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Strategic Lawsuits Against Public Participation

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Strategic Lawsuits Against Public Participation – "a *weapon to intimidate people who are exercising their constitutional rights, restrain public interest in advocacy and activism; and convert matters of public interest into technical private law disputes"*

Introduction / overview

SLAPP lawsuits are a strategic litigation tool where the aim is more often than not, not so much to win or get a remedy, as to silence or discourage criticism or opposition. They are seen as a weapon of deterrent by those who threaten or use them. SLAPPs seek to exploit the burdens of litigation that will be familiar to all litigation lawyers, including the risk of winning or losing inherent in any litigation, the time and costs thereof and the discovery obligations.

Most North American litigators will be familiar with the term SLAPP - "Strategic lawsuits against public participation" - but the concept is relatively new across the Atlantic in the UK and Europe. Lawyers there, as well as citizen groups and activists, need to be up to speed with what the term signifies, how such lawsuits are perceived, and how to respond to them.

This article will look briefly at the history of SLAPPs, starting with their origins in the US and the procedural "anti-SLAPP" devices that have been developed there to try and control them. It will then look at how awareness of SLAPP lawsuits has extended, and how they are now being identified in the UK and Europe. Finally, it will consider what is being done in Europe and the UK to counter and control them.

Identification - What is a SLAPP lawsuit?

It is hard to capture the salient features of SLAPPs, they often turn on the identification of a number of subjective features that may not be easily verifiable. For starters, a SLAPP suit is not necessarily one that is completely without merit. Seeking to identify such suits on that basis alone can be problematic. It is important therefore to see them in a wider context, that will often include, as a minimum, motivation and aims, and whether there is a disparity of power and resources[1].

While SLAPPs are often centred around defamation claims, that is by no means the sole cause of action that is deployed. Copyright, privacy, data protection, and various economic torts may also feature. They can include cases involving environmental/animal rights, civil/human rights, neighbourhood problems, housing and development. They may not be primarily directed against the media – they are often deployed against environmental organisations and to silence individuals speaking out about domestic violence and abuse.

[1] For an excellent popular description of SLAPPs its worth watching this HBO video explanation by John Oliver, which is available on YouTube at https://www.youtube.com/watch?v=UN8bJb8biZU; See too the online tool from Index on Censorship: *'Am I facing a Slapps case?'* www.indexoncensorship.org/am-i-facing-a-slapps-lawsuit/

According to the international activists' and lawyers' task force Protect the Protest, the tell-tale signs of a SLAPP law suit[2] are that it:

- targets forms of free speech,
- takes advantage of a power imbalance,
- threatens to bankrupt the defendant,
- attempts to remain in court as long as possible,
- is part of a usually wider public relations offensive designed to bully critics, and follows a pattern of serial bullying, as the plaintiff usually has a history of using SLAPPs or threatening legal action in order to scare critics into silence.

Background and history

The origins of SLAPP lawsuits lie in concerns which developed around 50 years ago in the United States - a country where strong free speech rights are embodied in the First Amendment to the US Constitution[3] - over what were seen as attacks on citizen speech – from consumer complaints to environmental protests – which resulted in its suppression. Starting from the fairly narrow confines of protecting the right of a citizen to speak to an elected representative, to the dissatisfied citizen speaking out more widely, through to consumer protests and boycotts and pamphlets and the media reporting of campaigns, the term SLAPP became commonplace, and with it, a need to limit and control such suits.

It is not only freedom of speech and the press that is protected by the First Amendment. The right to petition the Government for a redress of grievances is also important and early challenges to SLAPPs in the US courts were based as much on that as on pure free speech rights. The "petition" clause has been said by the U.S. Supreme Court to be one of the "fundamental principles of liberty and justice" and "among the most precious of the liberties guaranteed by the Bill of Rights"[4]. The Colorado state supreme court in dismissing a SLAPP lawsuit in 1984, summed it up thus:

> "*Citizen access to . . . government constitutes one of the foundations upon which our republican form of government is premised. In a representative democracy, government acts on behalf of the people, and effective representation depends to a large extent upon the ability of the people to make their wishes known to government officials acting on their behalf.*"[5]

But it should not be thought that this right to petition is a peculiarly US right. In fact, it has been traced by US academics back over 1000 years in English law to the 10th century

