

Unsafe for Scrutiny Explainer:¹

Strategic Lawsuits against Public Participation (SLAPPs) and the impact on journalists

What are SLAPPs?²

Strategic lawsuits against public participation (SLAPPs) are vexatious legal actions that are taken not necessarily with the goal of winning in court, but which instead aim to intimidate, to induce fear, to tire and consume the financial and psychological resources of the target. The aim is to limit the spread of information and have a chilling effect on critical and dissenting voices.

SLAPPs are not defined aspects of law themselves. Instead, they can be characterised by the manner in which a range of laws concerning typically defamation, but also other torts, labour laws, privacy and data protection, are used by litigants to threaten parties into silence, either through the retraction of published public interest reporting (oftentimes coupled with extensive punitive threats) or the coerced commitment to not publish in the first place.

SLAPPs are initiated by influential elites, often state actors, business entities or powerful individuals. While their targets can include human rights defenders, civil society organisations, activists, academics and anyone else who expresses an opinion on a public matter that is uncomfortable for the particular elite, journalists are most frequently the subject of SLAPPs.

How do SLAPPs against journalists work?

As indicated above, the intention behind a SLAPP is not necessarily to take the investigative journalist or media outlet to court, where the facts of the matter will be presented. Rather it is to utilise the threat of usually lengthy and expensive legal action, which poses a significant financial threat, as a means to stop information being published or have it removed after publication.

One of the biggest issues with these types of vexatious legal threats is that it has, to date, been a largely hidden problem. Usually these threats are communicated through letters from lawyers marked 'private and confidential' and, if successful in achieving their aim, the public will never know. Moreover, these letters are not necessarily official 'pre-action' letters, but threaten potential future legal action, the grounds for which may hold little legal weight. There is a significant contrast in the ease by which lawyers can issue these out on behalf of their clients, and the difficulties faced by journalists, especially freelancers or small media outlets, to find the financial resources and legal expertise to respond.

The impact on journalists and broader media freedom

The threat of any legal action can have a significant impact on a journalist and/or media outlet regardless of whether or not it is taken to court. It can paralyse the journalist or media outlet's ability to continue working, even more so than other forms of threats and harassments, largely due to the high financial penalty, the significant amount of time and resources needed to respond and the stress it can cause. This is reflective of the high volume of potential legal challenges being received and the cumulative effect that they can have.

There is usually a strong power imbalance between those behind these legal threats, who are utilising this tactic to prevent further investigation into their potential wrong-doings, and the journalists who are on the receiving end. Even an initial letter can in itself be enough to intimidate journalists into self-censorship for fear of incurring expensive legal fees to seek advice and provide a response to such communication. It is also notable that those pursuing the media through the use of legal threats do not always limit themselves to these methods. There have been several examples of law firms being utilised in combination with a network of public relations consultants, corporate investigators and private protection agencies to harass journalists.

¹ This explainer was prepared by the FPC based upon research and findings as part of its 'Unsafe for Scrutiny' project, kindly supported by the JFJ.

² The definition of SLAPPs presented here is based upon 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-slapps-strategic-lawsuits-against-public-participation/>

SLAPPs and the United Kingdom

Vexatious legal threats are made against journalists and media outlets based in the UK, but the UK has been also identified as a leading international source of vexatious legal action against foreign media. There have been a growing number of foreign freelance journalists, and news outlets without staff and offices in the UK, that have reported receiving letters from London law firms acting on behalf of the people they are investigating. In its global survey of 63 investigative journalists working on financial crime and corruption in 41 countries, the FPC found last year that the UK is the leading international source of these threats

Part of the reason the UK remains an attractive jurisdiction for SLAPP actions is that it is seen as easier to win libel cases in than other parts of the world. This is largely because:

