable conclusions, particularly those that exonerate Hitler. An ardent admirer of the Nazi leader, Irving placed a self-portrait of Hitler over his desk, described his visit to Hitler's mountaintop retreat as a spiritual experience, and declared that Hitler repeatedly reached out to help the Jews. In 1981 Irving, a self-described "moderate fascist," established his own right-wing political party, founded on his belief that he was meant to be a future leader of Britain. He is an ultra-nationalist who believes that Britain has been on a steady path of decline accelerated by its decision to launch a war against Nazi Germany. He has advocated that Rudolf Hess should have received the Nobel Prize for his efforts to try to stop war between Britain and Germany. On some level Irving seems to conceive himself as carrying on Hitler's legacy.

[. . .] Prior to participating in Zundel's trial, Irving had appeared at IHR conferences [. . .] but he had

never denied the annihilation of the Jews. That changed in 1988 as a result of the events in Toronto.

Both Irving and Faurisson advocated inviting an American prison warden who had performed gas executions to testify in Zundel's defense, arguing that this would be the best tactic for proving that the gas chambers were a fraud and too primitive to operate safely. They solicited help from Bill Armontrout, warden of the Missouri State Penitentiary, who agreed to testify and suggested they also contact Fred A. Leuchter, an "engineer" residing in Boston who specialized in constructing and installing execution apparatus. Irving and Faurisson immediately flew off to meet Leuchter. Irving, who had long hovered on the edge of Holocaust denial, believed that Leuchter's testimony could provide the documentation he needed to prove the Holocaust a myth. According to Faurisson, when he first met Leuchter, the Bostonian accepted the "standard notion of the 'Holocaust.'"

After spending two days with him, Faurisson declared that Leuchter was convinced that it was chemically and physically impossible for the Germans to have conducted gassings. Having agreed to serve as an expert witness for the defense, Leuchter then went to Toronto to meet with Zundel and Christie and to examine the materials they had gathered for the trial.

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David Irving, who during the Zundel trial declared himself converted by Leuchter's work to Holocaust denial and to the idea that the gas chambers were a myth, described himself as conducting a "one man intifada" against the official history of the Holocaust.

In his forward to his publication of the Leuchter Report, Irving wrote that there was no doubt as to Leuchter's "integrity" and "scrupulous methods." He made no mention of Leuchter's lack of technical expertise or of the many holes that had been poked in his findings. Most important, Irving wrote, "Nobody likes to be swindled, still less where considerable

sums of money are involved.” Irving identified Israel as the swindler, claiming that West Germany had given it more than ninety billion deutsche marks in voluntary reparations, “essentially in atonement for the ‘gas chambers of Auschwitz.’” According to Irving the problem was that the latter was a myth that would “not die easily.” He subsequently set off to promulgate Holocaust denial notions in various countries. Fined for doing so in Germany, in his courtroom appeal against the fine he called on the court to “fight a battle for the German people and put an end to the blood lie of the Holocaust which has been told against this country for fifty years.” He dismissed the memorial to the dead at Auschwitz as a “tourist attraction.” He traced the origins of the myth to an “ingenious plan” of the British Psychological Warfare Executive, which decided in 1942 to spread the propaganda story that Germans were “using ‘gas chambers’ to kill millions of Jews and other ‘undesirables.’”

Branding Irving and Leuchter “Hitler’s heirs,” the British House of Commons denounced the former as a “Nazi propagandist and long time Hitler apologist” and the latter’s report as a “fascist publication.” One might have assumed that would have marked the end of Irving’s reputation in England, but it did not. Condemned in the Times of London in 1989 as “a man for whom Hitler is something of a hero and almost everything of an innocent and for whom Auschwitz is a Jewish deception,” Irving may have had his reputation revived in 1992 by the London Sunday Times. The paper hired Irving to translate the Goebbels diaries, which had been discovered in a Russian archive and, it was assumed, would shed light on the conduct of the Final Solution. The paper paid Irving a significant sum plus a percentage of the syndication fees.

The Russian archives granted Irving permission to copy two microfiche plates, each of which held about forty-five pages of the diaries. Irving immediately

violated his agreement, took many plates, transported them abroad, and had them copied without archival permission. There is serious concern in archival circles that he may have significantly damaged the plates when he did so, rendering them of limited use to subsequent researchers.

Irving believes Jews are “very foolish not to abandon the gas chamber theory while they still have time.” He “foresees [a] new wave of anti-semitism” [sic] due to Jews’ exploitation of the Holocaust “myth”, C.C. Aronsfeld, “Holocaust revisionists are Busy in Britain,” *Midstream*, Jan. 1993, p.29.

Journalists and scholars alike were shocked that the *Times* chose such a discredited figure to do this work. Showered with criticism, the editor of the *Sunday Times*, Andrew Neil, denounced Irving’s view as “reprehensible” but defended engaging Irving because he was only being used as a “transcribing technician.” Peter Pulzer, a professor of politics at Oxford and an expert on the Third Reich, observed that it was ludicrous for Neil to refer to Irving as a “mere technician,” arguing that when you hired someone to edit a “set of documents others had not seen you took on the whole man.”

However the matter is ultimately resolved, the *Sunday Times* had rescued Irving’s reputation from the ignominy to which it had been consigned by the House of Commons. In the interest of a journalistic scoop, this British paper was willing to throw its task as a gatekeeper of the truth and of journalistic ethics to the winds. By resuscitating Irving’s reputation, it also gave new life to the Leuchter Report.

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A similar attitude is evident in the media reviews of David Irving’s books: Most rarely address his neofascist or denial connections.

Irving is one of the most dangerous spokespersons for Holocaust denial. Familiar with historical evidence,

he bends it until it conforms with his ideological leanings and political agenda. A man who is convinced that Britain's great decline was accelerated by its decision to go to war with Germany, he is mist [sic] facile at taking accurate information and shaping it to confirm his conclusions. A review of his recent book, Churchill's War, which appeared in New York Review of Books, accurately analyzed his practice of applying a double standard of evidence. He demands "absolute documentary proof" when it comes to proving the Germans guilty, but he relies on highly circumstantial evidence to condemn the Allies. This is an accurate description not only of Irving's tactics, but of those of deniers in general.

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As we have seen above, Nolte, echoing David Irving, argues that the Nazi "internment" of Jews was justified because of Chaim Weizmann's September 1939 declaration that the Jews of the world would fight Nazism.

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Another legal maneuver has been adopted by a growing number of countries. They have barred entry rights to known deniers. David Irving, for example, has been barred from Germany, Austria, Italy and Canada. Australia is apparently also considering barring him.⁴⁷

At trial, the Defendants did not contest that the quoted passages referred to Irving. Justice Gray stated in his judgment that all readers of the book would have understood the passages discussing Holocaust deniers generally to refer to Irving individually.⁴⁸ The Defendants also did not contest the issue of publication.

In order to determine how readers would interpret the statements about Irving in *Denying the Holocaust*, both the

⁴⁷ See *Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478, ¶ 2.4 (Q.B. Apr. 11, 2000).

⁴⁸ See *id.* ¶ 2.7.

Defendants and the Plaintiff were required to set forth the defamatory meaning of the statements. Justice Gray accepted neither the Defendants' nor the Plaintiff's proposed interpretation.⁴⁹ Rather, he determined how an ordinary reader of *Denying the Holocaust* would understand the statements.⁵⁰ Justice Gray determined the natural and ordinary meaning of the Defendant's statements in the opinion noting:

- i. that Irving is an apologist for and partisan of Hitler, who has resorted to the distortion of evidence; the manipulation and skewing of documents; the misrepresentation of data and the application of double standards to the evidence, in order to serve his own purpose of exonerating Hitler and portraying him as sympathetic towards the Jews;
- ii. that Irving is one of the most dangerous spokespersons for Holocaust denial, who has on numerous occasions denied that the Nazis embarked upon the deliberate planned extermination of Jews and has alleged that it is a Jewish deception that gas chambers were used by the Nazis at Auschwitz as a means of carrying out such extermination;
- iii. that Irving, in denying that the Holocaust happened, has misstated evidence; misquoted sources; falsified statistics; misconstrued information and bent historical evidence so that it conforms to his neo-fascist political agenda and ideological beliefs;
- iv. that Irving has allied himself with representatives of a variety of extremist and anti-Semitic groups and individuals

⁴⁹ See *id.* ¶¶ 2.13-.14.