[2] For a more recent European approach, see the essay "The increasing rise, and impact, of SLAPPs: Strategic Lawsuits Against Public Participation" by Nik Williams, Laurens Hueting and Paulina Milewska from the European Centre for Press and Media Freedom (ECPMF), published on 9 December 2020 as part of a wider FPC publication under the 'Unsafe for Scrutiny' project - https://fpc.org.uk/the-increasing-rise-and-impact-of-slappsstrategic-lawsuits-against-public-participation/

[3] During the ratification process for the US Constitution by individual states – the last state ratified it in May 1790 – concerns emerged about a lack of enumeration of basic civil rights. Recommendations for amendments to it were made: James Madison introduced 12 amendments in 1789. The first of those amendments provided that Congress should make no law respecting an establishment of religion or prohibiting its free exercise. It protects freedom of speech, the press, assembly, and the right to petition the Government for a redress of grievances. It was adopted on December 15, 179 as one of the ten amendments that constitute what is known as the Bill of Rights

[4] DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 222 (1967)

[5] Protect Our Mountain Environment Inc. v. District Court, 677 P.2d 1361, 1364 (Colo. 1984)

"Andover Code" of Edgar the Peaceful and to the Magna Carta in 1215[6]. It has also become one of the "human rights" recognised by international law[7].

As early as 1975, US academics were writing about the problems of using the law to harass environmental protestors[8]. By the mid to late 1980s, two academics in particular – sociologist Penelope Canan and law professor George W. Pring - had identified and started applying the term SLAPP[9] to identify the political and judicial intimidation, harassment and threats directed against activitists, protestors and journalists across a wide range of fields. Such lawsuits were said to have a "chilling" effect and to stifle speech, criticism and opposition. In his seminal 1989 article, "SLAPPs: Strategic Lawsuits against Public Participation"[10], Pring wrote:

> "*Americans are being sued for speaking out politically. The targets are typically not extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making. The cases are not isolated or localized aberrations, but are found in every state, every government level, every type of political action, and every public issue of consequence. There is no dearth of victims: in the last two decades, thousands of citizens have been sued into silence. What is this new (and, we believe, growing) litigation phenomenon? The civil lawsuits we are studying at the University of Denver's Political Litigation Project are all filed against non-governmental individuals and groups for having communicated their views to a government body or official on an issue of some public interest. We call the suits "SLAPPs," for Strategic Lawsuits Against Public Participation. We have found that this accurately captures both their causation and their consequences. SLAPPs are frighteningly common and easy to stimulate.*"

He said that SLAPPs struck at

> "*a wide variety of traditional American political activities. We have found people sued for reporting violations of law, writing to government officials, attending public hearings, testifying before government bodies, circulating petitions for signature, lobbying for legislation, campaigning in initiative or referendum elections, filing agency protests or appeals, being parties in law-reform lawsuits, and engaging in peaceful boycotts and demonstrations. Yet these are among the most important political rights citizens have."*
>
> "*The apparent goal of SLAPPs is to stop citizens from exercising their political rights or to punish them for having done so. SLAPPs send a clear message: that there is a "price" for speaking out politically. The price is a multimillion-dollar lawsuit and the expenses, lost resources, and emotional stress such litigation brings.*"

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[6] D. Smith, The Right to Petition for Redress of Grievances: Constitutional Development and Interpretations 12 (Texas Tech Univ. 1971). See too Sources of English Constitutional History (C Stephenson & F.G. Marcham,1937, rev. Ed. 1972); E. Dumbauld, The Bill of Rights and What It Means Today (1957); B. Schwartz, The Bill of Rights: A Documentary History (1971)

[7] See for example, Art 21(1) of the Universal Declaration of Human Rights, 1948); Art 25 of the International Covenant on Civil and Political Rights, (1966)

[8] Note, Counterclaim and Countersuit Harassment of Private Environmental Plaintiffs: The Problem, Its Implications, and Proposed Solutions, 74 Mich. L. Rev 106 (1975)

[9] Canan & Pring, Strategic Lawsuits Against Public Participation, 35 Soc. Probs. 506 (1988); Canan & Pring, Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches, 22 Law & Society Rev. 385 (1988); Pring, Intimidation Suits Against Citizens: A Risk for Public-Policy Advocates, 7 Nat'l L. J. 16 (July 22, 1985);

[10] 7 Pace Environmental Law Review, 3 (1989), published in conjunction with Canan, The SLAPP from a Sociological Perspective, 7 Pace Environmental Law Review, 23 (1989).

