The SLAPPback starts now: Why legislation must be introduced to prevent the abuse of the law of defamation.

Introduction

In July 2019, the Guardian published an open letter from a self-described 'group of press freedom campaigners', calling for action against what they described as the abuse of defamation law 'as a means of intimidating and silencing journalists working in the public interest.'[1] The phenomenon of 'Strategic Lawsuits Against Public Participation', (SLAPPs) or of large interests filing claims against private citizens with the sole intention of intimidating them into withdrawing a statement or communication, was first identified by Canan and Pring as far back as 1988 in the United States.[2] As Canan and Pring explain, the lawsuits themselves are unlikely to succeed. The act of bringing the suit however, with the threat of a lengthy litigation process and crippling costs of both procedure and representation, often has the desired effect of causing the prospective defendant to retract a statement or complaint. In the original American study, defamation claims accounted for fifty-three per cent of such suits.[3]

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[1] Letter: 'Press Freedom Campaigners Call for Action on 'Vexatious Lawsuits' <https://www.theguardian.com/world/2019/jul/20/letter-press-freedom-campaigners-call-for-action-on-vexatious-lawsuits> accessed July 2019

[2] Canan & Pring, Strategic Lawsuits Against Public Participation, 35 Soc. PROBS. 506 (1988).

[3] George W. Pring, SLAPPs: Strategic Lawsuits against Public Participation, 7 Pace Envtl. L. Rev. 3 (1989) pg. 9. Available at: http://digitalcommons.pace.edu/pelr/vol7/iss1/11 Accessed August 2019

Meanwhile, academic debate on the English law of defamation and its potential chilling effect on the press has largely centred around the substantive law[4], whereas insufficient attention has been given to the exploitation of the procedure of suing in defamation, in particular the suing of individual journalists. As such, occurrences of strategic claims are becoming an ever-increasing phenomenon in the UK and in Europe, to the extent that a group of MEPs are calling for a new EU directive to address the issue.[5] Whilst there are several remedies that members of the press have when sued by larger interests in defamation, the law in the UK as it stands neither deters the bringing of SLAPPs nor adequately prevents the chilling effect on the free speech of the defendant journalists. It is argued that the best means of doing so whilst still allowing large private interests to protect their reputations is to introduce legislation enabling defendants to countersue for the abuse of process, or in other words, to bring a 'SLAPPback.'

The Current Law

At first appearance, the changes brought about both by legislation and the common law would appear to be sufficient to safeguard the press's right to free speech from vexatious private litigation. The position taken by Lord Bingham in *Reynolds v. Times Newspapers* highlights the priority given to freedom of expression.

[4] See, for example, the judgment of Laws LJ in *British Chiropractic Association v Singh* [2011] 1 WLR 133 (2010)

[5] [5] Stephanie Kirchgaessner, 'MEPs call for power to tackle 'vexatious lawsuits' targeting journalists', The Guardian, <https://www.theguardian.com/world/2018/feb/22/meps-call-for-power-to-tackle-vexatious-lawsuits-targeting-journalists> accessed July 2019

'The rule and regulation of speech is the exception requiring justification. The existence and width of any exception can only be justified if it is underpinned by a pressing social need.'[6]

The recognition of the essentiality of a press able to report on matters concerning issues in the public interest without fear of reprisal from larger interests is reflected in the test adopted in *Reynolds* itself, later carried forward into s4(1) of the 2013 Defamation Act, in which a defendant will have a defence to an action for defamation if they can show both that *'The statement complained of was, or formed part of a statement on a matter of public interest';* and that *'The defendant reasonably believed that publishing the statement complained of was in the public interest*'. The test of 'reasonable belief' should mean that where a journalist acts in good faith in publishing a story he believes to be in the public interest, he has a defence to an action even if the story itself later proved to be untrue. The same, furthermore, applies to a 'peer reviewed statement in an academic or scientific journal', provided that the defendant can establish that independent review of the statement was carried out by either the editor or a person of expertise.[7]

