

UK ANTI-SLAPP WG: PROPOSALS FOR PROCEDURAL REFORM
Judicial Guidance, Civil Procedural Reform, and a UK Anti-SLAPP Law

PRACTICE DIRECTIONS/JUDICIAL GUIDANCE

Judicial guidance should be used to help assist judges in the interpretation of existing measures, whether procedural protections under civil procedural rules or statutory mechanisms that exist to address SLAPPs. “Practice directions” give practical advice to judges on how to interpret the civil procedure rules (CPR) - while this is unique to England and Wales, the principles below apply to all UK jurisdictions:

- **Security for Costs/Caution for Expenses:** CPR 25.12 provides for limited circumstances in which security for costs can be issued. In a few instances, however, security for costs has been imposed on claimants as a sanction for misconduct, even where the test under 25.12 was not met.¹ In other cases, such as the lawsuit filed by Charles Taylor against the author of *The Mask of Anarchy*, security for costs has apparently been used as a means of testing the seriousness of a claim (in that case successfully, since the SLAPP was dismissed after Taylor was ordered to pay security for costs).² There has not as yet been any practice direction issued dealing with security for costs, and given the ad hoc way courts have responded to issues such as proportionality guidance should be issued on when security for costs could be used as an interim sanction, or as a means to test the seriousness of a claim.
- **Motion to Strike:** CPR 3.4 allows courts to strike out a claim not only if it discloses no reasonable grounds for bringing a claim, but also where the statement represents an “abuse of the court’s process”. A Practice Direction for such motions already exists, which explains that an abuse of process includes claims that are “vexatious, scurrilous or obviously ill-founded”. There is no established legal definition for vexatious (or indeed scurrilous), but in *Attorney General v Barker* Lord Bingham set out characteristics of ‘vexatious conduct’, including that ‘whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process by the court, meaning by that *a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process*’ [emphasis added]. One simple but potentially effective way to strengthen the use of 3.4 in relation to SLAPPs would be to incorporate Bingham’s criteria into the existing Practice Direction, thereby making clear that “vexatious” here includes SLAPPs.

RECOMMENDATIONS

1. The Practice Directions should be updated to include guidance on how security for costs and motions to strike should be applied in the context of SLAPPs.
2. Training should be offered by the Judicial College to judges across the UK on how to understand and respond to abuse of process in the context of SLAPPs.

OUTSTANDING QUESTIONS

1. To what extent do similar rules exist in Northern Ireland and Scotland that are not being applied consistently in the context of SLAPPs? What forms of guidance would be appropriate?
2. What other ways can judges be made more sensitive to the use of SLAPPs/SLAPP tactics and of the ways they can be tackled using existing judicial mechanisms?

¹ See *Alba Exotic Fruit Sh Pk v MSC Mediterranean Shipping Company S.A.* [2019]

² Stephen Ellis, *Face to face with England’s libel laws*, available at <https://journals.openedition.org/socio/568?lang=en>

CPR REFORM

Arguably, in the context of the procedural abuse engaged in by SLAPP litigants, much can be accomplished within the CPRC's mandate of ensuring "the civil justice system is accessible, fair and efficient" (s1 Civil Procedure Act 1997). The extent to which needed reform can be accommodated within the CPR, or within the framework of NI and Scottish procedural reform, needs to be further explored. While the following applies only to the rules stipulated within the CPR of England and Wales, however, the principles underpinning these recommendations should be understood as applying across the UK:

- **Summary judgement:** grounds for dismissal need to be significantly widened so as to allow abusive claims to be disposed of at the earliest stage in proceedings. One way this could be done would be to amend CPR 24.4 to require claims targeting public participation to meet a higher threshold, and to ensure such cases can be heard prior to any disclosure obligations: e.g.
 - (1) *The court may give summary judgement against a claimant or defendant on the whole of a claim or on a particular issue if -*
 - (a) *It considers that -*
 - (i) *The claimant has no real prospect of succeeding on the claim or issue; or*
 - (ii) *The claim targets acts of public participation and discloses no likely prospect of succeeding.*

A definition of "public participation" could then be included (see below).