To qualify as a SLAPP for Pring and Canan's seminal research, a case had to be

"1. a civil complaint or counterclaim (for monetary damages or injunction),
2. filed against non-governmental individuals and/or groups,
3. because of their communications to a government body, official, or the electorate,
4. on an issue of some public interest or concern."

The first, albeit quite narrow in scope, US anti-SLAPP law was inroduced in Washington in 1989. 1993 saw the introduction of a much broader California anti-SLAPP law and, by 2010, many US states had introduced quite broad-based anti-SLAPP laws.

In Canada, Quebec and Ontario have had anti-SLAPP legislation for several years and, in 2019, British Columbia followed suit, passing an anti-SLAPP Act to "protect free expression by preventing wealthy individuals and large companies from using their superior resources to sue journalists, activists or other critics for the purposes of intimidating or silencing them".

In *1704604 Ontario Ltd v Pointes Protection Association*[11]**,** an appeal heard in November 2019 in a matter dealing with the environmental impact of a private development, the Supreme Court of Canada dismissed the developer's suit as a SLAPP suit. The developers had sued and claimed damages for CAD$6 million for defamation and breach of contract. The court emphasised the public interest in SLAPP legislation, noting that the case was "*about what happens when individuals and organisations use litigation as a tool to quell such expression, which, in turn quells participation and engagement in matters of public interest."* The court in *Pointes* approved the principles established and enunciated in *Grant v Torstar Corp***.**[12] in determining what constitutes "*a matter of public interest."* Public interest is to be given a broad interpretation. It is irrelevant at the threshold stage whether "*the expression is desirable and deleterious, valuable or vexatious, or whether it helps or hampers the public interest … the question is only whether the expression pertains to a matter of public interest, defined broadly.* "Once a defendant demonstrates the threshold test that the proceedings arise from an expression relating to a matter of public interest, on a balance of probabilities, then the onus shifts on the plaintiff to show why proceedings should not be dismissed. The plaintiff is then required to clear what is referred to as the "*merits based hurdle*" and the "*public interest hurdle*". Simply put, the court held that a plaintiff claiming defamation must address the merits of the claim and demonstrate that the public interest in vindicating that claim outweighs the public interest in protecting the defendant's freedom of expression. The approach adopted by the Canadian Supreme Court demonstrated that speech made in connection with any issue of public interest or concern has a high level of protection. The Supreme Court confirmed in its ruling that the court will not hear SLAPP style lawsuits unless the plaintiff can pass a rigorous test to show that it suffered real harm that outweighs the public interest in the expression of those views.

Thirty-three states in the US, plus DC, now have anti-SLAPP laws. There is, however, no federal anti-SLAPP law. There has been increasing pressure to get a federal act passed, particularly because the position in federal – as opposed to state – courts, remains unclear due to conflicting judicial decisions.

Between 2018 and 2020, the Uniform Law Commission had a committee looking at SLAPPS across US states and interest groups. It developed a Uniform Law – the Uniform Public Expression Protection Act of July 2020 - which can serve as a model for anti-SLAPP laws across the US. In November 2020, the state of New York updated its anti-SLAPP law, so as to significantly increase the protection available to defendants in lawsuits based on the exercise of free speech rights.

[11] [2020] SCC 22
[12] [2009] 3 S.C.R. 640

The procedural defence tools developed by North American anti-SLAPP laws

North American anti-SLAPP laws have focused primarily on the development of procedural mechanisms which allow a court to dismiss early on, abusive or frivolous claims that otherwise could have required costly, time-consuming, and intrusive discovery. In those US states that have anti-SLAPP laws, once a defendant can show that a lawsuit is an action based on their public communications or other free speech conduct, a number of mechanisms can be deployed. These include an expedited / fast track trial process, which allows a defendant to issue a dismissal motion and avoid a full trial process; an enhanced and shifted burden of proof; speedy judgment and a speedy appeal route. These expedited processes are often accompanied by an automatic stay of discovery and mandatory fee-shifting, whereby if a defendant wins a motion to dismiss a SLAPP suit, it will have its costs and attorney's fees paid by the plaintiff/claimant.