In addition, where it can be shown that a defamation claim '[does] not serve the legitimate purpose of protecting the claimant's reputation',[8] the court has the power to strike out the claim, referred to by Laws LJ in *Lait v. Evening Standard* as 'The principle in the *Jameel*' case. In *Jameel* itself, the primary concern was whether the cost of the

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[6] *Reynolds v Times Newspapers Ltd,* [2001] 2 A.C. 127 (1999) p67 para 4

[7] Defamation Act 2013 s6 para 3

[8] *Lait v Evening Standard Ltd, [2011] 1 W.L.R. 2973 (2011)* at [42]

procedure would be 'all out of proportion to what has been achieved', with Lord Phillips stating that *'It would be an abuse of process to continue to commit the resources of the English court…to an action where so little is now seen to be at stake.'*[9] However, as Richard Hyde has suggested[10], one can infer from the judgment of Laws LJ in *Lait v. Evening Standard*, which emphasises the ability of the court at a pre-trial stage to consider the balance between the public interest and private right[11], that if it were obvious that a public interest defence under s4(1) of the Defamation Act was available, a court would be able to strike out the claim as an abuse of process.

Nonetheless, prospective defendants remain inadequately protected from the larger interest bringing the claim in the first place. Even before a defendant reaches the point at which a claim may be struck out, they have already incurred the costs of finding representation, of filing an application for a claim to be struck out and even preparing some preliminary evidence needed for the court to strike out the claim. Coupled with the uncertainty of whether the case will in fact go to trial, particularly where the evidence is complex, it is inevitable that many journalists without large financial backing will choose to settle the claim outside of court and withdraw the statement. Moreover, as the joint English PEN and Index on Censorship inquiry into English Libel Law points out, the publishing body providing libel insurance to the journalist or media will often insist on a settlement out of court, fearing that the costs of court proceedings

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[9] *Jameel v Dow Jones & Co Inc*, [2005] Q.B. 946 (2005) at [69]

[10]Richard Hyde (2014) Procedural Control and the Proper Balance between Public and Private Interests in Defamation Claims, Journal of Media Law, 6:1, 47-68, DOI: 10.5235/17577632.6.1.47 at pg.60

[11] *[2011] 1 W.L.R. 2973 (2011)* at [42-44]

will push their own insurance premiums upwards.[12] The courts themselves have acknowledged the unsatisfactory outcome of such an imbalance in defamation proceedings. Particularly revealing was the judgment of Laws LJ in *Singh*, in which the power of the current law to enable a large interest to silence a journalist through brute legal force was explicitly stated.

> *"It seems unlikely that anyone would dare repeat the opinions expressed by Dr Singh for fear of a writ. Accordingly this litigation has almost certainly had a chilling effect on public debate which might otherwise have assisted potential patients to make informed choices …By proceeding against Dr Singh, and not the Guardian…the unhappy impression has been created that this is an endeavour by the BCA to silence one of its critics…If that is where the current law of defamation takes us, we must apply it."*[13]

This demonstrates that the prospect of a successful defence or even a strike-out by the court is neither enough to deter potential litigants from bringing vexatious claims, nor enough to make the defendants feel they have an alternative remedy to settlement when they are brought. Thus, despite the importance the English law of defamation attaches to the freedom of the press, it remains inadequately equipped to protect journalists from its exploitation.

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[12] (2009) Free Speech is Not For Sale. Available at: [WWW] http://www.libelreform.org/ourreport (accessed September 2019) (the Index/PEN report). P.10 Recommendation 8

[13] *British Chiropractic Association v Singh* [2011] 1 WLR 133 (2010) at [12]

The Case for Reform

The consequent ability of large interests to silence and intimidate journalists into retracting statements and articles after issuing a claim poses several dangers.

Firstly, the ability of the press to speak freely is of immense value to a democratic society. The original study conducted by Pring and Canan highlights the need for the constant challenge and petition of political bodies by private citizens in a democracy not only so that the populace make informed decisions about how they vote, but in order to enable the government to act on behalf of the people, by making the wishes of the people known.[14] The press is an essential vehicle for this. The recent attempt by Arron Banks at bringing a claim in defamation seeking damages and an injunction against Carole Cadwalladr subsequent to her claim that 'Leave.EU' broke electoral law through their use of data[15] should thus make us very afraid of the potential for journalistic inquiry to be chilled where the need for inquiry into a political process is needed most.

