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Libel cases and public debate – Some Reflections on whether Europe should be concerned about SLAPPs?

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Abstract

In recent years, Strategic Lawsuits Against Public Participation (SLAPPs) have become well-recognized as challenging free speech and public participation in the United States, Canada and Australia. However, in Europe SLAPPs remain largely unrecognized with little consideration of their use and impact. This paper argues that SLAPPs are used in Europe and have been neglected for a number of reasons. In order to examine the European SLAPP action, the paper focuses on libel law in England and Wales. It considers the debate on free speech that has flowed out of libel cases and concludes by reflecting on what advantages might flow from a refocusing of that debate that includes a recognition of SLAPP actions.

Introduction

Over the last few years, the issue of strategic lawsuits against public participation (SLAPPs) has created much activist concern, legislative response and academic comment in the United States.[1] At the same time the concept has been grown in recognition and significance in both Canada[2]

[1] There are many articles published both in discussion of the SLAPP generally and in relation to anti-SLAPP legislation developed by States in the USA. See, for example P. Patterson, 'Have I Been SLAPPed? Arkansas's Attempt to curb Abusive Litigation: The Citizen Participation in Government Act', 60 *Ark. L. R.* (2007), 507. There are also a number of SLAPP projects based in universities, for example the First Amendment Project Anti-SLAPP Resources Centre (see <http://www.thefirstamendment.org/antislappresourcecenter.html>) and the California Anti-SLAPP Project (see <http://www.casp.net/#>).

[2] S. Lott, Report: Corporate Retaliation Against Consumers: The Status of Strategic Lawsuits Against Public Participation (SLAPPs) in Canada (PIAC, 2004). See Canadian Internet Policy and Public Interest Clinic, *Defamation and SLAPPs* (CIPPIC, undated), found at <http://www.cippic.ca/defamation-and-slapps/>.

and Australia[3] where environmental activism has been the major targets of SLAPP actions. However, the situation in Europe is somewhat different. If you search the academic literature and activist debates, the SLAPP has hardly been on the agenda.[4] Even in England where the issue of free speech, particularly in the context of libel law, has recently given rise to much debate, and where the *McLibel* case seemed to herald the arrival of SLAPPs, the concept is little mentioned.

This paper provides an overview of the best-known SLAPP cases brought in Europe, most of which can be found in England. It will examine some of the reasons why the SLAPP is largely unrecognized within the European context despite the existence of such cases. In considering why there has been a neglect of the SLAPP, the paper will consider the relationship between free speech and public participation and the protection afforded to both by the European Convention on Human Rights.[5] It will also note the impact of previous high profile SLAPP suits on possible litigators, and shifting strategies to silence direct action protests in the UK. The paper will use the current demands for reform of the law of libel in England and Wales to examine more closely the approach to free speech within Europe and conclude by considering what benefits might arise from the inclusion of the SLAPP action in the wider discussion of free speech and public participation.

Strategic Lawsuits Against Public Participation

SLAPPs were first identified in the Uniited States by Canan and Pring in their definitive book *SLAPPs: Getting Sued for Speaking Out*.[6] The SLAPP is something different from an 'ordinary' attack on free speech; it is an attack on public participation in government. This approach is rooted in the American idea that protected speech necessarily involves active public engagement with the political process. Indeed, the First Amendment to the U.S. Constitution extends

[3] T. Anthony, 'Quantum of Strategic Litigation – Quashing Public Participation', 14(2) *Australian Journal of Human Rights,* (2009), 1. See also Australian Internet campaign and support group for defendants sued by a logging company Gunns Ltd.: 'Stop The SLAPP', found at <http://www.slapp.org.au/home>.
[4] For discussion of SLAPPs in the European context, see F. Donson, *Legal Intimidation* (Free Association Books, 2000) and S. Kravchenko, 'Citizen Enforcement of Environmental Law in Eastern Europe', 10 *Widener L. Rev.* (2003-2004), 475, at 487-491.
[5] European Convention for the Protect ion of Human Rights and Fundamental Freedoms (Rome, 4 November 1960).
[6] G. W. Pring, P. Canan, *SLAPPs: Getting Sued for Speaking Out* (Temple University Press, 1996).