- The 'burden of proof' in a UK libel case is on the defendant – i.e. it is not up to the plaintiff to prove that the statement in question is false, rather the defendant must prove that the statement is true – which is often a far harder task than it might at first appear. It is the judges who decide 'legal meaning' that the journalists then have to prove.
- Fighting a defamation case in the UK is a lengthy and expensive process, with potential legal costs spiralling into the thousands if not millions – some of which will not be recoverable even if you win. Therefore, it is understandable why many, often cash-strapped, media outlets would rather comply with the demand to change or remove content than face legal action, even if they know what they have written is true.
- Despite legal reform in 2013 aimed at reducing the impact of libel tourism, it nevertheless holds that you do not have to be British or resident in the UK full time to bring a case. It is only necessary to demonstrate a connection that could establish your 'standing' – e.g. a home or business – and that the article in question was read in the UK. When looked at in this way, the bar for meeting the criteria can be considered quite low, taking into account that it is easy to purchase property in the UK but also effectively buy residency and eventually citizenship via investment visas.
- Due to the common practice in British journalism of offering a 'right to reply' to individuals mentioned in an article, these legal challenges can happen prior to publication. If successful, the public will be denied the right to know, not only about the information at question but even the fact that a legal challenge against the journalist or media outlet took place.

Further tightening of UK laws to reduce the possibility of libel tourism would be a welcome next step; however, it would not improve the situation for journalists and media outlets based in the UK. One potentially positive development, however, is that in 2019 the Supreme Court, the highest court in the UK, ruled that claimants must demonstrate that they have suffered 'serious harm' in order to bring a defamation case. This places an onus on claimants to produce evidence that their reputation has been 'seriously harmed', with profit-making entities required to show that they suffered serious financial loss. Nevertheless, it will be for judges to decide the merits of individual cases. Moreover, there is also no mechanism for early dismissal of potential vexatious cases, meaning journalists and/or media outlets still need to cover considerable pre-trial legal costs.

Examples of Cases Linked to the UK

Below are some examples of journalists who have been subject to vexatious legal threats. These include journalists based in the UK as well as foreign journalists who have been pursued through the UK court or received threats issued by UK law firms.

- **Clare Rewcastle Brown**, an independent UK journalist, was subject significant legal challenges as well as surveillance, smear campaigns and digital hacking, while investigating Malaysia's 1MDB corruption scandal. Her reporting led to the imprisonment of former Malaysian Prime Minister, Najib Razak, with the believed masterminded behind the scandal, businessman Jho Low, currently on the run from justice in Malaysia, Singapore and the US.³
- **Dan McCrum**, a UK reporter with The Financial Times, was subject to "furious online abuse, hacking, electronic eavesdropping, physical surveillance and some of London's most expensive lawyers" in the course of his reporting into Wirecard, a German financial technology firm. He noted that almost all the external professionals hired by the company to protect its reputation were based in London. His investigation brought to light what has been referred to as 'biggest accounting fraud case since the Enron scandal in 2011' and Wirecard's ultimate demise.⁴
- **Paul Radu**, an investigative reporter and co-founder of the Organised Crime and Corruption Project (OCCRP), was pursued through the UK Courts by an Azerbaijani politician, despite the fact that OCCRP's investigation was into his business dealings in Azerbaijan and Radu is a Romanian citizen. The case was ultimately discontinued in January 2020, with the articles at question kept online albeit with a disclaimer. However, this was only after almost two years of pre-trial proceedings costing OCCRP hundreds of thousands of dollars, even with pro/low-bono legal support, as well as significant time, effort and stress diverting them from other investigations.⁵
- **Daphne Caruana Galizia**, a Maltese investigative journalist, who at the time of her murder in October 2017, was facing 47 civil libel suits most of them brought by Maltese politicians and their business associates, which she described 'as an intimidation strategy as they retreat[ed] under siege' from her reporting into their corrupt practices. After her murder, Caruana Galizia's family accused the UK based law firm Mishcon de Reya of 'hounding' their mother.⁶

³ Clare Rewcastle Brown, A scandal of corruption and censorship: Uncovering the 1MDB case in Malaysia, 9 December 2020, <https://fpc.org.uk/a-scandal-of-corruption-and-censorship-uncovering-the-1mdb-case-in-malaysia/>, published as part of FPC's report, Unsafe for Scrutiny: How the misuse of the UK's financial and legal systems to facilitate corruption undermines the freedom and safety of investigative journalists around the world, December 2020 <https://fpc.org.uk/publications/unsafe-for-scrutiny-12-2020-publication/>

⁴ Dan McCrum, Wirecard and me: Dan McCrum on exposing a criminal enterprise: Intimidation, surveillance and conspiracy theories: inside the FT's five-year investigation of a billion-dollar fraud, 3 September 2020, <https://www.ft.com/content/745e34a1-0ca7-432c-b062-950c20e41f03>

⁵ Paul Radu, How to Successfully Defend Yourself in Her Majesty's Libel Courts, 26 February 2020, GIJN, <https://gijn.org/2020/02/26/how-to-successfully-defend-yourself-in-her-majestys-libel-courts/>

⁶ Susan Coughtrie, The UK as a key nexus for protecting media freedom and preventing corruption globally, 9 December 2020, <https://fpc.org.uk/the-uk-as-a-key-nexus-for-protecting-media-freedom-and-preventing-corruption-globally/>, published as part of FPC's report, Unsafe for Scrutiny, December 2020.