However, the importance of the freedom of the press extends beyond challenge to political process. In a world in which corporate bodies have increasing control over the lives of private citizens, free investigation into their activities becomes critical for citizens to operate in society. It is notable that the call for an EU directive tackling

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[14] Canan & Pring, Strategic Lawsuits Against Public Participation, 35 Soc. PROBS. 506 (1988). Pg. 17

[15]Charlotte Tobbitt, 'Carole Cadwalladr will defend 'true' claims about Brexiteer Arron Banks in libel battle' < https://www.pressgazette.co.uk/carole-cadwalladr-will-defend-true-claims-about-brexiteer-aaron-banks-in-libel-battle/> July 2019, accessed August 2019

SLAPPs highlighted the suits brought by Appleby against the Guardian and the BBC in response to the publication of the 'Paradise Papers', a piece of investigative journalism of immense importance to the public for its disclosure of off-shore tax havens, with the intent of preventing further publication.[16] The vast financial resources of some corporate interests compared to those in the press, moreover, particularly independent journalists or freelance writers and bloggers, shows great potential to chill important investigative reporting. Indeed, it can be shown that there is particular danger in effectively allowing large corporate interests to essentially regulate the press through private litigation. As David Mead has pointed out[17], the Freedom of Information Act 2000 does not cover corporations, and as such information about steps taken to sue journalists is less likely to reach the public domain, particularly given the frequency with which claims are settled outside of court and thus not reported on.[18] Consequently, not only is reporting suppressed, but where a journalist has agreed to retract a statement, the public are left in the dark as to how or why.

Finally, the importance of sustaining a 'marketplace of ideas' with regard to comment and opinion has been stressed by the courts multiple times over the course of defamation proceedings, and remains crucial even outside of such important pieces

[16] MEPs call for power to tackle 'vexatious lawsuits' targeting journalists (The Guardian) <https://www.theguardian.com/world/2018/feb/22/meps-call-for-power-to-tackle-vexatious-lawsuits-targeting-journalists> accessed July 2019

[17] A chill through the back door? The privatised regulation of peaceful protest., P.L. 2013, Jan, 100-118 pg. 9

[18] (2009) Free Speech is Not For Sale. Available at: [WWW] http://www.libelreform.org/ourreport (accessed September 2019) (the Index/PEN report). P.9, see also Appendix p.14-20

of investigative journalism. Laws LJ made this clear in *Singh*[19], quoting Judge Easterbrook in *Underwager v. Salter*[20]:

> *'"Scientific controversies must be settled by the methods of science rather than by the methods of litigation … more papers, more discussion, better data, and more satisfactory models—not larger awards of damages—mark the path towards superior understanding of the world around us."'*

The trend, therefore, of litigation in the UK brought against journalists commenting on such scientific controversies[21], has the potential to allow the marketplace of ideas to become a monetary market, in which large financial backing wins out over the truth.

Potential Breach of the ECHR

Furthermore, analogy with the case of *Steel v. UK*[22] suggests that if it is indeed the case that individual journalists are being silenced by the issuing of a vexatious defamation claim, the UK may well be in breach of its obligations under article 10 of the European Convention on Human Rights (ECHR.) The European Court on Human Rights (ECtHR) has stressed that when balancing the right to freedom of expression against the right to reputation.

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[19] [2011] 1 WLR 133 (2010) at [34]

[20] *Underwager v Salter* (1994) 22 F 3d 730 , at para 14:

[21] (2009) Free Speech is Not For Sale. Available at: [WWW] http://www.libelreform.org/ourreport (accessed September 2019) (the Index/PEN report). Pg. 20 Appendix, Bad Science (2007-08)

[22] (68416/01), [2005] E.M.L.R. 15 (2005)

> *"The more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible "chilling" effect on others are also important factors to be considered."*[23]

In addition, the Court considered the need for 'equality of arms' to be present in a court proceeding in order for the law enabling corporations to sue private individuals to be proportionate to that individual's right to freedom of expression.[24] As a result, it is reasonable to suggest that if it could be shown that defamation lawsuits were capable of being used to suppress a journalist's speech through prohibitive procedural costs intimidating them into retracting a statement, this could well present a restriction disproportionate to their right to freedom of expression.