⁵⁰ See *id.*

- and on one occasion agreed to participate in a conference at which representatives of terrorist organizations were due to speak;
- v. that Irving, in breach of an agreement which he had made and without permission, removed and transported abroad certain microfiches of Goebbels' diaries, thereby exposing them to a real risk of damage;
 - vi. that Irving is discredited as an historian.⁵¹

2. *Defendants Assertion of Justification*

Lipstadt and Penguin Books chose to assert the defense of justification.⁵² In proving justification, the Defendants had to establish that all of the statements that Irving complained of were substantially true in their ordinary and natural sense.⁵³ The Defense had to establish not only that Irving's work was riddled with errors, but also that he deliberately misstated facts and distorted historical evidence to advance his political and ideological views.⁵⁴ As a result, the defendants had the difficult task of proving allegations about Irving's state of mind, as early as 30 years ago, at the time he was writing his books.

The Defendants relied heavily on the evidence of five distinguished academic historians: Richard Evans, Professor of Modern History at the University of Cambridge; Robert Jan van Pelt, Professor of Architecture at the University of Waterloo; Christopher Browning, Professor of History at Pacific Lutheran University; Dr. Peter Longerich, Reader in the Department of German at the University of London; and Hajo Funke, Professor of Political Science at the Free University of Berlin.⁵⁵ These witnesses examined all of Irving's publications, the evidence he used to support his conclusions, and the available evidence that

⁵¹ *Id.* ¶ 2.15.

⁵² *See Irving*, 2000 WL 362478, ¶ 1.2.

⁵³ *See id.* ¶ 4.2.

⁵⁴ *See id.* ¶ 13.138.

⁵⁵ *See id.* ¶ 4.17.

Irving chose not to use.⁵⁶ Together their expert reports totaled over 2,000 pages.⁵⁷

3. *The Court's Analysis*

In his decision, Justice Gray thoroughly examined all of the historical evidence provided by the Defendants. At the beginning of the judgment and again before the conclusion, the Judge emphasized that his function was to decide the question of Irving's treatment of evidence, not to make findings as to what happened during the Nazi regime.⁵⁸ In a neutral tone, he enumerated all of the Defendants' evidence and arguments and Irving's response to each item. In his conclusion, Justice Gray stated which arguments prevailed with respect to each claim.⁵⁹

The opinion addressed several major areas of debate: Irving's historiography, the systematic killing of the Jews outside of Auschwitz, the gas chambers of Auschwitz, the bombing of Dresden, Irving's research trip to the Russian archives, and Irving's anti-Semitism and right-wing associations.⁶⁰ The Defendants examined Irving's writings and speeches on these topics to demonstrate that the evidence did not support his historical conclusions and that his Holocaust denial was motivated by his political and ideological beliefs.⁶¹ Ultimately, the Judge concluded that the Defendants had substantially justified their statements.⁶²

a. Irving's Historiography

The Defendants criticized Irving's untenable conclusions about several moments in history. The major criticisms were of Irving's contention that Hitler bore no responsibility for Kristallnacht and his failure to indicate to his readers when he was speculating rather than stating facts. The Defendants also challenged Irving's

⁵⁶ See *id.* ¶¶ 5.1-12.

⁵⁷ See *Irving*, 2000 WL 362478, ¶ 4.17.

⁵⁸ See *id.* ¶¶ 1.3, 13.3.

⁵⁹ See *id.* ¶¶ 13.1-162.

⁶⁰ See *id.* ¶¶ V, VI, VII, IX, X, XI, XII.

⁶¹ See *id.* ¶ 5.3.

⁶² See *id.* ¶ 13.167.

interpretation and translation of several Nazi documents that downplayed Hitler's role in the extermination of the Jews.⁶³

The Defendants hired Professor Richard Evans, author of numerous books about Germany, to write a report about Irving's historiography, his denial of the Holocaust, and his exculpation of Hitler.⁶⁴ Professor Evans' lengthy report included numerous examples of Irving's portrayal of Hitler, a portrayal which Evans claimed was entirely at odds with the available evidence.⁶⁵ He cited many instances in which Irving allegedly distorted the historical record by suppressing evidence and using unreliable sources in order to ultimately arrive at irrational conclusions about events and documents.⁶⁶ Professor Evans also criticized passages in which Irving wrote about Hitler in inappropriately flattering terms.⁶⁷

Irving countered each of Professor Evans' historiographical criticisms by supporting his use, or interpretation, of a particular document and by challenging the authenticity of documents put forth by the Defendants.⁶⁸ He denied that he falsified history to portray Hitler in a more favorable light and argued that he had every right to praise Hitler.⁶⁹ Irving stated that he frequently included material in his books which discredited Hitler and other Nazi leaders.⁷⁰ He also claimed that he always indicated in a footnote where the document could be found and often quoted the document in the original German, behavior that he claimed was inconsistent with the charge of being a historian who wishes to mislead his readers.⁷¹

Justice Gray found that the Defendants' assertion that Irving had seriously misrepresented Hitler's views on the Jewish question was justified.⁷² Justice Gray found that Irving deliberately misrepresented Hitler's views by mistranslating or omitting

⁶³ See *Irving*, 2000 WL 362478, ¶¶ 5.1-.249.

⁶⁴ See *id.* ¶ 4.17.

⁶⁵ See *id.* ¶ 5.5.

⁶⁶ See *id.*

⁶⁷ See *id.* For example, in Irving's book, *Hitler's War*, he described Hitler as "a friend of the arts, benefactor of the impoverished, defender of the innocent, persecutor of the delinquent." *Id.*

⁶⁸ See *id.* ¶ 5.9.

⁶⁹ See *Irving*, 2000 WL 362478, ¶ 5.10.

⁷⁰ See *id.* ¶ 5.11.

⁷¹ See *id.* ¶ 5.12.

⁷² See *id.* ¶ 13.31.

documents or parts of documents and that this misrepresentation was deliberate.⁷³ Finally, Justice Gray stated that the picture of Hitler that Irving provided readers conflicted with the evidence.⁷⁴

b. Hitler's Involvement in the Systematic Killing Outside of Auschwitz

The Defendants criticized Irving's general representation of Hitler's attitude toward the Jews and his involvement in the policy to exterminate them.⁷⁵ Irving's view of Hitler may be summarized by his statement that Hitler was "the best friend the Jews had in the Third Reich."⁷⁶

To justify the Defendants' criticism of Irving, Dr. Peter Longerich, a specialist in the Nazi era, gave evidence of Hitler's role in the persecution of the Jews under the Nazi regime and of the systematic character of the Nazi policy for the extermination of the Jews.⁷⁷ Christopher Browning, a Professor of History at Pacific Lutheran University, presented evidence of the implementation of the Final Solution, which involved shooting Jews in the East and gassing Jews in camps other than Auschwitz.⁷⁸

Based on the evidence presented by Dr. Longerich and Professor Browning, the Defendants contended that, beginning in December 1941, Heinrich Himmler embarked on a giant homicidal gassing program of Jews throughout Europe at camps specially designed for that purpose.⁷⁹ There is no explicit evidence that Himmler and Hitler discussed the extermination.⁸⁰ The Defendants, however, argued that in light of the fact that the program was overseen by Himmler, the frequency with which Himmler and Hitler met, and the evidence of Hitler's thoughts and public statements about Jews,

⁷³ See *id.* ¶¶ 13.51, 13.140.

⁷⁴ See *id.* ¶ 13.141.

⁷⁵ See *Irving*, 2000 WL 362478, ¶ 6.1.

⁷⁶ *Id.* ¶ 6.9. During the course of the trial, Irving conceded that Hitler must have known about the gassing after 1943, that he knew and approved of the program of shooting Jews, and that the Reinhardt camps at Chelmo, Treblinka, and Sobibor were Nazi killing centers where hundreds of thousands of Jews were killed. See *id.* ¶ 13.152.

⁷⁷ See *id.* ¶ 4.17.

⁷⁸ See *id.*

⁷⁹ See *id.* ¶¶ 6.73-.77.