- **The Courts Discretion as to Costs (CPR 44.2):** a claim may be meritorious under law but still be pursued using abusive SLAPP tactics: e.g. where proceedings are deliberately stretched out to harass and drain the resources of the defendant. A potentially straightforward way to provide for sanctions against SLAPPs that succeed on their merits would be to amend 44(4) to include a new basis for departing from the general rule. For example:
 - (1) *In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including -*
 - (a) *whether the claim targets acts of public participation, and is intended to have or will have the impact of chilling further acts of public participation*
- **Pre-Action Protocol for Claims Targeting Public Participation:** pre-action protocols set out the steps the court would normally expect parties to take before commencing proceedings for particular types of civil claims. This can be important in informing the court's approach to costs. A pre-action protocol governing claims against public participation should consist of:
 - A clear definition of "public participation", including "public interest" (see below)
 - A statement on the importance of protecting public participation rights, and a clear set of aims for protecting these rights and preventing abusive proceedings.
 - A note that this protocol is meant to complement rather than replace the Pre-Action Protocol for Media and Communications Claims, extending the expectation that parties pursue ADR to all claims concerning acts of public participation.
 - Requirements to reply to good-faith pre-publication letters enquiring on matters of public interest and, if a reasonable period is given, to engage in any fact-finding process before commencing civil proceedings.
 - A requirement to pursue a case in the small claims court for claims that are reasonably understood to be under £10,000
 - Potentially circumstances in which the use of SLAPPs could lead to the issuance of a civil restraint order, in line with CPR 3.11

RECOMMENDATIONS

1. The Civil Procedure Rules Committee should assess how the CPR can be updated to address the growing problem of SLAPPs, pursuant to sections 1 and 2 of the Civil Procedure Act 1997. This should entail a full consultation on potential anti-SLAPP reform to the CPR.
2. A Pre-Action Protocol should be issued to set out the steps the court would expect parties to take before commencing proceedings targeting acts of public participation, including an expectation that parties engage in good-faith with the right-to-reply process and pursue alternative dispute resolution (ADR) before commencing litigation.

OUTSTANDING QUESTIONS

1. How much of the SLAPP problem can be addressed within the framework of the civil procedure rules? In particular, to what extent can the grounds for dismissal be extended?
2. How else might procedural protections be extended to SLAPP victims through CPR reform?

ANTI-SLAPP LAW

The CPR Committee cannot create new law, and so anything that goes beyond the powers delegated under Sections 1 and 2 of the Civil Procedure Act 1997 must form the basis of a new law. The following are provisions that cannot be achieved through the above and should be included in a UK anti-SLAPP law.

- **Right to Public Participation:** the law should start by affirmatively recognising the right to public participation. This will reinforce the application of Articles 10 and 11 of the ECHR in the context of civil lawsuits and assist in the interpretation of defamation and civil procedural provisions. By clearly defining the scope of the right, this can also avoid overreach or abuse of the law. An example of how this could look like can be found below:

1 Purpose of this Act

The purpose of this law is to protect and promote public participation and to prevent the use of the courts to undermine the rights of individuals to participate in public debate on matters of public interest. Provisions in this act should be interpreted so as to advance this purpose and accord special protection to the right to public participation, in line with Articles 10 and 11 of the European Convention on Human Rights.

2 Meaning of Public Participation

(1) In this act “public participation” means any communication or conduct aimed at influencing public opinion or otherwise engaging on a matter of public interest.

(2) For the purposes of subsection (1) “matter of public interest” means any issue of political or societal significance.