protection not only to free speech but also 'to petition the government for a redress of grievances.'[7] Given this, Canan and Pring identified a number of criteria which, if a lawsuit met one of the primary elements and three secondary elements, it could be classified as a SLAPP:

> Primarily, it had to involve communications made to influence a government action or outcome, which, secondly, resulted in (a) a civil complaint or counterclaim (b) filed against nongovernment individuals or organizations (NGOs) on (c) a substantive issue of some public interest or social significance.[8]

The definition was designed to be neutral, making no value judgment as to the virtues of either the target or the instigator of the lawsuit.

Canan and Pring also identified the context of these cases highlighting three distinct phases. Firstly the citizen becomes concerned about a public issue and will make her view known to a government official, agency or the public more generally. This is the political behaviour protected by the U.S. Constitution. Secondly, an affected party, unhappy with the citizen's political engagement, files a lawsuit that targets the citizen because of her political stance. This effectively *transforms* the dispute from a matter of public concern to a private legal case focusing attention on the harm caused to the filer rather than the political concern of the target. The final stage of the process relates to the outcome of the court case. The SLAPP target may be able to successfully claim constitutional protection from the court thus re-transforming the case back into the public political matter. However, when this does not happen, the litigation will progress as a normal case and result in a breach of the targets' First Amendment rights and effectively chill their speech.

This first definitional account of the SLAPP suit was, as I have indicated, deeply rooted in the importance of distinguishing the SLAPP suit from normal attacks on free speech through lawsuits. The emphasis is on the participation of the public in the political process and the need to protect that participation from more powerful interests who have the resources and knowledge to silence their citizen critics.

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[7] US Const. am. 1.
[8] See G.W. Pring and P. Canan, n. 6 above, at 9.

Whilst the USA has a strong constitutional protection for public participation in the political process, other jurisdictions have traditionally lacked this express protection so important to an understanding of and response to SLAPP suits. The right to freedom of expression in itself can offer some impact in tackling intimidatory lawsuits aimed a public participation, but it is the identification of the SLAPP and its connection to participation that provides a particular level of protection for targets.

Over time, the definition of the SLAPP has been widened to a more general understanding which identifies it as a type of civil action which in many cases does not progress past the writ serving stage. In recent years, the main instigators of such action have been corporations, but they may also be government, officials or high profile business people. The targets are individual citizens, or more often members of community or issue groups.[9] The purpose of the lawsuit is to punish participation, to discourage others from engaging in similar activity, and finally to silence the debate.

More recent suggestions as to identification of SLAPPs therefore focus on two key elements. Firstly the fact that a case is aimed a public participation, which may include protest actions, consumer boycott campaigns, pamphlets and other publications, and even web-based campaigns including website, blogs and comment. Secondly the plaintiff's action should be seen as lacking merit. Anthony therefore summarizes the looser description as follows 'SLAPPs can be seen as meritless suits designed to intimidate and harass political critics into silence and not to achieve the purposes of the action, such as compensation for the wrong.'[10]

Thus more emphasis has tended to be placed on the merits/demerits of the party's case in order to justify a possible challenge to the case on the basis of abuse of process. The issue of merits is potentially problematic however. A case may have merit as to its content, but the challenge to its merits may arise where there exists a disparity of power and resources between the complainant and defendant. It is often this second form of merit that is most relevant in the discussion of

[9] Examples of cases brought by corporations against environmental and campaign groups include the *McLibel* case, discussed below and *Daishowa Inc. v. Friends of the Lubicon* (1996), O.R. [3d] 215. See discussion of this case in C. Tollefson, 'Strategic lawsuits and environmental politics: Daishowa v., Friends of the Lubicon', 31(1) *Journal of Canadian Studies* (1996), 119.