The Suggested Reform

Whilst numerous reforms have been suggested and executed over the last decade regarding English libel law, few have been directly addressed at preventing the issuing of SLAPPs. The most recent attempt at lobbying the European Commission for anti-SLAPP legislation suggested the creation of a legal-aid fund for journalists, which could be accessed after successfully defending themselves from a vexatious defamation claim.[25] Nonetheless, whilst this goes some way to enabling the defendant to feel they have sufficient financial backing to vindicate themselves in court, it does

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[23] Steel v United Kingdom (68416/01), [2005] E.M.L.R. 15 (2005) at [95]

[24] [2005] E.M.L.R. 15 (2005) at [95]

[25] Stephanie Kirchgaessner, 'MEPs call for power to tackle 'vexatious lawsuits' targeting journalists', The Guardian, <https://www.theguardian.com/world/2018/feb/22/meps-call-for-power-to-tackle-vexatious-lawsuits-targeting-journalists> accessed September 2019

little to prevent the claim being brought in the first place, and would inevitably result in both journalist and taxpayer money being wasted at the whim of the bringer of the SLAPP.

Instead, the development by legislation of a tort of abuse of process in defamation cases, with authorisation for judges to award exemplary damages, would have the effect of both deterring potential vexatious claims, and enabling journalists to fight such claims without fearing that they would be unable to recover their costs. Such legislation has been in place in California since 1992, and the State has since seen former defendants of SLAPPs recover large amounts in damages against former claimants.[26] To bring a claim, defendants must establish firstly that their acts arise from an exercise of their first amendment right to free speech involving a public issue or a matter of public interest, and secondly that the complaint 'is both legally sufficient and supported by a sufficient prima facie showing of facts.'[27], or rather that there is some evidence to demonstrate that the original claim was based on the defendant's free speech. (Crucially, the courts have held that there should be no need to prove intent on the part of the defendant.)[28] Even in the absence of the equivalent of the first amendment in the UK, the recognition of a common law right to freedom of speech and the role of

[26] Merriam and Benson, 'Identifying and Beating a Stratgic Lawsuit Against Public Participation' 1993, Duke Environmental Law and Policy Forum, p.29 para 1

[27] Californian Civil Procedure Code Section 425.16

[28] Navellier v. Sletten (Navellier I), 52 P.3d 703 (Cal. 2002) as cited in Golden, 'The Use (and Abuse) of anti-SLAPP motions to strike, Rutgers Journal of Law and Public Policy vol 12:4 Summer 2015 pg.29

the courts in balancing it against the civil right to reputation as a 'function of our constitution'[29] means that this would be a suitable model to import into the UK.

The idea is not uncontroversial, and even commentators such as Andrew Scott, who suggested such legislative reform alongside Alastair Mullis[30], admits that one of them remains unconvinced of its viability in England and Wales.[31] Statutory authorisation for the award of exemplary damages, however, is not unprecedented in the English law of defamation. Subsequent to Lord Leveson's recommendation[32], exemplary damages can be awarded under the Crime and Courts Act 2013 against defendant newspapers where in refusing to participate in independent regulation, their conduct has shown 'a deliberate or reckless disregard of an outrageous nature for the claimant's rights.'[33] The establishes a precedent for statute to approve the award of exemplary damages not only to vindicate a claimant's right, but to achieve a public policy goal. This suggests that placing the question in the hands of the courts of whether the defendant has indeed shown 'deliberate or reckless disregard for the claimant's right to freedom of speech' (for example) to the extent that damages should

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[29] *Lait v Evening Standard Ltd,* [2011] 1 W.L.R. 2973 (2011) at [45]