Efforts to address the issue of SLAPPs in Europe

Council of Europe

Several texts adopted at the Council of Europe, of which the UK is a member, also explicitly refer to the problem of SLAPPs and other forms of intimidating or vexatious litigation against journalists and media outlet, including the Committee of Ministers 2018 Recommendation on the roles and responsibilities of internet intermediaries and the 2012 Declaration on the desirability of international standards dealing with forum shopping in respect of defamation, to ensure freedom of expression.

In October 2020, Human Rights Commissioner Dunja Mijatović outlined a threefold approach she argues is needed as part of a comprehensive response to effectively counter SLAPPs:⁷

- Preventing the filing of SLAPPs by allowing the early dismissal of such suits. This should go hand in hand with an awareness raising exercise among judges and prosecutors, and proper implementation of the case-law of the European Court of Human Rights on defamation;
- 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.

Mijatović also pointed out that the European Court of Human Rights has already stressed that States are required to create a favourable environment for participation in public debate by all, enabling everyone to express their opinions and ideas without fear.

European Union

According to a recent study commissioned by the European Commission, SLAPPs are “increasingly used across EU member states, in an environment that is getting more and more hostile towards journalists, human rights defenders and various NGOs.”⁸ To address this gap in protection, a broad coalition of civil society organisations have been advocating for the EU to undertake a number of complimentary steps, including through the adoption of an EU Directive on SLAPPs.

On December 1st 2020, over 60+ non-governmental organisations from across Europe endorsed a Model EU Anti-SLAPP Directive.⁹ The European Commission has committed to “take action to protect journalists and civil society against strategic lawsuits against public participation” in its 2021 work programme.

⁷ Dunja Mijatović, Time to take action against SLAPPs, 27 October 2020, <https://www.coe.int/en/web/commissioner/-/time-to-takeaction-against-slapps>

⁸ Petra Bárd, Judit Bayer, Ngo Chun Luk and Lina Vosyliute, SLAPP in the EU context, 29 May 2020 https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf

⁹ Protecting Public Watchdogs Across The EU: A Proposal For An EU Anti-SLAPP Law, 01 December 2020, https://dq4n3btxmr8c9.cloudfront.net/files/zkecf9/Anti_SLAPP_Model_Directive.pdf

Additional resources on SLAPP:

- Foreign Policy Centre, The increasing rise, and impact, of SLAPPs: Strategic Lawsuits Against Public Participation, Nik Williams, Laurens Hueting and Paulina Milewska from the European Centre for Press and Media Freedom (ECPMF), December 2020 - <https://fpc.org.uk/the-increasing-rise-and-impact-of-slapps-strategic-lawsuits-against-public-participation/>
- The European Centre for Press and Media Freedom, SLAPP: the background of Strategic Lawsuits Against Public Participation, Sofia Verza, PhD candidate at the University of Perugia, <https://www.ecpmf.eu/slapp-the-background-of-strategic-lawsuits-against-public-participation/>
- EU-CITZEN: Academic Network on European Citizenship Rights, SLAPP in the EU context, Petra Bárd, Judit Bayer, Ngo Chun Luk and Lina Vosyliute, May 2020, https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf
- Index on Censorship, A gathering storm: the laws being used to silence the media, 2020, <https://www.indexoncensorship.org/campaigns/the-laws-being-used-to-silence-media/>
- Index on Censorship, The Impact of SLAPPs on Europe's Media, December 2020, <https://www.indexoncensorship.org/slapps-european-vexatious-legal-threats-actions-research-project/>
- Index on Censorship, Tool: Am I Facing A SLAPP Lawsuit?, <https://www.indexoncensorship.org/am-i-facing-a-slapps-lawsuit/>

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