[10] See T. Anthony, n. 3 above, at 12

SLAPPs and intimidatory lawsuits generally. As a result, the question of merits has been regarded as too limited in some jurisdictions with the result that an emphasis has been placed on the motivation of the lawsuit not the legal content.[11]

As the definition is widened, the distinction between general intimidatory law suits and the SLAPP suit, so central to Canan and Pring's definition, is weakened. Indeed, the SLAPP label has become a shorthand method of describing a wide variety of intimidatory or even persecutory action.[12] However, many of these cases fail to meet the basic elements of the definition and the use of the term in this way does little to assist in developing a reasoned response to the SLAPP suit.

Within Europe there have been a small number of high profile imtimidatory legal cases brought which clearly fall into the SLAPP category. In the next section, I will examine some key cases and consider whether any conclusions can be drawn as to how the domestic and region human rights courts have responded to them.

McLibel - The **European SLAPP case**

The most high profile SLAPP action to be fought in Europe was that brought by McDonald's Restaurants against two activists. The story of the *McLibel* litigation was of a corporation, used to successfully threatening lawsuits to protect its interests, finally coming up against critics who had nothing to lose in defending their right to speech.

Prior to the *McLibel* case, McDonald's had developed an aggressive policy of self-protection. Traditional business public relations (PR) and advertising campaigns were backed up with a strategy of litigation against alleged trademark infringements and critics.[13] Trademark cases were

[11] Ibid. For example, see the Australian Capital Territory legislation - Protection of Public Participation Act 2008, A2008-48, found at <http://www.legislation.act.gov.au/a/2008-48/current/pdf/2008-48.pdf>, which focuses on 'improper purpose' rather than merit.

[12] For example, the case of *Nikitin v Russia*, [2004] ECHR 371 has been cited as a SLAPP, however, it involves a situation more akin to State persecution as it involved a charge of treason against a former captain in the Russian Navy after he assisted in a report on the radiation hazards of Russian submarines. He was acquitted but the overall conduct of the prosecution appeared to involve a degree of malicious prosecution and bad faith. See J. Gleason, Strategic Lawsuits against Public Participation, in S. Sec (ed), *Handbook on Access to Justice under the Aarhus Convention* (REC, 2003), at 59.

[13] See F. Donson, n. 4 above, Chapter 5.

often seen as methods of restraining competition whilst McDonald's typically defended them as protecting their corporate interests, whilst legal assaults on critics were characterized as protection of business reputation. Whatever the motivations, the strategy worked very well for a long period with writers, journalists, publishers and activists generally unwilling to take on the costs of a libel action. Typically, critics would capitulate to the demands of the corporation and provide an apology and undertake to make corrections where McDonald's considered this appropriate. Interestingly, McDonald's was able to rely on previously given apologies to support further demands for retractions. The fact that many of those apologies were gained regardless of the merits of their claims was irrelevant.[14]

Things changed for McDonald's when it decided to undertake the same strategy against members of Greenpeace (London).[15] The action was to result in the infamous *McLibel* case: *McDonald's Corporation, McDonald's Restaurants v. Steel and Morris.*[16] The case was to become the longest trial in English legal history, lasting 314 days, and is estimated to have cost McDonald's £10 million.[17]

The case centred on a six-page pamphlet entitled 'What's wrong with McDonald's?' which accused the company of 'McCancer, McDisease and McGreed' and involved a strident critique of many of McDonald's commercial practices. The leaflet had a low circulation level of just a few thousand; however, despite this, McDonald's mounted a typically aggressive response. The company hired a number of private security firms to infiltrate London Greenpeace and having realized it could not sue the organization[18] in 1990 it decided to sue Morris, Steel and three others[19] for libel.

Legal aid was not available to the activists, but they did receive some free legal advice, which was summed up as follows:

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[14] Ibid., at 79.