[30] Alastair Mullis and Andrew Scott: 'Something rotten in the state of English libel law? A rejoinder to the clamour for reform of defamation' Comms. L. 2009, 14(6), 173-183

[31] Andrew Scott, 'Opinion: "Ignoring domestic abuse? SLAPPS in the UK" January 2011, <https://inforrm.org/2011/01/27/opinion-ignoring-domestic-abuse-slapps-in-the-uk-andrew-scott/> accessed August 2019

[32] Lord Jusice Leveson, November 2012 'An Inquiry Into the Culture, Practices and Ethics of the Press' Executive Summary, pg.16 para 68

[33] Section 34(6)(a)

be awarded against them not only because the claimant's rights must be vindicated, but because of the public interest in making an example of those who bring strategic claims in the first place, would not pose an unusual or onerous challenge for a judge exercising discretion.

A Step Further?

Naturally, the availability of remedy through counter-suit imposes some burden on the potential claimant, and some may see it simply as a means of incurring further legal costs. Nonetheless, it is argued that the imposition of such a burden is preferable to introducing reform which would prevent large interests from bringing defamation claims at all. The joint English PEN and Index on Censorship inquiry into English Libel Law recommends that large and medium-sized bodies corporate bodies be exempted from English libel law unless they can demonstrate malicious falsehood.[34] Whilst seemingly radical, under the Australian Uniform Defamation Laws, a company is not allowed to bring a claim for defamation unless it has fewer than ten employees, thereby allowing small businesses that may seriously struggle financially after damage to their reputation to bring claims whilst preventing the potential exploitation of the law by large corporations.

This approach, however, stems from a flawed understanding of the purpose of defamation law. The tort of defamation is not merely intended to protect reputation, but to encourage the responsible use of speech on the part of commentators. One

[34] English PEN & Index on Censorship: Free Speech Is Not For Sale: The Impact of English Libel Law on Freedom of Expression (November 2009) p.12 para 14

might take the rejection of generic privilege of political discussion by Lord Cooke in *Reynolds* on the grounds that

> *'The commercial motivation of the press and other sections of the media can create a temptation to… exaggerate, distort or unfairly represent alleged facts in order to excite the interests of readers'*[35]

and apply it to discussion of large corporations. The importance of the media in allowing the public to make informed decisions both on political and economic matters means that it is just as important for the press to exercise their powers of comment responsibly as it is for them to exercise their speech freely.

Moreover, such an approach fails to recognise the damage that defamation can have on the reputation of even a large business, and the consequent need for compensation where reputation has been unfairly damaged. As the ECtHR pointed out in *Steel,* the interest in protecting a company's commercial success and viability is not only for the benefit of the corporation itself, but '*for the benefit of shareholders, employees… also for the wider economic good.*'[36] The potential for the comment of even one individual therefore to damage that success and viability[37] suggests that it is more important than ever to ensure that free speech is exercised responsibly.

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[35] Reynolds v Times Newspapers Ltd, [2001] 2 A.C. 127 (1999) [at 219]

[36] Steel v United Kingdom (68416/01), [2005] E.M.L.R. 15 (2005) [at 94]

[37] Justina Vasquez, 'In One Tweet, Kylie Jenner Wiped Out $1.3 Billion of Snap's Market Value', Bloomberg, <https://www.bloomberg.com/news/articles/2018-02-22/snap-royalty-kylie-jenner-erased-a-billion-dollars-in-one-tweet> accessed September 2019

Conclusion

The increasing prevalence of SLAPPs in the UK, and their notable use in attempts to bully and silence investigative journalists and scientific commentators should be a cause of concern for all, and the need for legislative reform to prevent such abuse of defamation law is paramount. The creation of a tort of abuse of process, which would enable the claimant to recover both expenses and potentially exemplary damages, would both enable the claimant to successfully vindicate their original statement whilst deterring potential bringers of SLAPPs. Nonetheless, reform should stop short of preventing or excessively hindering the bringing of legitimate claims in defamation even by large private interests, for the sake of preventing irresponsible journalistic comment.

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