SLAPPs – a brief international spotlight: South Africa

SLAPP lawsuits are not purely a North American concept or problem. Taking South Africa as a single example[13], in 2005, a developer, Wraypex, developed a golf complex, which included a golf course, a number of residential dwellings and a boutique hotel, on land that had previously been farms. Wraypex brought libel proceedings against four defendants, who were all members of a local nature conservancy, and were private land owners who lived within the conservancy. Wraypex brought suits over statements they had made to either government officials designated to receive information about the development, or to other members of the conservancy. None of the statements complained of were made to the press. It took 5 years, but in 2010, a judge struck out the defamation suits[14], holding them to be “vexatious litigation”. The Judge said Wraypex’s action was "purposeless from an economic point of view" and that even if the company had won its case, it could not in good faith have expected more than an "infinitesimal fraction" of the R170m it claimed.

More recently, in February 2021, the Western Cape High Court issued a judgment against an Australian mining company, Mineral Resources Commodities and its local subsidiary, and their directors in a defamation case they brought against three environmental attorneys (including over remarks presented at a lecture at the Summer School at University of Cape Town) and three community activists (who had criticised the companies in books and radio interviews), where damages amounting to a total amount of over £600,00 were being claimed. The defendants were being sued over alleged defamatory statements made in relation to the claimant’s current and proposed operations on the West Coast and Eastern Cape. The operations on the Wild Coast related to attempts by MRC to mine a long stretch of beach land, provoking much public debate and community activism over the potentially permanent destruction of fauna and flora versus the short term benefits of titanium mining[15].

They defendants argued that the defamation proceedings were an abuse of court process and should not be permitted since they were aimed at silencing public criticism regarding environmental issues and were using the court process to achieve an improper

[13] For more detailed articles on SLAPPs in South Africa see e.g. Murombo, T. 2008. Beyond Public Participation: The disconnection between South Africa’s new Environmental Impact Assessment (EIA) law and sustainable development. Potchefstroom Electronic Law Journal 11(3):107-136; Murombo, T and Valentine, H. 2011. SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa. South African Journal on Human Rights 27:82-116.

[14] Wraypex Pty Ltd v Barnes and others: https://leap.unep.org/countries/za/national-case-law/wraypex-pty-ltd-v-barnes-and-others-0

[15] See *Mineral Sands Resources (Pty) Ltd v Reddell*, No place for SLAPPs in South Africa – Odette Geldenhuys and Dario Milo, 23 February 2021, INFORRM blog - https://inforrm.org/2021/02/23/case-law-south-africa-mineral-sands-resources-pty-ltd-v-reddell-no-place-for-slapps-in-south-africa-odette-geldenhuys-and-dario-milo/

end and cause them financial or other prejudice in order to silence them. This, they argued, violated the right to freedom of expression. They said that the lawsuit was being brought for the ulterior purpose of discouraging, censoring, intimidating and silencing the defendants, members of civil society, the general public and the media in relation to public criticism of the company.

The case focused on whether South African law recognised a SLAPP defence (the case did not deal with whether such a defence actually applied on the merits of the case). The Judge noted that SLAPP cases were usually disguised as ordinary civil claims, often defamation claims, and were designed to discourage others from speaking on issues of public importance. "*SLAPPs are designed to turn the justice system into a weapon to intimidate people who are exercising their constitutional rights, restrain public interest in advocacy and activism; and convert matters of public interest into technical private law disputes*", the Judge said, holding that

> *"Corporations should not be allowed to weaponise our legal system against the ordinary citizen and activists in order to intimidate and silence them. It appears that the defamation suit is not genuine and* bona fide*, but merely a pretext with the only purpose to silence its opponents and critics. Litigation that is not aimed at vindicating legitimate rights, but is part of a broad and purposeful strategy to intimidate, distract and silence public criticism, constitutes an improper use of the judicial process and is vexatious. The improper use and abuse of the judicial process interferes with due administration of justice and undermines fundamental notions of justice and the integrity of our judicial process. SLAPP suits constitute an abuse of process, and is inconsistent with our constitutional values and scheme."*

The Judge found that the mining companies were "*claiming inexplicably exorbitant amounts for damages, which the defendants can ill-afford. They instituted these proceedings fully aware of the fact that there is no realistic prospect of recovering the damages they seek. This action will without a doubt place an economic burden on the defendants*". This was exacerbated, the Judge found, by the fact that "public participation is a key component in environmental activism and the chilling effect of a SLAPP can be detrimental to the enforcement of environmental rights and land use decisions". She concluded that the case had the classic features of a SLAPP case – "the DNA" matched. The mining corporations' technical objection to the defence being raised was dismissed, leaving the defendants free to argue that the SLAPP defence applies on the merits at the next stage of the case.