[15] Greenpeace (London) is a separate organization from Greenpeace International. Although they share some history Greenpeace (London) and Greenpeace International have, since 1977, been separate organizations and have worked on different campaigns. For more information see the McSpotlight website, found at <http://www.mcspotlight.org/people/biogs/london_grnpeace.html>

[16] *McDonald's Corporation, McDonald's Restaurants v. Steel and Morris,* [1997] EWHC QB 366.

[17] See F. Donson, n. 4 above, at Chapter 6. See also J. Vidal, *McLibel – Burger Culture on Trial* (Macmillan, 1997).

[18] It was an unincorporated body.

[19] Proceedings against the three others were ultimately withdrawn following their decision to provide the company with an apology. See F. Donson, n. 4 above, at 85.

> [D]on't bang your heads against a brick wall, be pragmatic, just say sorry. No one will think that you really mean it, you will save yourselves time, energy and money and be able to get on with campaigning elsewhere. You can comfort yourself with the fact that a trial would hardly be fair if you defended yourselves. Leave while you can.[20]

The activists were under no illusions as to McDonald's motivations in bringing the case – to suppress their views and continue silencing critics of the company. Thus despite the legal advice, Steel and Morris decided to fight for their right to speak. We can assume that this decision was a surprise for the corporation, which had perhaps underestimated the willingness of people with nothing to lose to fight on points of principle.

The trial was to become the subject of a large amount of media coverage and became the focus of its own campaign,[21] which attracted far more attention than London Greenpeace's pamphlets ever had. Whilst McDonald's were represented by lawyers highly versed in the complex law of defamation,[22] Morris and Steel were refused legal aid[23] and represented themselves throughout the proceedings. Three years after the case had opened, Mr. Justice Bell delivered a judgment[24] running to 750 pages which concluded that McDonald's had indeed been defamed[25] and awarding damages of £60,000 despite the fact that McDonald's had failed to show actual damage. No attempt was made by the corporation to recover the damages.

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[20] See J. Vidal, n. 17 above, at 75.

[21] The campaign was centred on a website called *McSpotlight* (found at <http://www.mcspotlight.org/>), which provided an information portal for information on both the case and the wider issues relating to McDonald's. It continues to operate today.

[22] Defamation occurs when someone makes a false statement that harms the reputation of another. Within the area of law related to defamation the specific offences of libel, related to a written or permanent claim, and slander, related to a spoken claim, operate to protect a person's reputation. This paper will for the most part discuss the operation of the law of libel, but within the wider context of defamation.

[23] It is estimated that McDonald's spent over £10 million on its trial expenses, whilst the defendants had to rely on money raised by donation to fund their expenses. See J. Vidal, n.17 above, at 6. The fact that legal aid was not available in defamation hearings in the UK was raised by the defendants before the European Court on Human Rights. See discussion below.

[24] The case was not heard by a jury, but by Mr. Justice Bell sitting alone. This is an unusual development and was due to the view that the case was too complex and likely to take too long for a jury.

[25] The court found that Steel and Morris had not proved their allegation against McDonald's on a number of issues including allegations of rainforest destruction, links between their food and serious illness, and bad working conditions. However, the court did find that they had proved a number of claims including the 'exploitation' of children through advertising, false claims regarding nutrition, health risks to long-term customers and low pay. See J. Vidal, n. 17 above, at 305-314 and F. Donson, n. 4 above, at 94-5. In a case of this length and complexity it is hardly surprising that the judgment resulted in partial victories for both sides.

Steel and Morris appealed the decision and claimed that libel law in England was 'oppressive' in nature. The Court of Appeal dismissed the appeal on a number of grounds,[26] although the Court did reduce damages to £40,000. Significantly, it rejected the activists' claims that corporations should not be able to sue for defamation and should be treated in the same way as public authorities.[27] The court noted that corporations and public authorities were in constitutionally different categories, and that the heart of the decision to prevent public authorities suing was the idea that people should have the space to criticize their publicly elected officials without fear of litigation. The court did not completely dismiss the notion, however, observing that the question of whether corporations should lose their right to sue for libel had 'some substance' but that it would be for Parliament to act on that issue not the court.[28]

The impact of *McLibel* on SLAPPs in the UK

A significant element of the *McLibel* case revolved around a clash of cultures between the corporation and its targets. The serial litigation strategy of McDonald's had worked successfully against mainstream media outlets. However, when it came up against Steel and Morris, who in many ways exemplified the committed activist of the do-it-yourself (DIY) political culture that has come to dominate much of British environmental and anti-globalization campaigns, the corporation was never going to chill their speech.