⁸⁰ See *id.* ¶¶ 6.23-.38.

it is inconceivable that Hitler was unaware of, or did not authorize, the mass extermination of Jews by gassing.⁸¹

In response, Irving maintained that Hitler lost interest in anti-Semitism after he came to power, and only espoused anti-Semitic views for political reasons.⁸² He also wrote that Hitler did not know, or approve of, the policy of mass shooting and gassing of Jews in certain parts of Europe.⁸³ Irving maintained that Hitler favored solving the “Jewish Problem” by means of deportation rather than extermination.⁸⁴

Justice Gray accepted the testimony of Professor Browning and Dr. Longerich. He concluded the evidence disclosed substantial, if not wholly irrefutable, proof that Hitler was not only aware of the gassing at the Reinhard camps, but also was consulted on, and approved of, the extermination.⁸⁵ The Judge found that if Hitler knew, and approved of, extermination by shooting, it was reasonable to assume that he approved of extermination by other means.⁸⁶ Justice Gray found it unreasonable to assume that Himmler could, or would have, concealed from Hitler an extermination program of such magnitude.⁸⁷

c. Auschwitz

The Defendants challenged Irving’s view that no Jews died in gas chambers at Auschwitz, a position adopted by Irving after reading the Leuchter Report.⁸⁸ The Defendants introduced evidence that indicated Auschwitz was an extermination camp where approximately one million Jews were put to death in gas chambers between 1941 and 1944.⁸⁹ The court had to decide

⁸¹ See *Irving*, 2000 WL 362478, ¶¶ 6.1, 6.38

⁸² See *id.* ¶ 6.8.

⁸³ See *id.* ¶ 6.13.

⁸⁴ See *id.* ¶ 6.9.

⁸⁵ See *id.* ¶ 13.67.

⁸⁶ See *id.*

⁸⁷ See *Irving*, 2000 WL 362478, ¶ 13.67.

⁸⁸ See *id.* ¶ 7.9 (noting that Mr. Fred Leuchter was described by Irving as “a professional consultant who routinely advised penitentiaries on electric chair and gas-chamber execution procedures”). Leuchter’s report, entitled “An Engineering Report on the Alleged Execution Gas Chambers at Auschwitz, Birkenau and Majdanek Poland,” concluded that no gas chambers operated at Auschwitz. Irving regarded that report as an important historical document and adopted its major conclusions. *Id.*

⁸⁹ See *id.* ¶ 7.6.

whether the evidence could possibly support Irving's contention that Auschwitz was one of the many labor camps established by the Nazis and not an extermination camp.⁹⁰

The Defendants used the testimony of Professor Robert Jan van Pelt, who has studied and written extensively on Auschwitz.⁹¹ The Defendants claimed that the totality of the evidence, including camp blueprints, eyewitness accounts, documents relating to the capacity of the crematoria, and the amount of cyanide gas delivered to the camp, amounted to convincing proof of the mass extermination of the Jews by gas.⁹²

During the course of the trial, Irving modified his opinion and conceded that there had been one gas chamber at Auschwitz, but claimed it was used solely to fumigate or delouse clothing.⁹³ He also accepted that Jews were gassed "at some scale" at the camp.⁹⁴ Irving, however, firmly denied the claim advanced by Professor van Pelt, that 500,000 Jews died in a certain morgue at Auschwitz.⁹⁵

In asserting that there were no homicidal gas chambers, Irving relied on the fact that there was no reference to the commissioning, construction, or operation of crematoria for genocidal purposes.⁹⁶ Irving challenged the eyewitness evidence, claiming that the inmates' testimonies were influenced by stories that they had heard after the war.⁹⁷ He also claimed that the Nazi testimony was unreliable because it was given at post-war trials by prisoners who wished to ingratiate themselves with their captors.⁹⁸ Further, Irving maintained that the roof of Morgue 1 at Crematorium 2 showed no sign of the wire-mesh columns through which gas was introduced into the chamber.⁹⁹ He also relied on the fact that daily reports sent from Auschwitz to Berlin contained no mention of inmates being gassed, although they did catalogue lists of inmates'

⁹⁰ See *id.* ¶¶ 7.6, 7.8.

⁹¹ See *id.* ¶ 4.17.

⁹² See *id.* ¶ 7.75.

⁹³ See *Irving*, 2000 WL 362478, ¶ 7.89. For this proposition, Irving relied on the Lechter Report. See *id.*

⁹⁴ See *id.* ¶ 7.11.

⁹⁵ See *id.*

⁹⁶ See *id.* ¶¶ 7.102-.105.

⁹⁷ See *id.* ¶ 7.110.

⁹⁸ See *id.*

⁹⁹ See *Irving*, 2000 WL 362478, ¶ 7.91. Van Pelt contends that the gas chamber was located in Morgue 1 of Crematoria 2. See *id.* ¶¶ 7.60-.62.

deaths from natural causes, hangings, and shootings.¹⁰⁰ In addition, he noted that the amount of fuel, reportedly delivered to Auschwitz for the crematoria, was insufficient to sustain the number of bodies the Defendants had claimed were cremated.¹⁰¹

During Irving's cross examination of Professor van Pelt, van Pelt testified that he relied exclusively on eyewitness accounts recorded immediately after the war so that "cross pollination" of survivors' stories was not likely to have occurred.¹⁰² Additionally, while Defendants admitted that not all eyewitness evidence was reliable, the "convergence" or similarity of the accounts, along with documentation of the accounts, tended to prove the eyewitnesses' validity.¹⁰³ Furthermore, van Pelt stated that less fuel could be used in a crematorium if several bodies were burned simultaneously.¹⁰⁴ He testified that the morgue was not originally built as a gas chamber, but was later redesigned to make it easier for gassings to take place.¹⁰⁵ Van Pelt finally concluded that the roofs of the crematoria were destroyed, rendering it impossible to determine whether there were once holes into which the pellets containing cyanide could be poured.¹⁰⁶

Justice Gray held that no fair-minded historian could doubt the existence of gas chambers at Auschwitz and their use to exterminate hundreds of thousands of Jews.¹⁰⁷ Although he stated that Irving made valuable criticisms about individual pieces of the Defendants' evidence, the totality of evidence led to the conclusion that there were in fact homicidal gas chambers at Auschwitz.¹⁰⁸ Justice Gray found that an objective historian would not consider the apparent absence of holes on the morgue roof to be a sufficient reason to discount the cumulative effect of the remaining evidence.¹⁰⁹

¹⁰⁰ See *id.* ¶ 7.103.

¹⁰¹ See *id.* ¶ 7.100.

¹⁰² See *id.* ¶ 7.34.

¹⁰³ See *id.* ¶ 7.75.

¹⁰⁴ See *Irving*, 2000 WL 362478, ¶ 7.125.

¹⁰⁵ See *id.* ¶ 7.121.

¹⁰⁶ See *id.* ¶ 7.120.

¹⁰⁷ See *id.* ¶ 13.91.

¹⁰⁸ See *id.* ¶ 13.83.

¹⁰⁹ See *id.*

d. The Goebbels Diary

In 1992, Irving went to Moscow to examine, and offer to purchase, glass microfiche plates of Josef Goebbels' diary.¹¹⁰ The issue before the court was whether Irving broke an agreement with the Moscow archive in connection with his examination of Goebbels' diary.¹¹¹ The court also addressed whether Irving endangered certain plates when he removed them from the archive.¹¹²

The Defendants alleged that Irving broke an agreement with the Moscow archive by removing three glass plates, including the one generally considered to be the most historically important, without permission.¹¹³ The Defendants suggested that, by removing the plates, Irving risked damaging the fragile historical documents.¹¹⁴ The Defendants relied on Irving's diary entries to illustrate the breach.¹¹⁵ They argued that a historian should seek permission before removing documents from an archive, and by failing to get permission, Irving breached an agreement.¹¹⁶ The Defendants claimed that Irving risked damage to the plates by removing them, leaving them in a hiding place on the ground for an afternoon, and subjecting them to forensic testing.¹¹⁷

Irving did not contest that he removed the plates to have them copied and tested.¹¹⁸ He claimed, however, that he had no formal agreement with the archive and, therefore, could not have breached an agreement.¹¹⁹ Irving maintained that he was compelled to remove the documents because he feared that the archive would be sealed before he could adequately study certain plates.¹²⁰ Irving also asserted that at no time did he endanger the plates since they

¹¹⁰ See *Irving*, 2000 WL 362478, ¶¶ 12.1-.2 (Paul Joseph Goebbels (1897-1945), a virulent hater of Jews and other "non-Aryan" groups, was Reichsminister for Propaganda and National Enlightenment during the Nazi regime from 1933 to 1945.).