- **Filter Mechanism:** a new means for summary disposal of claims should be instituted similar to Section 8 of the Defamation Act 1996, requiring a higher threshold to be met for claims targeting public participation. An example of what this could look like can be found below:

3 Summary disposal of claims targeting public participation

(1) The court may dispose summarily of the plaintiff’s claim where:

(a) The claim targets an act of public participation; and

(b) It appears to the court that the claim has no likely prospect of success and there is no reason why it should be tried; or

(c) The court otherwise considers it to be in the interests of justice for the claim not to proceed to trial

(2) In considering whether the claim should not proceed under (c) the court shall have regard to -

- (a) Any unreasonable failures to comply with the Pre-Action Protocol for Claims Targeting Public Participation
- (b) The disproportionate, excessive or unreasonable nature of the claim, or part of it, including but not limited to the quantum of damages claimed by the claimant;
- (c) The scope of the claim, including whether the objective of the claim is a measure of prior restraint;
- (d) The nature and seriousness of the harm likely to be or have been suffered by the claimant;
- (e) The litigation tactics deployed by the claimant, including but not limited to the choice of jurisdiction and the use of dilatory strategies;
- (f) The foreseeable costs of proceedings;
- (g) The existence of multiple claims asserted by the claimant against the same defendant in relation to similar matters;
- (h) The imbalance of power between the claimant and the defendant;
- (i) The financing of litigation by third parties;
- (j) Whether the defendant suffered from any forms of intimidation, harassment or threats on the part of the claimant before or during proceedings;
- (k) The actual or potential chilling effect on public participation on the concerned matter of public interest

(3) Court proceedings shall otherwise be suspended pending resolution of a motion for summary dismissal under subsection (1)

- **Security for Costs:** where a claim targets an act of public participation, the court may make an order for security for costs in line with CPR 25.13(b)(ii) as an alternative to summary dismissal. Regard should be had to the factors listed out in 3(2) above, including compliance with the Pre-Action Protocol on Claims Targeting Public Participation.
- **Sanctions:** all costs should automatically be borne by the plaintiff where the case is found to be a SLAPP, and exemplary damages should be made available for cases where the claimant has exhibited particularly egregious conduct. This could be modeled on the examples that exist of where Parliament explicitly authorised the award of exemplary damages, such as the Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951. For example:

4. Exemplary Damages

- (1) *Where a case targeting public participation is dismissed by the court, the court may take account of the conduct of the claimant with a view, if the court thinks fit, to awarding exemplary damages in respect of the wrong sustained by the defendant and the threat posed to public participation.*
- (2) *In considering whether exemplary damages should be imposed, the court shall have regard to the factors listed under s3(2).*

- **Civil Restraint Orders:** courts should be empowered to issue a civil restraint order (CRO) against SLAPP litigants. This could potentially be achieved by amending Section 42 of the Senior Courts Act to enable such orders to be imposed, without the need for application from the Attorney General, against those who have pursued multiple (i.e. 2 or more) SLAPP cases. This would enable repeat offenders to be included in the MOJ's registry of vexatious litigants - providing an important deterrent against those routinely relying on the use of SLAPPs.³

³ HM Courts & Tribunals Service, Guidance – Vexatious litigants, Gov.uk, last updated 9 July 2021, <https://www.gov.uk/guidance/vexatious-litigants>

RECOMMENDATIONS

1. The Ministry of Justice should launch a consultation with a view to introducing an anti-SLAPP law in the next Parliamentary session.
2. Any anti-SLAPP law should include an early dismissal mechanism to filter out SLAPPs at the earliest possible point in proceedings along with robust sanctions to deter the use of SLAPPs.
3. Courts should be empowered to issue security for costs and, where necessary, civil restraint orders against those pursuing SLAPPs.

OUTSTANDING QUESTIONS

1. To what extent could a universally applicable public interest defence (similar to section 4 of the Defamation Act 2013) be introduced alongside the above measures?
2. How can protective measures be instituted to ensure SLAPP victims are not at a substantial financial disadvantage in defending themselves in court? Can such measures be introduced in an anti-SLAPP law or does an anti-SLAPP fund (or legal aid) need to be introduced?
3. Are there other means beyond the MOJ register to “name and shame” SLAPP litigants that can be built into an anti-SLAPP law? Should this be extended to those who routinely use spurious legal threats as a means of shutting down criticism?