The negative censoring intent, which was recognized by the defendants as being at the heart of the *McLibel* case, was in fact transformed by the commitment, energy and ability of the *McLibel* defendants and their supporters. Indeed, the nature of the court case provided the defendants with some very practical benefits. For example, Steel and Morris used the discovery process to force McDonald's to hand over documents that most activists could only dream of seeing, whilst

[26]. The grounds of appeal also included that if a corporation could sue, then it should be sufficient for the defendant to show 'reasonable belief' in the words complained of, and that there was abuse of process because of the inequality of arms between the parties. For a full analysis of the decision of the Court of Appeal, see M.A. Nicholson, 'McLibel: A Case Study in English Defamation Law', 18(1) *Wisconsin International Law Journal* (2000), 102, at 102-127.

[27] *Derbyshire County Council v. Times Newspapers*, [1993] AC 534.

[28] *Steel and Anor v. McDonald's Corporation and Anor*, [1999] EWCA Civ 1144. The applicants were denied leave to appeal to the House of Lords and the final stage of the long-running case was heard in the European Court of Human Rights in 2005. See discussion below at n. 50 below.

the chance to cross-examine McDonald's executives under oath resulted in a series of damaging admissions.

These elements then fed into the opportunity that Morris and Steel had to spotlight their cause in front of the international media. Whilst their lives were utterly overtaken by the case,[29] it became an activist tool in its own right that resulted in a serious blow to McDonald's reputation despite its victory in the courts. The case therefore illustrated very clearly that activists with nothing to lose and a strong enough level of political commitment can transform a lawsuit into a political opportunity. Clearly McDonald's was not mortally wounded by the litigation, but its reputation did take a battering.[30]

It is well clear that SLAPPs do not work when the target is not silenced, or does not care about the threat, or ultimately welcomes the opportunity a SLAPP action offers them. *McLibel* illustrates these components well and is perhaps one reason for the apparent lack of SLAPP actions, using libel laws, brought against this type of activist. However, direct action by environmental activists has continued to result in civil litigation, as exemplified by legal action[31] brought by Monsanto against a number of individuals participating in the *genetiX snowball* campaign in the late 1990s which was part of a direct action campaign against genetically modified crops in the UK.[32] This litigation largely revolved around applications for injunctions with an emphasis on preventing further activism without necessarily attracting large-scale media interest by taking cases as far as a full court hearing. Claims for damages to Monsanto's crops were also very much a part of the initial litigation threat although these were later dropped.

The use of injunctions to prevent protest actions, and in fact to seek injunctions so wide-ranging as to effectively stifle activism, has become a much more frequent source of legal action in the UK. This shift has also seen an imaginative use of civil powers, which have been reshaped to meet the threat of direct action. This trend is exemplified by the Protection from Harassment Act

[29] Including all the legal elements, the *McLibel* case ran from 1990, when the first writ was served, to 2005 when their application to the European Court of Human Rights judgment was concluded.
[30] The distribution of the original pamphlet rose from 3000 to 3 million copies. The case is generally seen as a strategic mistake in PR terms. M. Haig, *Brand Failures: The truth about the 100 Biggest Branding Mistakes of All Time* (Kogan Page, 2003).
[31] *Monsanto PLC v Tilly and ors,* 1998 - M - No. 851 (High Court) (17 July 1998).
[32] See F. Donson, n. 11 above, Chapter 9.