¹¹¹ See *id.* ¶ 12.3.

¹¹² See *id.*

¹¹³ See *id.* ¶ 12.5.

¹¹⁴ See *id.*

¹¹⁵ See *id.* ¶¶ 12.10-.11.

¹¹⁶ See *Irving*, 2000 WL 362478, ¶ 12.11.

¹¹⁷ See *id.* ¶¶ 12.12-.14.

¹¹⁸ See *id.* ¶ 12.17.

¹¹⁹ See *id.* ¶ 12.16.

¹²⁰ See *id.* ¶ 12.17.

were wrapped in cardboard and plastic throughout the journey.¹²¹

Justice Gray determined that Irving had formed an agreement with the head archivist through one conversation they had.¹²² Justice Gray, however, found that an implicit agreement not to remove the plates could not be inferred from the one negotiation since the archives were in “a general state of chaos.”¹²³ Therefore, Irving did not breach an agreement with the archive.¹²⁴ Justice Gray also accepted Irving’s assertion that the plates were safe at all times.¹²⁵

e. The Bombing of Dresden

The court addressed the question of whether Irving’s account of the Allied bombing of Dresden in 1945 was supported by the evidence.¹²⁶ In his book, *The Destruction of Dresden*, and in subsequent speeches and writings, Irving has claimed that there were between 60,000 and 250,000 fatalities as a result of the bombings.¹²⁷

The Defendants alleged that Irving knowingly relied on a forged document, known as TB47, and other unreliable evidence, such as statements by unidentified individuals, to support his claim that 250,000 died in the bombing of Dresden.¹²⁸ The Defendants submitted evidence of eleven incidents over twenty-three years where Irving offered differing numbers of Dresden fatalities.¹²⁹ They also presented evidence that in 1963 Irving had previously denounced the Dresden document referred to as TB47.¹³⁰ Professor Evans testified that due to questions surrounding the document’s origins, TB47 was clearly a forgery.¹³¹

Irving attempted to justify the validity of various documents and other evidence that he had relied on in his assertions about

¹²¹ See *id.* ¶ 12.19.

¹²² See *Irving*, 2000 WL 362478, ¶ 13.131.

¹²³ See *id.* ¶ 13.132.

¹²⁴ See *id.*

¹²⁵ See *id.* ¶ 13.134.

¹²⁶ See *id.* ¶¶ 11.1-4.

¹²⁷ See *id.* ¶ 11.6.

¹²⁸ See *Irving*, 2000 WL 362478, ¶¶ 11.9, 11.41, 11.42.

¹²⁹ See *id.* ¶ 11.6.

¹³⁰ See *id.* ¶ 11.10.

¹³¹ See *id.* ¶ 11.27.

Dresden.¹³² Irving stated that after he had learned that his high estimations of the fatalities were false, he failed to make corrections in the 1991 edition because the book had already gone to print.¹³³

Justice Gray found that the evidence surrounding TB47 that Irving ignored would have been viewed by any dispassionate historian as proof that the document was fake and that the actual Dresden death toll was approximately 25,000.¹³⁴ Further, he stated that Irving's estimates of 100,000 or more deaths lacked any evidential basis.¹³⁵ The Judge, however, found that the Defendants had not justified the assertion that Irving invented evidence in order to support his claims.¹³⁶

f. Irving's Holocaust Denial, Anti-Semitism, and Right Wing Political Associations

The question before the court was whether Irving was a Holocaust denier and whether his denials were justified.¹³⁷ The court also addressed whether Irving's statements about Jews and Blacks qualified him as an anti-Semite and a racist.¹³⁸ In addition, the court looked at Irving's political affiliations to determine whether he associated with right-wing political organizations.¹³⁹

Professor Evans testified on behalf of the defendants that the following were typical views held by a "Holocaust Denier":

- i. [T]hat Jews were not killed in gas chambers or at least not on any significant scale;
- ii. [T]hat the Nazis had no policy and made no systematic attempt to exterminate the European Jewry and that such deaths as did occur were the consequence of individual excess unauthorized at the senior level;

¹³² *See id.* ¶ 11.8.

¹³³ *See id.* ¶ 11.40.

¹³⁴ *See Irving*, 2000 WL 362478, ¶ 13.123.

¹³⁵ *See id.* ¶ 13.126.

¹³⁶ *See id.* ¶ 13.127.

¹³⁷ *See id.* ¶ 8.15.

¹³⁸ *See id.* ¶ 9.1.

¹³⁹ *See id.* ¶ 10.3.

- iii. [T]hat the number of Jews murdered did not run into the millions and that the true death toll was far lower;
- iv. [T]hat the Holocaust is largely or entirely a myth invented by Allied propagandists and sustained after the war by Jews in order to obtain financial support for the newly-created state of Israel.¹⁴⁰

Through speeches and writings the Defendants showed that Irving held many of the views described above.¹⁴¹ The Defendants then used the evidence of their expert historians to show that these statements were false.¹⁴²

The Defendants relied primarily on Irving's speeches to various groups worldwide to illustrate his history of racism and anti-Semitism.¹⁴³ Some particularly emotive moments in the trial included videos of Irving speaking to a group of skinheads chanting "*sieg heil*"¹⁴⁴ and telling a Canadian audience that "more people died in the back of Senator Kennedy's car at Chappaquiddick than died in the gas chambers at Auschwitz."¹⁴⁵ The Defendants also presented quotations by Irving stating that he felt queasy seeing black men play cricket for England and calling the AIDS epidemic a 'Final Solution' which will wipe out blacks, homosexuals, drug addicts, and the sexually promiscuous.¹⁴⁶

Professor Hajo Funke introduced evidence of Irving's association with right-wing individuals and pro-Nazi groups in Germany.¹⁴⁷ Professor Funke testified that Irving has spoken, and attended meetings, at many Nazi, right-wing, and anti-Semitic organizations.¹⁴⁸

Irving objected to the Defendants' use of his speeches, claiming that it is customary to use more colorful language in speech than in writing.¹⁴⁹ He claimed that by making certain statements about Jews he was merely explaining to Jews why there is anti-

¹⁴⁰ See *Irving*, 2000 WL 362478, ¶ 8.4.

¹⁴¹ See *id.* ¶¶ 8.6, 8.17, 8.20, 8.29.

¹⁴² See *id.* ¶ 8.21-.24.

¹⁴³ See *id.* ¶ 9.5.

¹⁴⁴ "*Seig heil*" is a Nazi salute.

¹⁴⁵ See *Irving*, 2000 WL 362478, ¶ 8.17, viii.

¹⁴⁶ See *id.* ¶ 9.6.

¹⁴⁷ See *id.* ¶ 10.5.

¹⁴⁸ See *id.* ¶¶ 10.8-.25.

¹⁴⁹ See *id.* ¶¶ 9.8, 13.94.

Semitism.¹⁵⁰ By his characterization of Jewish stereotypes, Irving claimed that he intended to warn Jews not to encourage negative public perception by behaving in certain ways.¹⁵¹ He also stated that Jews should not be protected from his criticism.¹⁵² In order to prove that he was not a racist, Irving said that he had employed several members of ethnic minorities.¹⁵³ Irving argued that the Defendants were seeking to prove him guilty by association with certain right-wing individuals.¹⁵⁴

Justice Gray found it “to be incontrovertible that Irving qualifies as a Holocaust denier.”¹⁵⁵ He based this decision on the fact that Irving’s denial of several aspects of the Holocaust was contrary to the evidence presented.¹⁵⁶ The Judge also noted that Irving expressed his Holocaust denial in offensive terms, such as dismissing the eyewitnesses *en masse* as having mental problems and asking a Holocaust survivor how much money she made from her tattoo.¹⁵⁷

The Judge relied on Irving’s statements to conclude that he was a racist and an anti-Semite.¹⁵⁸ He rejected Irving’s contention that he was merely expressing to Jews why anti-Semitism exists and that Jews could be subject to his criticism.¹⁵⁹ Justice Gray found that Irving’s statements could not be read as legitimate criticism of Jews because the language Irving used was offensive.¹⁶⁰ Finally, even though much of the evidence proffered by the Defendants was tenuous, Justice Gray found that Irving had associated with several right-wing groups and individuals.¹⁶¹

4. Justice Gray’s Conclusion

After determining that Irving misrepresented the evidence, Justice Gray addressed whether this misrepresentation was

¹⁵⁰ See *id.* ¶ 9.10.

