

Reading the Riot Act to the Powerful: Strategic Lawsuits Against Public Participation

by Joseph Lewin

Summary

The UK Government has announced its readiness to introduce legislative reform aimed at countering the recent surge in a perceived form of tactical libel action, known in the press as “Strategic Lawsuits Against Public Participation”, or “**SLAPPs**”.

What are SLAPPs?

SLAPPs are tactical legal actions commenced by influential and powerful persons such as state actors or private oligarchs. The objective of this litigation is to stifle unwanted public criticism of, or investigation into, powerful public figures. Targets will usually include journalists, activists and academics.

SLAPPs generally take the form of defamation claims which are threatened or brought before the English courts. These actions include claims to extensive damages for reputational harm and indemnities for legal fees. Although mostly associated with defamation claims, SLAPPs can be founded upon other causes of action, such as alleged data protection claims, privacy claims and other torts.

The jurisdiction of England and Wales has a reputation for being claimant-friendly in its treatment of defamation cases; under English law, the burden of proof is effectively shifted to the Defendant, who is required to either establish that a potentially defamatory statement is true or otherwise show that another legal defence can be relied upon.

Despite there being a general perception that these claims can be unmeritorious, SLAPPs have operated as an effective tool to control the public narrative: the threat of financial ruin (with extensive legal fees and claims to damages), and reputational / personal harm, have given SLAPPs a reputation of ‘bullying’ investigators and journalists into silence. Claims can also be clustered together, and / or brought across jurisdictions to bolster their power.

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Claimants in SLAPP actions often have little or no interest in the merits of the claim itself, or indeed an intention to proceed to trial. Instead, the threat of litigation is intended to quickly shut down unwanted discussion or publication before the matter reaches the steps of the courtroom.

The risks posed by SLAPPs

SLAPPs can have a chilling effect on investigative journalism, academic research and whistle-blowing activity. In aggressively litigating against potentially sensitive investigations or, in some cases, mere alternative opinions – often via a continuous chain of threatening legal correspondence – claimants can potentially shield themselves from exposure to damaging revelations, or even challenges to convenient but false narratives.

Indeed, given that few private individuals or journalists have the resources to fight a determined and well-funded claimant through to trial, in the majority of cases SLAPPs successfully achieve their intended aim of silencing the potential defendant.

SLAPPs have been viewed, at least in the press and popular media, as a legal tactic perpetuated by high net-worth individuals or oligarchs; particularly those from the Russia Federation and the Commonwealth of Independent States. As such, the use of SLAPPs has come under increasing scrutiny following the Russian invasion of Ukraine in February 2022. In the words of the current British Justice Secretary Dominic Raab: “*we won’t let those bankrolling Putin exploit the UK’s legal jurisdiction to muzzle their critics*”.

Proposed legislative reform

On 20 July 2022, the Ministry of Justice published a paper entitled “*Strategic Lawsuits Against Public Participation (SLAPPs): Government Response to the Call for Evidence*” (available [here](#)).

The report confirms that the Government intends to “*mov[e] decisively to stamp out SLAPPs*”. The proposed reform focuses on the introduction of a three-part test, designed to assist in the early dismissal of meritless claims.

Courts will be required to consider the following three questions:

1. Is the case against activity in the public interest?
2. If so, is there evidence of an abuse of process?
3. If so, does the case have sufficient merit?

As currently contemplated, the legislation will include a clear definition of “*public interest*” for the purposes of stage one, and an established set of common characteristics of SLAPPs to assist with stage two. Stage three will focus on whether there is at least a realistic prospect of success.

Notably, the test is not restricted to the defamation context (which, as noted above, is the claim most commonly associated with SLAPPs). Instead, it has purposefully been drafted widely enough to encompass other heads of action, such as privacy claims. As

discussed above, this move is necessary to encompass the range of contexts in which SLAPPs are commonly used.

The ability for targets of SLAPPs to obtain early dismissal on the basis of a clear legislative framework is an improvement to relying upon the heavily fact-specific and inconsistent case law; at present, this is the only way to achieve the same outcome.

Future costs reform

A common feature of SLAPPs – and one of the primary reasons for their success as an intimidating tactic – is the threat of mounting legal costs in defending a claim. Whilst high net-worth individuals and large corporations can afford to bankroll a meritless claim in the knowledge that it can be discontinued before the legal process is fully engaged, ordinary persons find it considerably more difficult.

The report accordingly proposes the future introduction of a *“formal costs protection regime...to shield SLAPPs Defendants from excessive costs risk, and enable unmeritorious claims to be properly defended”*.

Whilst the specific nature of any costs caps and scheme design will be explored in depth by the Civil Procedure Rule Committee, the report notes that, in the future, *“punitive damages may be a particularly appropriate reform measure in a SLAPPs context”*.

Further, whilst the *“precise levels of any default costs caps for SLAPPs”* will require further attention, the report states that the Government is provisionally persuaded *“that it might be sensible to invert the levels currently in the [Environmental Costs Protection Regime], with, for example, the default Defendant costs cap set at £5,000”*.

Any SLAPPs-related costs regime would be implemented through secondary legislation, once primary legislation establishing the above three-part test has been passed.

Conclusion

The proposed introduction of legislative reform to counter the risks posed by SLAPPs will be welcomed by current and prospective targets of these unmeritorious claims.

Simultaneously, the report serves notice on parties wishing to control the public discourse: the silencers may well become the silenced.