1997 (PHA).[33] This legislation was intended to protect the victims of stalkers but was drafted in very general terms allowing it to be used in relation to any form of harassing conduct, including protest action. Indeed, attempts were made to no avail at the time of legislation to elicit reassurances from the British Home Secretary that it would not be used against peaceful protesters.[34]

Fears that the PHA would be used in this way were quickly realized when injunctions were granted against animal rights protesters shortly after the Act was passed.[35] Court decisions also acknowledged that protest behaviour might under the legislation amount to harassment.[36] In recent years, injunctions brought under the legislation have been used to ban activists from demonstrating in the vicinity of companies, to stop people raising their voices, and even to prevent them from taking photographs in certain locations.[37] The basis for the granting of the injunction is typically that the activities of protesters will cause 'distress or alarm' to employees.[38]

An example of this extended use of injunctions under the PHA can be found in the attempt in 2007 by the British Airports Authority (BAA) to gain an injunction against the groups involved in 'Plane Stupid'[39] in order to prevent the 'Camp for Climate Action' from taking place outside Heathrow Airport. The application involved one of the widest ranging injunctions ever sought in British legal history and could have affected the combined membership of the groups which

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[33] The law requires that a person not engage in a course of conduct that he knows, or ought to know, amounts to the harassment of another. It is not necessary to prove that the person intended to harass someone; rather the law imposes a test as to whether a reasonable person who had the same information would think that it amounted to harassment. Protection from Harassment Act 1997, (c.40), section 1.

[34] E. Finch, Legitimate Protest or Campaign of Harassment – Protesters, Harassment and reasonableness: The decisions in DPP v. Moseley, 5 *Web JCLI* (1999), found at 2. <http://webjcli.ncl.ac.uk/1999/issue5/finch5.html>.

[35] Ibid., at 2, noting the case of *Brown v O'Neill and ors* (unreported) 15 August 1997.

[36] Ibid. Finch makes the point that protest is distinguished under the law from 'ongoing and protracted campaigns of opposition' which amount to 'deliberate attempts to force people to desist from carrying out a business which they had a legal right to pursue and should not be perceived as and protected in the same way as legitimate protests.' See ibid., at 8.

[37] An injunction under the Act was used on environmental protestors in Oxfordshire. It banned protest and also stopped anybody from filming within a mile of the protest site. *RWE N Power Plc and anor v Carroll and ors* HQ07X00505 (High Court) (14 February 2007) court papers found at <http://www.epuk.org/News/475/the-npower-injunction-in-full>; SchNEWS, 'Putting on the writs', SchNEWS 581 (27 March 2007), found at <http://www.schnews.org.uk/archive/news581.htm>.

[38] Injunctions are most often sought on an *ex parte* basis based on limited evidence. A breach of an injunction can lead to up to five years in prison. See Protection from Harassment Act 1997, (c.40), section 2.

[39] *Heathrow Airport Ltd & Another v Joss Garman & Others*, [2007] EWHC (QB). Plane Stupid is a network of grassroots organizations that are committed to using non-violent direct action against aviation expansion. See 'Plane Stupid – About us', found at <http://www.planestupid.com/aboutus>.

added up to approximately five million people.[40] The court was highly critical of the application, both in terms of the breadth of the requested order, and the legal source. The use of the PHA 1997 was described as being 'entirely inappropriate'[41] as the protest group and organizers had never done anything that could be considered as being harassment, despite taking part in unlawful protest. The court instead granted a civil injunction to prevent unlawful direct action protests at Heathrow Airport on the basis that they would have a serious and damaging effect on the running of the airport and also that terrorists might use the disruption caused by the protests to target airport users. The injunction did not have a power of arrest attached to it, and did not interfere with any legal activity the protesters might engage in. It was also limited to Heathrow Airport and land surrounding it owned by BAA and would last for one month rather than the indefinite order that had been requested by BAA.