¹⁵¹ See *id.*

¹⁵² See *Irving*, 2000 WL 362478, ¶ 9.9.

¹⁵³ See *id.* ¶ 9.18.

¹⁵⁴ See *id.* ¶ 10.28.

¹⁵⁵ *Id.* ¶ 13.95.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See *Irving*, 2000 WL 362478, ¶ 13.101.

¹⁵⁹ See *id.* ¶¶ 13.103-104.

¹⁶⁰ See *id.* ¶ 13.103.

¹⁶¹ See *id.* ¶¶ 13.111-115.

deliberate and motivated by a desire to present Hitler in a more favorable light.¹⁶² The Defendants offered evidence of Irving's anti-Semitism and associations with right-wing political groups as evidence of his state of mind.¹⁶³ Alternatively, Irving claimed that if he had misrepresented the evidence, it was a result of innocent mistakes.¹⁶⁴

Justice Gray stated that a significant feature of the case was that "Irving . . . appeared to make concessions about major issues."¹⁶⁵ The Judge explained that Irving's readiness to retreat from the positions set forth in his writing demonstrated "his willingness to make assertions about the Nazi era which . . . [were] irreconcilable with the available evidence."¹⁶⁶ In response to Irving's argument that his mistakes were all innocent, Justice Gray wrote that all of Irving's errors converge, tending to exonerate Hitler and to reflect Irving's partisanship for the Nazi leader.¹⁶⁷ In addition, the Judge held that the content of his speeches displayed a distinctly pro-Nazi and anti-Jewish bias and that he associated with neo-fascists and appeared to share many of their racist and anti-Semitic prejudices.¹⁶⁸ The Judge found that the Defendants showed that Irving had a political agenda which disposed him to manipulate the historical record so that it appeared to conform to his own political beliefs.¹⁶⁹

Justice Gray also found that the Defendants did not justify some of the statements made in Lipstadt's book.¹⁷⁰ The Defendants failed to prove that Irving breached an agreement with Russian archive officials, or that he endangered microfiche plates of great historical significance.¹⁷¹ The Defendants also failed to justify their assertion that Irving was scheduled to speak at an anti-Zionist conference in Sweden in 1992.¹⁷² Relying on Section 5 of the Defamation Act of 1952,¹⁷³ however, the Judge held that the

¹⁶² *See id.* ¶ 13.136.

¹⁶³ *See id.* ¶¶ 13.160-163.

¹⁶⁴ *See Irving*, 2000 WL 362478, ¶ 13.163.

¹⁶⁵ *Id.* ¶ 13.152.

¹⁶⁶ *Id.* ¶ 13.159.

¹⁶⁷ *See id.* ¶ 13.142.

¹⁶⁸ *See id.* ¶¶ 13.161-162.

¹⁶⁹ *See id.* ¶ 13.162.

¹⁷⁰ *See Irving*, 2000 WL 362478, ¶ 13.166.

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *See* Defamation Act of 1952, c. 66, § 5 (Eng.).

proven charges were sufficiently grave to demonstrate that the Defendant's failure to prove the truth of certain statements did not materially affect Irving's reputation.¹⁷⁴

5. Damages

As the losing party in the trial, Irving is responsible for the Defendant's legal costs,¹⁷⁵ which totaled more than UK£3 million.¹⁷⁶ Penguin's counsel requested an initial payment of UK£500,000, in response to which Irving argued that such a sum would preclude him from appealing the decision.¹⁷⁷ Finally, on May 6, 2000, the court ordered Irving to make an initial payment of UK£150,000 within six weeks.¹⁷⁸ Subsequently, the law firm Irving had hired to represent him on appeal withdrew from the case "on ideological grounds."¹⁷⁹

II. *IRVING v. PENGUIN* EXAMINED UNDER AMERICAN LIBEL LAW

If David Irving had brought suit in the United States, he would have had to surmount several First Amendment obstacles. First, Irving would be considered a public figure, since as a successful writer and lecturer, he enjoys greater access to channels of communication.¹⁸⁰ As a result, he would have had the burden of proving that Deborah Lipstadt published defamatory statements

¹⁷⁴ See *Irving*, 2000 WL 362478, ¶ 13.167.

¹⁷⁵ See *Vick & MacPherson*, *supra* note 3, at 627 (noting that "under English rule a defeated defendant is responsible for the plaintiff's costs and legal fees").

¹⁷⁶ See *Roy Ulrich*, *supra* note 26, at A21.

¹⁷⁷ Vikram Dodd, *Irving Ordered to Pay £150,000 Interim Costs*, *THE GUARDIAN* (Manchester), May 6, 2000, at 10.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ In *Lerman v. Flynt Distribution Co.*, the Court of Appeals established a four-part test to determine who is a limited-purpose public figure. 745 F.2d 123, 136-37 (2d Cir. 1984). The court stated that:

A defendant must show that the plaintiff has: 1) successfully invited public attention to his views in an effort to influence others prior to the incident that is subject of litigation; 2) voluntarily injected himself into a public controversy related to the subject of the litigation; 3) assumed a position of prominence in the public controversy; and 4) maintained regular and continuing access to the media.

Id.

with actual malice.¹⁸¹ Actual malice requires a showing of knowledge that the statements were false or made in reckless disregard of the truth.¹⁸² Under these standards, it is unlikely that Irving would be able to defeat a defendant's motion for summary judgment.

A. Applicable Law

U.S. libel law places the burden of proof on the plaintiff. Plaintiffs in libel actions may have private or public figure status. Public figure plaintiffs must prove that the defendant published with actual malice, meaning the defendant had knowledge that the statement was false or published with reckless disregard of whether the statement was false or not.¹⁸³ In addition, the plaintiff must provide evidence of actual malice to survive a summary judgment motion.¹⁸⁴

1. Actual Malice

The Supreme Court of the United States first established a federal libel standard in 1964 with the landmark decision of *New York Times Co. v. Sullivan*.¹⁸⁵ Prior to *New York Times*, U.S. libel law was almost identical to the English common law of libel.¹⁸⁶ Before 1964, U.S. libel was a tort found only in common law, and like current English law, the defendant assumed the burden of proving the truth.¹⁸⁷

¹⁸¹ See *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (holding that in defamation cases involving speech of public concern the plaintiff has the burden of proving falsity); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967) (holding public figures must bear the burden of showing by a clear and convincing standard that the defendant published with knowledge of falsity or reckless disregard of the truth).

¹⁸² See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁸³ *Id.* at 280.

¹⁸⁴ See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

¹⁸⁵ See *id.* The Court established a precedent that prohibits a public official from recovering damages from a defamatory falsehood without proof that the Defendant made the statement with actual malice, or "knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

¹⁸⁶ See Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law?*, 16 HASTINGS COMM. & ENT. L.J. 235, 239 (1994).

¹⁸⁷ See *N.Y. Times*, 376 U.S. at 265-69 (stating that Alabama law reflected common law and that under Alabama law the defendant has the burden of proving truth).

