

Ewan Kennedy submission of 13 January 2023

PE1975/F: Reform the law relating to Strategic Lawsuits Against Public Participation (SLAPPs)

SLAPPs first came to public attention in the late 1980s in the United States, famously the land of the free, including the Constitutional right to freedom of speech. Judges were recognising court cases that breached this right, with an early case going to the New York Supreme Court. In recent years, many Western countries have seen our law courts used by the very rich and powerful, many (most?) of whom have gained their wealth through means they would prefer the public didn't know about, to silence those who have been looking too closely.

One of the more widely publicised cases of this recently was the English case brought by Arron Banks against Carole Cadwallader, claiming damages for libel in respect of some remarks she made, hinting that he might have had some Russian connections. What we know about Mr Banks suggests that he is a very wealthy fellow indeed, whereas his target was a well-known and very active investigative journalist, a career that is more likely to get you shot than to gather wealth.

Instead of suing the media who published his target's remarks, Ted Talks and the Guardian, he attacked her personally. As we know, she successfully defended herself, but at enormous personal and emotional cost and huge expenditure, funded by outraged citizens who rallied to help at a time when everyone is under strain.

In recent weeks we've seen another example, with Nadim Zahawi hiring an international law firm, Osborne Clarke, to threaten an activist with a libel case for asking him to come clean about his tax returns. Often, we don't get told when people are silenced; Osborne Clarke had "ordered" the activist not to tell anyone that they were threatening him.

These cases both illustrate a prime feature of a SLAPP; there is usually a huge imbalance of financial muscle. In addition to this, classic features are:

- The case is brought by an individual or corporation with something to hide.
- As it says on the tin, the target is public participation in the exposure of wrongdoing.
- The remedy is usually disproportionate and the costs enormous.

There is often no basis whatsoever for the case, or perhaps the case is mainly, but not entirely, unfounded. Often there is no damage of the sort a court will regard as appropriate for compensation; by that I mean reputational damage caused by the disclosure of criminal or some other gross misconduct. In Mr Banks' case his links with various Russian individuals were already well known and indeed had been publicised by himself.

Contrary to what seems to underlie the SPICe briefing, SLAPPs do not inhabit the law of defamation exclusively. The legal system is full of procedures, often archaic and always expensive, that cunning lawyers will find to conceal the misdeeds of the super-rich. I am aware of a current litigation here in Scotland where a simple interdict is the chosen weapon.

It's interesting to note that the Scottish courts were among the earliest to develop the concept of "vexatious litigation", which on the face of things provides a basis for our judges to throw out a case that appears to be clearly without foundation. However, examination of how the ability to declare someone a "vexatious litigant" has been used should not give us much hope that it provides a workable solution. To date it has mainly been invoked by powerful bodies, including the State itself, to silence troublesome individuals such as Robbie the Pict.

Across the World it has been widely recognised that leaving it to judges to rely on common law rules designed for another purpose is unsatisfactory and undemocratic.

Following the American cases, legislators there and elsewhere got interested. Currently there is legislation in thirty-one States in America, plus Quebec, British Columbia and Ontario in Canada, plus the Australian Capital Territory.

As noted in the SPICe Briefing, Westminster is also considering provisions regarding matters such as costs and the European Commission has recognised the need to have clear rules for judges to follow and has a team of experts working on a draft Directive that will basically define what is a SLAPP and set out detailed rules.

It is essential that Scotland should avoid becoming the only system without the means of protecting our citizens against this global problem. To start the process of creating rules, I suggest that the Committee should recommend that our Parliament appoint a delegate to observe the work of the Commission and participate as may be allowed, in order to benefit from what is already being done and ensure best practice in our own system.