The gathering storm in Europe and the UK

In the US and Canada, as well as in South Africa, the lead against SLAPPs was taken by environmental activists, who challenged the use of such lawsuits and argued for procedural safeguards. Ultimately, it was the coming together of a large body of disparate interests, lawyers, community and environmental activists, politicians and the media, that saw real change achieved. There are now similar, albeit nascent, movements in Europe and the UK.

Unsurprisingly, given the more nuanced approach of the European free speech right in Article 10 ECHR, and in particular the need to balance the rights and responsibilities of others, there has generally been a much more limited appreciation of the right of public participation in the political arena in Europe than in the US and hence a much slower process of identifying the use of SLAPP lawsuits.

In the case of *McDonald's Corp. v Steel and Morris*[16] (the "McLibel" case), two activists distributed leaflets on "What's wrong with McDonalds?" accusing the company of

[16] (1997) EWHC 366

"McCancer, McDisease and McGreed". The allegations related to the negative health consequences of food, bad working conditions, exploitation of children and deforestation. The original case before the UK courts lasted many years. The McLibel case is now widely regarded as a classic SLAPP, because McDonald's aim was seen as one of silencing its critics with a heavy-handed claim for damages that they could never have expected to recover from the defendants[17].

Notwithstanding the absence of legislative SLAPP interventions in Europe, the European Court of Human Rights has considered the public interest as a decisive consideration in favour of freedom of expression. In *Handyside v United Kingdom*[18] the ECtHR stated that a democratic society should tolerate ideas that "*offend, shock, or disturb the State or any sector of the population."* Furthermore, in *Steel and Morris v United Kingdom*[19], the ECtHR held that in a democratic society even small and informal campaign groups should be enabled to contribute to public debate on matters of general public interest, such as health and the environment.

In France in 2018, Greenpeace, (who were of course well familiar with the use of SLAPP lawsuits because of actions against them in the US and Canada, for example over their challenges to some big infrastructure projects and developments such as the Dakota Access Pipeline) found themselves on the receiving end, along with a number of other NGOs, campaigners and journalists, of lawsuits from the Bollore Group over their critical reporting of and activism around the companies' actions in Cameroon[20]. One of the lawsuits, against TV Channel France, sought 50 million Euro damages. Out of this legal action, came a small French based anti-SLAPP protest group called "On ne se taira pas" – "we will not be silent". Similar anecdotal stories of lawsuits began to emerge from other European countries - including Italy, Serbia and Croatia.

Then, on 16 October 2017, Maltese journalist Daphne Caruana Galizia, was murdered in Malta by a car bomb; at time of her death she was facing more than 40 civil and criminal defamation suits, a number of which were threatened by corporate entities, businessmen and politicians; legal action was threatened in a number of suits against her, not in Malta but in the UK and US[21]. One law suit against her was commenced in Arizona by Pilatus Bank, which demanded $40 million damages (there is apparently a damages cap of €12,000 in Malta).

On the back of this, NGOs, campaigners and speech activists across the UK and Europe started to coordinate and talk. In 2018, Greenpeace, in conjunction with the University of Amsterdam, carried out some SLAPP research[22]. Looking at 130 cases across Europe, they found a number of common features, including

- That defamation was most commonly used, particularly against Journalist's investigating corruption or exposing corporate abuses
- In a number of countries (for example UK, France, Ireland, Malta,) there were problems with the use of libel especially around the burden of proof, where the burden was on the defence, and where the costs of fighting a case were very high;