In *New York Times*, the Supreme Court departed from the common law tradition holding that a public official could not recover damages for defamation without proving, by clear and convincing evidence, that the defendant published the defamatory statement with actual malice.¹⁸⁸ The rationale for this decision rested on the First Amendment guarantee of freedom of expression on issues of public concern.¹⁸⁹ *New York Times* also changed the evidentiary standard, requiring the plaintiff to show actual malice with “convincing clarity”¹⁹⁰ rather than a mere preponderance of the evidence, the standard which was previously required of the defendant.¹⁹¹ In holding certain libel actions up to First Amendment scrutiny, the Court shifted the burden of proof from the defendant to the plaintiff.¹⁹² In a subsequent decision, *Gertz v. Robert Welch*,¹⁹³ the Court determined that for both public officials and public figures, the showing of actual malice was subject to a clear and convincing standard of proof.¹⁹⁴

The Court clarified the *New York Times* malice standard in a later case, *St. Amant v. Thompson*.¹⁹⁵ Actual malice, the Court said, requires a showing of either deliberate falsification or reckless publication “despite the publisher’s awareness of probable falsity.”¹⁹⁶ The Court stated that the plaintiff must prove that the defendant published the statement in bad faith, noting that, “[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”¹⁹⁷ In addition, the Court stated that “[f]ailure to investigate does not itself establish bad faith.”¹⁹⁸ Under the actual malice standard, even a deliberate alteration of the words uttered by the plaintiff does not constitute knowledge of falsity unless the alteration materially changes the meaning of the speaker’s

¹⁸⁸ *See id.* at 279-80. The Court defined malice as knowledge that the defamatory statement was false or reckless disregard of whether the statement was false or not. *Id.*

¹⁸⁹ *See id.* at 269.

¹⁹⁰ *Id.* at 285-86.

¹⁹¹ *See id.*

¹⁹² *See id.* at 279.

¹⁹³ 418 U.S. 323 (1974).

¹⁹⁴ *See id.* at 342. (noting that in a libel action brought against the publisher of magazine article that called the Plaintiff a communist, the Court held that the Defendant could not claim constitutional privilege on the basis of discussion of public issue).

¹⁹⁵ 390 U.S. 727, 730-31 (1968).

¹⁹⁶ *Id.* at 731 (quoting *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 153 (1967)).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 733 (citing *N.Y. Times*, 376 U.S. at 287-88).

words.¹⁹⁹ The inquiry into actual malice focuses on the defendant's belief regarding truthfulness.²⁰⁰

2. Public Figures

A logical extension of the *New York Times* rule followed three years later in *Curtis Publishing Co. v. Butts*.²⁰¹ The Supreme Court extended the *New York Times* heightened standard to include nonpublic officials or public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."²⁰²

In *Gertz v. Robert Welch, Inc.*²⁰³ the Court discussed the rationale underlying the distinction between public and private figures.²⁰⁴ Public figures have "greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."²⁰⁵ The Court divided its discussion of public figures into two categories: limited-purpose and all-purpose public figures.²⁰⁶

Examples of all-purpose public figures are rare, and "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life."²⁰⁷ Some examples of all-purpose public figures include political candidates,²⁰⁸ entertainers,²⁰⁹ political and social activists,²¹⁰ and well-known writers and critics.²¹¹ Most public

¹⁹⁹ See *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991).

²⁰⁰ See *Herbert v. Lando*, 441 U.S. 153, 170 (1979) (permitting Plaintiff to probe the editorial decision-making process of Defendant and noting that *New York Times* and its progeny require the plaintiff to focus on the defendant's subjective state of mind).

²⁰¹ 388 U.S. 130 (1967) (Defendant published an article accusing the Plaintiff, the athletic director of the University of Georgia, of attempting to fix a game between the University of Georgia and the University of Alabama.).

²⁰² *Id.* at 164.

²⁰³ 418 U.S. 323 (1974).

²⁰⁴ See *id.*

²⁰⁵ *Id.* at 344.

²⁰⁶ See *id.* at 351.

²⁰⁷ See *id.* at 352.

²⁰⁸ See, e.g., *Goldwater v. Ginzburg*, 414 F.2d 324 (2d. Cir. 1969).

²⁰⁹ See, e.g., *Burnett v. Nat'l Enquirer, Inc.*, 193 Cal. Rptr. 260 (1983); *Eastwood v. Superior Court of L.A. County*, 198 Cal. Rptr. 342 (1983).

²¹⁰ See, e.g., *Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204 (1981); *Nader v. de*

figures are limited-purpose public figures who have intentionally become embroiled in particular controversies in order to influence the resolution of the issues involved.²¹²

The extent to which the plaintiff has voluntarily thrust himself into a public controversy is one of the most important factors in determining limited-purpose public figure status.²¹³ In cases following *Gertz*, the Court has given the voluntariness requirement even greater importance.²¹⁴

3. Summary Judgment

In *Anderson v. Liberty Lobby, Inc.*,²¹⁵ the Supreme Court held that summary judgment must be granted in defamation cases in which “actual malice” was at issue, unless the plaintiffs demonstrated that they will be able to present “clear and convincing evidence” of actual malice.²¹⁶ The Court ruled that a trial judge must consider the “quantum and quality of proof necessary to support liability under *New York Times*.”²¹⁷

Defense motions for summary judgment are commonplace in suits involving public figure plaintiffs.²¹⁸ Summary judgment motions have proven to be a powerful tool against public figure defamation plaintiffs.²¹⁹ In 1995 and 1996, defendants were

Toledano, 408 A.2d 31 (D.C. 1979).

²¹¹ See, e.g., *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976); *Montandon v. Triangle Publ'ns, Inc.*, 120 Cal. Rptr. 186 (1975); *Maule v. NYM Corp.*, 76 A.D. 2d 58 (1980); *Braden v. News World Communications, Inc.*, 22 Media L. Rep. 1065 (D.C. Super. 1993)

²¹² See *Gertz*, 418 U.S. at 345.

²¹³ See SMOLLA, *supra* note 31, § 2:31.

²¹⁴ See, e.g., *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55 (1976) (holding that seeking a divorce did not constitute a voluntary act or an assumption of the risk sufficient to render the Plaintiff a public figure); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979) (holding that Plaintiff Wolston had not voluntarily entered the controversy surrounding the investigation of Soviet espionage, but had been dragged into the controversy unwillingly); *Hutchinson v. Proxmire*, 443 U.S. 111, 133-36 (1979) (holding that a professor who voluntarily applied for federal funds was a limited-purpose public figure for the purpose of commentary on his publicly-funded research).

²¹⁵ 477 U.S. 242 (1986).

²¹⁶ *Id.* at 255.

²¹⁷ *Id.* at 254.

²¹⁸ See SMOLLA, *supra* note 31, § 12:75

²¹⁹ See Press Releases, LDRC Bulletin 1997 No. 3: Report on Summary Judgment, available at <http://www.ldrc.com/sumjud.html> (last visited Oct. 28, 2000).

successful in 85.2% of summary judgment motions against public figure plaintiffs.²²⁰

B. Irving v. Penguin under U.S. Libel Law

David Irving enjoys considerable access to the media through his own books and invitations to speak to organizations around the world. As a result, he would be considered a public figure for purposes of U.S. libel law. If Irving brought suit against Penguin Books and Lipstadt in the United States, he would have the burden of proving the falsity of Lipstadt's statements, and he would be required to prove *New York Times* malice in order to avoid a summary judgment in Lipstadt's favor.

1. Irving as a Public Figure

Irving is a successful writer and lecturer. He "enjoys significantly greater access to the channels of effective communication"²²¹ and would probably be considered an all-purpose public figure in a U.S. defamation action. The facts clearly support this conclusion, since Irving has written over thirty books,²²² and even before *Denying the Holocaust* David Irving was a familiar name in England.²²³

Before the trial, Irving challenged Lipstadt's statements in many arenas. Irving disputed Lipstadt's allegations at lectures and maintained a website where he posted the evidence supporting his historical conclusions and propaganda.²²⁴ On the website, he provided his daily diary entries concerning the events of the trial,

²²⁰ See *id.*

²²¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974).

²²² See generally SMOLLA, *supra* note 31, § 2:87 (stating that "[w]riters, critics and columnists may achieve sufficiently pervasive fame and influence to achieve all-purpose public figure status").

²²³ See Sarah Lyall, *Critic of Holocaust Denier is Cleared in British Libel Suit*, N.Y. TIMES, April 12, 2000, at A1 (noting that Irving is the author of more than 30 books, some of which have been highly admired, notably "Hitler's War" (1977)); see also Vikram Dodd, *Irving: Consigned to History as a Racist Liar*, THE GUARDIAN (Manchester), Apr. 12, 2000, at 1 (reporting that "Irving had increased his political activity over the past fifteen years, addressing far right audiences in the U.S., Germany, Canada and the new world").

²²⁴ See David Irving's Action Report On-Line, at <http://www.fpp.co.uk> (last visited November 1, 2000).

texts of his lectures, and some of his books. Irving also owns the company that published his last book.²²⁵

In *Lamkin-Asam v. Miami Daily News, Inc.*,²²⁶ the court held that a scientist who had written a book about her search for research grants to develop a cure for cancer was an all-purpose public figure.²²⁷ The court found that the Plaintiff's efforts to arouse public indignation and influence the allocation of public funds, participation in public debates in health matters, publication of her autobiography and other writings and speeches, and efforts to seek substantial publicity, among other things, aggregately gave her public figure status as a matter of law.²²⁸ Similarly, a court addressing Irving's public figure status would review Irving's publicity-seeking behavior, and most likely find him an all-purpose public figure.

Alternatively, Irving would at least be considered a limited-purpose public figure for the purpose of this trial, since he voluntarily thrust himself into the vortex of the debate by successfully inviting public attention to his views prior to the litigation, and maintaining access to the media.²²⁹ Through the

²²⁵ See DAVID IRVING, NUREMBERG, THE LAST BATTLE (1997), which was published by Focal Point Publications, Irving's publishing imprint. Cf. *Loeb v. Globe Newspaper Co.*, 489 F. Supp. 481 (D. Mass. 1980) (holding that Plaintiff, a newspaper owner who "regularly takes strong public stands on controversial issues . . . (and who) invites expression of contrary opinion" is a public figure).

²²⁶ 408 So. 2d 666 (Fla. Dist. Ct. App. 1981).

²²⁷ See *id.* at 668.

²²⁸ See *id.*

²²⁹ See *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999).

The court stated in part:

Before a plaintiff can be classified, as a matter of law, as a limited-purpose public figure, the defendant must prove that: (1) the plaintiff has access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and, (5) the plaintiff retained public figure status at the time of the alleged defamation.

Id. at 534.

In *Lerman v. Flynt Distribution Co., Inc.*, the Court of Appeals for the Second Circuit specifically defined what constitutes a limited-purpose public figure. See 745 F.2d 123 (2d Cir. 1984). The court stated:

A defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of the litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and

publication of over thirty books on the subject of World War II and numerous lectures and public debates on the subject of the Holocaust and Hitler's involvement, Irving has voluntarily thrust himself into the Holocaust debate.

Irving could be considered a public figure merely by reason of having published books.²³⁰ Courts have consistently held that authors may be public figures for the purpose of libel actions due to the subject of their works.²³¹ According to this reasoning, Irving would be a public figure for the purpose of the libel action because Lipstadt's statements concerned the subject of his books.

2. Actual Malice

As a public figure, Irving would have the burden of proving that Lipstadt's statements are false and that she and Penguin Books published those statements with knowledge of their falsity or reckless disregard for whether they were false. Lipstadt would probably move for summary judgment on the ground that there

continuing access to the media.

Id. at 136-37.

In *Lerman*, the court applied these factors to the Plaintiff, Jackie Collins Lerman, who was a prominent author on topics dealing largely with evolving sexual mores in society. The court found that Lerman was in fact a public figure with respect to a lawsuit in which the Defendant publication had printed her name next to a picture of a nude woman. Because Lerman had voluntarily written works catering to the public's interest in sexual mores, she was "deemed to have purposefully surrendered part of what would otherwise have been her protectable privacy rights, at least those related in some way to her involvement in writing her books and screenplays." *Id.* at 137. In considering whether Lerman had injected herself into a "public controversy" related to the Defendant's publication, the court noted that "[a] public 'controversy' is any topic upon which sizeable segments of society have different, strongly held views." *Id.* at 138.

²³⁰ See SMOLLA, *supra* note 31, § 2:87.

²³¹ See, e.g., *Hotchner v. Castillo-Puche*, 404 F. Supp. 1041 (S.D.N.Y. 1975) (noting that by adapting Ernest Hemingway's books for television, movies, records, and ballet, the author had voluntarily injected himself into a public controversy concerning the latter years of Hemingway's life); see also *Joseph v. Xerox Corp.*, 594 F. Supp. 330 (D.D.C. 1984) (holding that a lawyer who wrote a book about legal self-representation was a public figure for purposes limited to the subject of the book); *Knudsen v. Kansas Gas & Elec. Co.*, 807 P.2d 71 (Kan. 1991) (holding that a freelance writer whose article was published in a newspaper became a public figure by writing the article which was the basis of the allegedly defamatory statements); *Underwager v. Salter*, 22 F.3d 730 (7th Cir. 1994) (holding authors of books were limited-purpose public figures when bringing suit against Defendants who made public assertions challenging the accuracy of the books); *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996) (stating "anyone who publishes becomes a public figure in the world bounded by the readership of the literature to which he has contributed").

was no genuine issue of material fact,²³² since Irving would be unable to prove actual malice. Irving would be forced to show that a reasonable jury could find actual malice with convincing clarity.²³³

The standard of proof for actual malice is higher than the typical civil requirement of proof by a preponderance of the evidence.²³⁴ To prove actual malice, the plaintiff must demonstrate with clear and convincing evidence that the defendant realized that the statements were false or that the defendant subjectively entertained doubts as to the truth of the statements.²³⁵ In addition, actual malice must be pleaded with specificity.²³⁶ Thus, public figure plaintiffs rarely overcome summary judgment motions.²³⁷ One court stated that “defamation actions should be disposed of at the earliest possible stage of the proceedings if the facts as alleged are insufficient as a matter of law to support a judgment for the plaintiff.”²³⁸ Deborah Lipstadt clearly believed what she wrote was true. She gathered her information from many sources, and published in good faith. Lipstadt’s belief in her statements would preclude a finding of actual malice since there must be sufficient evidence to permit the conclusion that the defendant “entertained serious doubts as to the truth of [the] publication.”²³⁹

A determination of whether the defendant published with actual malice is an inquiry into the state of mind of the defendant.²⁴⁰ The question of Lipstadt’s state of mind arose in connection with the *Irving* case in London.²⁴¹ Throughout the trial, Irving claimed that

²³² See Fed. R. Civ. P. 56(c).

²³³ See *Adler v. Conde Nast Publ’ns Inc.*, 643 F. Supp. 1558, 1565 (S.D.N.Y. 1986).

²³⁴ See *World Boxing Council v. Cosell*, 715 F. Supp. 1259, 1262 (S.D.N.Y. 1989).

²³⁵ See *N.Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964).

²³⁶ See *Nicosia v. De Rooy*, 72 F. Supp.2d 1093, 1097 (N.D. Cal. 1999); see also *Barger v. Playboy Enters.*, 564 F. Supp. 1151, 1156 (N.D. Cal. 1983); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1063 (9th Cir. 1998) (“[W]hen ‘a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.’” (citation omitted)).

²³⁷ See Press Releases, LDRC Bulletin 1997 No. 3: Report on Summary Judgment, available at <http://www.ldrc.com/sumjud.html> (last visited Oct. 28, 2000).

²³⁸ See *Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992).

²³⁹ *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

²⁴⁰ See *id.*

²⁴¹ See *Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478, ¶ 3.8 (Q.B. Apr. 11, 2000).

Lipstadt was the head of a conspiracy to damage his reputation as a historian and silence him,²⁴² an argument he used to support his request for aggravated damages.²⁴³

Irving relied on the fact that Lipstadt did not attempt to verify the statements that she made, that she continued to publish the defamatory statements, and that she was the “prime mover” in an international Jewish conspiracy to prevent the dissemination of his books, ensuring that he is banned from as many countries as possible.²⁴⁴ Because the conspiracy theory was Irving’s only proof of Lipstadt’s state of mind, it is likely that Irving would assert this argument as proof of actual malice in a court in the United States. The conspiracy assertion would not suffice as proof of actual malice since it is a mere assertion of spite or ill will toward Irving.²⁴⁵ Though spite or animus toward the plaintiff is circumstantial evidence of actual malice, it cannot serve alone as a basis for actual malice.²⁴⁶ In addition, Irving would be unable to plead this argument with specificity. In London, he simply mentioned Lipstadt’s association with groups such as the Anti-Defamation League.²⁴⁷ A U.S. court would likely find that Lipstadt’s personal animosity toward, and disagreement with, Irving’s views does not create an inference of actual malice.