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[17] See the paper by Fiona Donson: "Libel Cases and Public Debate – Some Reflections on whether Europe Should be Concerned about SLAPPs," RECIEL 19, no. 1 (2010): 84-85.
[18] Case No. 5493/72,
[19] (2005) 41 EHRR 22
[20] Monitor Tracking Civic Space, Civicus, "SLAPP Lawsuits threaten critical voices in France," 9 March 2018, https://monitor.civicus.org/newsfeed/2018/03/09/slapp-lawsuits-threaten-criticalvoices-france/
[21] (Juliette Garside, "Murdered Maltese reporter faced threat of libel action in UK," The Guardian, 1 June 2018, https://www.theguardian.com/world/2018/jun/01/murdered-maltesereporter-faced-threat-of-libel-action-in-uk)
[22]https://www.umweltinstitut.org/fileadmin/Mediapool/Downloads/01_Themen/05_Landwirtschaft/Pestizide/Suedtirol/University_of_Amsterdam_GPI_Research_SLAPPs_.pdf

- An absence of procedural routes to challenge [in Italy, Plaintiffs can get anonymity and the average case took 8 years [the OECD average is 2 years], but more than 6,000 or two-thirds of defamation lawsuits filed against journalists and media outlets annually are eventually dismissed as meritless by a judge
- In Croatia, of over 1,000 libel cases brought against media organisations or journalists, over 88% eventually ruled in favour of the defendant
- In Italy, Malta, Poland, a lot of cases were brought by politicians
- A number of countries retain laws making defamation a criminal offence.

More critical reports about the use of SLAPPS in Europe began to emerge[23] as did political interest and engagement. In April 2018, a cross-party group of MEPs called upon the European Commission to initiate anti-SLAPP legislation with a view to "give investigative journalists and media groups the power to request to rapidly dismiss 'vexatious lawsuits'". On 19 April 2018, the European Parliament passed a resolution on the "Protection of investigative journalists in Europe: the case of Slovak journalist Ján Kuciak and Martina Kušnírová". One of the points of the resolution called on the European Commission and the EU Member States to "present legislative or non-legislative proposals for the protection of journalists in the EU who are regularly subject to lawsuits intended to censor their work or intimidate them, including pan-European anti-SLAPP rules".

On 12 November 2019, 3 MEPs (David Casa, Stelios Kouloglu and Viola von Cramon) sponsored an expert talk on SLAPPS at the European Parliament in Brussels. In February 2020, 44 participants from across Europe met in Amsterdam to discuss the problem of SLAPPS and what to do about them. A working group was set up, and in June, a policy paper was produced.

On the 27 October, the Council of Europe Commissioner for Human Rights, Dunja Mijatović issued a Human Rights Comment[24] on SLAPPs. Her Annual Report highlighted the use of "groundless legal actions" against journalists and a number of public watchdogs, activists and campaigners. She argued that a comprehensive response was needed to effectively counter SLAPPs:

- Preventing the filing of SLAPPs by allowing the early dismissal of such suits (together with an awareness raising exercise among judges and prosecutors);
- Introducing measures to punish abuse, particularly by reversing the costs of proceedings; and
- Minimising the consequences of SLAPPs by giving practical support to those who are sued.

On 25 November 2020, the European Parliament passed a resolution "on strengthening media freedom" which also condemned SLAPPs and urged the Commission to take action against their use. On 1 December 2020, a broad network of NGOs published a proposal for a model EU anti-SLAPP Directive[25]: On 3 December 2020, the Commission published its European Action Plan on Democracy, which included an intention to present an initiative to protect journalists and civil society against SLAPPs in 2021. Finally, in its Work Programme 2021, the Commission announced action "to protect journalists and civil society against strategic lawsuits against public participation" in the form of an initiative

[23] European Union Fundamental Rights Agency (FRA) (2018) "Challenges facing civil society organisations working on human rights in the EU", January. (https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-challengesfacing-civil-society_en.pdf); ECPMF, SLAPPs: Strategic Lawsuits Against Public Participation", Resource Centre on Media Freedom in Europe, Special dossier, 19 December 2019, (https://www.rcmediafreedom.eu/Dossiers/SLAPPs-Strategic-Lawsuits-Against-PublicParticipation);

[24] Dunja Mijatović, Time to take action against SLAPPs, 27 October 2020, https://www.coe.int/en/web/commissioner/-/time-to-takeaction-againstslapps

[25] https://www.greenpeace.org/eu-unit/issues/democracy-europe/45318/protecting-public-watchdogs-across-the-eu-greenpeaces-proposal-for-an-eu-anti-slapp-law/ ; https://www.ecpmf.eu/a-proposal-for-an-eu-anti-slapp-law/

against abusive litigation targeting journalists and civil society (legislative or non-legislative), in the last quarter of 2021. This is one of the priorities of the Action Plan adopted by the Commission on 2 December 2020.