III. COMPARISON OF THE ENGLISH AND U.S. LIBEL SYSTEMS

The presumption of falsity is one of the fundamental differences between English and U.S. libel law.²⁴⁸ Another difference is the lack of fault requirement making libel a strict liability tort in England.²⁴⁹ The most critical difference between American and English libel law, however, is that English libel law recognizes no

²⁴² See *id.* ¶ 3.6.

²⁴³ See *id.* ¶ 3.8.

²⁴⁴ See *id.*

²⁴⁵ See *Masson*, 501 U.S. at 510.

²⁴⁶ See *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995); *Hinerman v. Daily Gazette Co.*, 423 S.E. 2d 560, 573 (W. Va. 1992); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989).

²⁴⁷ *Irving*, 2000 WL 362478, ¶ 3.8.

²⁴⁸ See SMOLLA, *supra* note 31, § 1:9.

²⁴⁹ See R.W.M. DIAS & B.S. MARKESINIS, *supra* note 31, at 160; see also SMOLLA, *supra* note 30, § 1:9.

special protection for defamation actions arising from critiques of public figures or public officials.²⁵⁰

One must bear in mind that victories for defendants in libel cases, such as *Irving*, are rare in England.²⁵¹ By suing for libel in England, Irving deprived Lipstadt of scholastic research for four years and caused the defense to spend over UK£3 million in expert reports, discovery, and legal fees.²⁵² Additionally, the expense of a legal defense and the time invested may be enough to discourage authors and scholars from expressing criticism of historians such as Irving in the English media.

Two aspects of English libel law, the expense of pursuing or defending a claim and the threat of huge damages and costs, have created a system that works to the advantage of the wealthy.²⁵³ English libel law has been commonly criticized for awarding verdicts that are “too high and as uncertain as a lottery.”²⁵⁴ In addition, a defeated party bears responsibility for litigation costs, which in libel cases often approach the size of the verdict itself.²⁵⁵ Legal aid is unavailable in libel cases, and contingency fee arrangements are prohibited in England.²⁵⁶ Consequently, the cost of pursuing a libel claim has become prohibitive for all except the wealthy or those backed by organizations with significant financial resources.²⁵⁷

Furthermore, the odds against defendants in English libel cases are staggering. In 1990, plaintiffs prevailed in eighty-eight percent

²⁵⁰ See SMOLLA, *supra* note 31, § 1:9.

²⁵¹ See HOOPER, *supra* note 28, app. at 483-523. In 1998, plaintiffs won thirty out of thirty-two libel cases adjudicated in England. In 1999, plaintiffs won fourteen out of seventeen cases adjudicated. *See id.* at 517-23.

²⁵² As the losing party, Irving bore the burden of the costs, but it is unlikely that, a private citizen, will be able to pay. *See Vick & Macpherson, supra* note 2, at 626-27 (1997). Journalists have predicted that Irving will declare bankruptcy and Penguin will never see a penny of the costs. *See Dodd, supra* note 218, at 1 (reporting that Irving denied having enough money to cover the cost of his defeat, that he was facing bankruptcy, and that the head of Penguin Books UK felt it was unlikely that all costs would be recovered).

²⁵³ *See Vick & Macpherson, supra* note 3, at 626-27.

²⁵⁴ KAYE, *supra* note 40, at 652; *see also* Vick & Macpherson, *supra* note 3, at 626-27.

²⁵⁵ *See Vick & Macpherson, supra* note 3, at 627.

²⁵⁶ *See id.*; *see also* HOOPER, *supra* note 28, at 459.

²⁵⁷ *See Vick & Macpherson, supra* note 3, at 627; *see also* HOOPER, *supra* note 28, at 459.

of the cases adjudicated,²⁵⁸ and, in 1999, only two defendants prevailed in defamation trials.²⁵⁹

It is likely that a defendant who publishes the truth will nonetheless be silenced by a wealthy, litigious plaintiff in a London court. This pitfall of English libel law was recently demonstrated in a series of cases involving a large drug manufacturer against an individual scientist.²⁶⁰ The drug manufacturer, Upjohn Company (“Upjohn”), sued Professor Ian Oswald, a scientist who had studied sleep deprivation drugs for over thirty years, for criticizing Halcion, a drug manufactured by Upjohn. Specifically, Upjohn sued Professor Oswald for alleging that Upjohn withheld adverse findings about the sleeping pill.²⁶¹ Professor Oswald pleaded justification and lost.²⁶² The legal cost of the action were estimated at over UK£2.5 million,²⁶³ and Judge May awarded Upjohn UK£25,000 in damages.²⁶⁴ The *Upjohn* decision was thoroughly criticized because the English libel laws allowed a powerful drug company to silence a critic, and essentially through a costly legal battle, suppressed the critic’s right to voice a public concern.²⁶⁵

²⁵⁸ See Vick & Macpherson, *supra* note 27, at 943.

²⁵⁹ See HOOPER, *supra* note 28, app. at 523.

²⁶⁰ The Upjohn Company and Another v. Oswald; Drucker v. Oswald; The Upjohn Company v. British Broadcasting Corporation and Another, Q.B. 27 May 1994, available in LEXIS, England and Wales Reported and Unreported Cases [hereinafter *Upjohn*]. For analysis of the case see James Penzi, *Libel Actions In England, A Game of Truth or Dare? Considering the Recent Upjohn Case and the Consequences of “Speaking Out”*, 10 TEMP. INT’L & COMP. L.J. 211 (1996).

²⁶¹ See James Penzi, *supra* note 260, at 219.

²⁶² See *id.* at 225.

²⁶³ See Penzi, *supra* note 261, at 223. The case was severely criticized because Upjohn chose to sue in England, basing jurisdiction on the existence of an Upjohn subsidiary in England and the sale of 100 copies of the New York Times. See *id.* at 219, 228 nn. 90, 91; HOOPER, *supra* note 28, at 192.

²⁶⁴ See Hooper, *supra* note 28, app. at 505. Concurrent to the trial, the United States Food and Drug Administration (“FDA”) reexamined Halcion and Upjohn’s contentions regarding the safety of the drug. The FDA examined the submissions by Upjohn and determined that Upjohn had indeed been lying and concealing evidence for twenty years. In reviewing the same 1972 test that Dr. Oswald had so vehemently criticized, the FDA determined that Upjohn’s excuse of “transcription errors” was false and misleading. The FDA also determined that Upjohn’s senior management knew about the adverse reactions to Halcion and deliberately failed to report data from certain studies. The FDA findings, however, released near the end of the libel trial, were not admitted into evidence. See *id.* at 198-200.

²⁶⁵ See Penzi, *supra* note 261, at 224-25.

CONCLUSION

In light of *Irving*, it is tempting to believe that libel law in England provides more freedom to both parties. Irving was permitted to sue Lipstadt, but he ultimately lost. In the United States, plaintiffs who are unable to show actual malice may not even make it to trial due to summary judgment. In contrast, the English public rejoiced over the official denunciation of Irving as a racist and a liar.²⁶⁶

The English rule placing the burden on libel defendants can be justified on the grounds that publishers and writers like Lipstadt should be able to prove the truth of what they write. On the other hand, writers may choose not to publish certain newsworthy, true, and critical statements, because they are concerned about whether they will be able to prove that the statements are true. Moreover, libel plaintiffs such as Upjohn can bring and win suits contesting the publication of true stories because defendants do not always have the resources to obtain evidence to prove the truth. “The irony is that the law deters critical reporting of precisely those whose activities most directly affect legitimate public interest.”²⁶⁷ The *Irving* case illustrates this irony: after challenging Irving’s integrity on a matter of public debate, Deborah Lipstadt was only able to prove the truth of her statements through 2,000 pages of expert reports and over UK£3 million worth of legal expertise against a *pro se* plaintiff.

²⁶⁶ See, e.g., Dodd, *supra* note 223 (reporting that a spokesman for the Reform Synagogues of Great Britain called the ruling “a victory for 6 million voices that cannot speak for themselves”).

²⁶⁷ Vick & Macpherson, *supra* note 3, at 623-36.