A coalition of non-governmental organisations from across Europe are due in the next few weeks to launch a Coalition Against SLAPPs in Europe (CASE) in recognition of the threat posed to public watchdogs by SLAPPs.

The English context

SLAPPs have only relatively recently entered the English lexicon. That is not to say that such lawsuits have not existed in the past, but that there has been a slowness in attributing the SLAPP label to them. In addition to the *McLibel* case referred to above, in the late 1980s there were a number of libel actions that might now be seen as SLAPPs; for example, a number of libel actions were threatened and brought by the waste incinerator company Rechem International against local individuals, academics and media who reported on or criticized their waste incineration plant at Pontypool. ReChem were importing toxic waste for incineration at the plant and there was a live issue as to whether it was the source of PCB and associated dioxin contamination.

As the local MP, Paul Murphy told the Commons in July 1992[26] in a debate on Toxic Waste disposal

> "*as long as a sword of Damocles in the form of the threat of law suits hangs over the heads of the council and local residents, it is pointless for them to serve as members of a liaison committee. The company is trigger-happy when it comes to the courts. Let me list just some of those who have been sued by ReChem simply for speaking their minds on an issue of great significance to the people of Wales: David Powell of STEAM—that case is still under investigation; the former Member of Parliament for Bootle, Mr. Allan Roberts, who was threatened with the law just months before he died; Red Dragon Radio; the Western Mail; Greenpeace; The Guardian; The Daily Star; the BBC. All of them have been taken to court for daring to express doubts about the incinerator and saying that there should be a public inquiry into what is happening at ReChem.*"

The late 1990s saw increasing use of the 1997 Protection from Harassment Act and the deployment of civil injunctions against environmental protestors[27]. 2009 saw another case that might well be viewed as a SLAPP case today, namely *BCA v Simon Singh*[28]. Concerns generally about the way libel was being used in England and Wales to supress scientific and other criticism and review, saw the emergence of the libel reform campaign, which ultimately led to the enactment of the Defamation Act 2013, which introduced some level of rebalancing, particularly with regard to the ability of big corporates to bring libel claims. Section 1 of the 2013 Act introduced a threshold requirement for corporates of substantial financial harm. Section 1 appears to offer a pretty effective check on corporate libel claims in England and Wales and there is a strong likelihood that a case such as *McLibel* would not get anywhere today[29].

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[26] HC Deb 10 July 1992 vol 211 cc717
https://api.parliament.uk/historic-hansard/commons/1992/jul/10/toxic-waste-disposal-wales

[27] see for example the action taken against campaigners opposed to genetically modified crops in *Monsanto v Tilly* 1998; and in 2007 the case brought by the *British Airports Authority* against protestors over Heathrow expansion

[28] https://www.5rb.com/case/british-chiropractic-association-v-singh-ca/

[29] https://inforrm.org/2020/11/17/corporate-claimants-in-libel-cases-part-1-the-case-for-reform-guy-vassall-adams-qc/; https://inforrm.org/2020/11/18/corporate-claimants-in-libel-part-2-the-defamation-act-2013-and-its-impact-guy-vassall-adams-qc/

In addition, in terms of defamation claims (although not, it should be noted, claims focused on privacy or data protection), Section 8 of the 1996 Defamation Act provides for summary disposal if a case has "no realistic prospect of success and there is no reason why it should be tried".

In England and Wales, in additional to the specific legal checks that exist for defamation claims, the Civil Procedure Rules also offer some potential recourse for defendants facing potential SLAPP suits. CPR Rule 1 sets out what is known as the "overriding objective" which states that courts should deal with cases justly and at proportionate cost. This includes, so far as is practicable, ensuring that the parties are on an equal footing. CPR Rule 3.4 also enables a court to strike out the whole or part of a statement of case which discloses no reasonable grounds for bringing … a claim (rule 3.4(2)(a)), or which is an abuse of the process of the court or otherwise likely to obstruct the just disposal of the proceedings (rule 3.4(2)(b)).

Finally, in England and Wales, the deployment of the "no real and substantial tort", "not worth the candle" approach in a line of cases from *Schellenberg v BBC*, *Wallis v Valentine* and *Jameel v Dow Jones & Co*[30] offers a further potential route of challenge to SLAPP lawsuits, not least because it appears that this principle is not solely limited to defamation claims

Schellenberg was a defamation action which was almost identical to two others which the Claimant had already settled on disadvantageous terms. The Judge regarded it as necessary to apply the CPR overriding objective, (even, as was then the case, in the context of litigation where there was a right to trial by jury). That required him to have regard to proportionality, and the possible benefits which might accrue, so as to render the expenditure of tens of thousands of pounds potentially worthwhile. He found that the requirement of proportionality in the overriding objective obliged him to consider whether "the game is worth the candle":

> *"I am afraid I cannot accept that there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources."*

Jameel was a defamation case in which the Claimant accepted that there had been minimal publication of the article complained of within the jurisdiction. Lord Phillips MR, giving the judgment of the court, observed that even if the Claimant succeeded in the action and was awarded a small amount of damages, it could perhaps have been said that he would have achieved vindication for the damage done to his reputation in this country, but both the damage and the vindication would have been minimal:

> *[69] …. The cost of the exercise will have been out of all proportion to what has been achieved. The game will not merely not have been worth the candle, it will not have been worth the wick. [70] If we were considering an application to set aside permission to serve these proceedings out of the jurisdiction we would allow that application on the basis that the five publications that had taken place in this jurisdiction did not, individually or collectively, amount to a real and substantial tort. Jurisdiction is no longer in issue, but, subject to the effect of the claim for an injunction that we have yet to consider, we consider for precisely the same reason that it would not be right to permit this action to proceed. It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake."*

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[30] *Schellenberg v BBC* [2000] EMLR 296; Wallis v Valentine [2002] EWCA Civ 1034; *Jameel* v *Dow Jones & Co. Inc*. [2005] EWCA Civ 75

There appears to be a line of authority outside the pure defamation sphere that the court has a duty to prevent the misuse of procedure in a way which would be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute[31].

Conclusion

There are moves afoot in Europe and the UK to try and introduce and deploy some of the procedural safeguards that have been introduced against SLAPP suits in the US and Canada. One of the most basic solutions is improving courts handling of SLAPPs by way of the introduction of a harmonised set of procedural rules to stop cross border forum shopping and to introduce consistent and proportionate procedural protections so as to limit the availability of SLAPPs against journalists, activists and citizens. Academics and lawyers have been arguing for the harmonising of the rules of jurisdiction known as Rome II in SLAPP cases[32], such that jurisdiction is grounded in the domicile of the defendant in matters such as defamation. This would remove the facility for pursuers to abuse their ability to choose a court or courts which have little connection to the dispute. A second legislative solution is to elevate certain categories of individuals and organisations to the status of "public figures." Which would ostensibly discourage their filing of a libel or slander suit, because they would be required to bear the higher burden of proving "actual malice" on the part of their opponents.

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[31] Lord Diplock in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, referred to the court's duty to prevent the misuse of procedure in a way which would be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute. *Sullivan v Bristol Film Studios Ltd* [2012] EWCA Civ 570; [2012] EMLR 27 and *Lilley v DMG Events Ltd* [2014] EWHC 610 (IPEC) both concerned copyright claims of low value. In *Citation plc v Ellis Whittam Ltd* [2013] EWCA Civ 155, which was a claim in slander and malicious falsehood based on words alleged to have been spoken by an employee of the Defendant about the Claimant, its competitor. The only issue of importance to the Claimant was an injunction, the critical question being whether there was an arguable case that there was a real risk of repetition of the alleged slander. The Defendant had offered an undertaking to use reasonable endeavours to ensure that there was no repetition. The court said it would not have been proportionate to allow the claim to proceed to trial. In IG Index Ltd -v- Cloete [2015] EWHC 3698, HHJ Richard Parkes QC struck out a breach of confidence/contract action on the grounds that the Claimant had nothing to gain.

[32] See the paper entitled "PROTECTING PUBLIC WATCHDOGS ACROSS THE EU: A PROPOSAL FOR AN EU ANTI-SLAPP LAW" authored by an expert working group composed of dr. Linda Maria Ravo, dr. Justin Borg-Barthet, and Prof. dr. Xandra Kramer, available at https://www.article19.org/wp-content/uploads/2020/12/Anti_SLAPP_Model_Directive-2-1.pdf