The debate in the UK on limitations on the right to engage in direct action has been ongoing for many years, during anti-road protests, anti-globalization protests and now climate change protests. Applications for injunctions to prevent occupations, camps, and street protests have become a normal response with critics of this form of protest noting that 'raising awareness is fine; causing disruption to no particular end is pointless'.[42] George Monbiot, who writes extensively in the UK on issues of the environment and political activism commented in response to the above comment that:

> Direct action is a demonstration in two senses of the word: a protest and an exposition. It drags neglected issues out of obscurity and thrusts them into the political domain. Whatever journalists might think of the demonstrators, they cannot help giving them the oxygen of publicity.[43]

This debate points to an important question in relation to SLAPP suits – what kind of public participation is worthy of protection? As will be discussed in the next section, political speech, including public protest, is protected under Article 10 of the European Convention on Human

[40] The targets included all members of the organisations belonging to an umbrella body called *Airport Watch*. See L. Murray, 'Diary of a Protest' 36(4), *Index on Censorship* (2007), 22.
[41] Ibid., at 25.
[42] The High Cost of Cheap Flights, *The Guardian* (2 August 2007).
[43] G. Monbiot, 'Because it is illegal, the climate camp is now also a protest for democracy', *Guardian Newspaper* (7 August 2007)

Rights. However, when speech takes the form of protest action the protected speech component can become overtaken by the question of legality and public order.[44]

Protection of free speech by the ECHR

The discussion above has considered the use of SLAPPs and other legal actions against direct action and DIY activists particularly in the UK. However, the SLAPP in not confined to this group of campaigners; it has potential to chill many different forms of speech and public participation. In particular, the use of libel actions against people is, as we have already noted, a key area of SLAPP activity, particularly in England. In order to provide a clearer consideration of how SLAPPs might be understood in the European context, it is therefore necessary to consider how free speech is conceived of in Europe and in particular give some consideration to key provisions of the European Convention on Human Rights (ECHR).

The effect of the SLAPP suit is the chilling political speech, closing down the arena for political discussion and transforming political speech into a more private legal-based dialogue. It is in the area of free speech protection that Europe significantly differs from the USA. Whilst the American First Amendment protection is strongly rooted in the protection of political speech, the jurisprudence that has developed under the ECHR has been dominated by the wording of its Article 10(2) in relation to when freedom of expression can be limited. As noted by Mullis and Scott, Europeans may view the American courts as having 'adopted what can be reasonably described as a fundamentalist approach to the value of freedom of expression. In this "sanctification" of freedom of speech the United States utilizes a curiously weighted balance in the determination of competition between expression and other social values.'[45]

The conclusion is that in the American freedom of expression is absolute whilst in Europe the exercise of the freedom requires a recognition and account of 'duties and responsibilities'. Article

[44] D. Bonner, H. Fenwick and S. Harris-Short, 'Judicial Approaches to the Human Rights Act', *52 ICLQ* (2003), 549, at 563-571.

[45] A. Mullis and A. Scott, 'Something Rotten in the State of English Libel Law? A Rejoinder to the Clamour for Reform of Defamation' (UEA/LSE, 2010), at 12. The report was commissioned by Lawyers for Media Standards, a campaign group made up of claimant libel lawyers, which aims to influence the debate on libel reform by emphasizing the rights to obtain redress of those damaged by the media.

10(1) of the ECHR acknowledges that 'Everyone has the right to freedom of expression' which includes the 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.' However, the provision goes on to set out the allowed limitations:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

This should not be understood to mean that the European Court of Human Rights (ECtHR) takes a fundamentally different approach to the foundation and significance of free expression than the US courts. The ECtHR decision in the case of *Handyside v United Kingdom*[46] sets out the foundations of its approach. The court stated that free expression was essential to a democratic society which should be able to tolerate and welcome not only favourable and inoffensive speech but also 'those that offend, shock or disturb the state or any sector of the population. Such are the demands of … pluralism, tolerance and broadmindedness without which there is no "democratic society"'.[47]

Thus political expression is regarded as 'one of the essential foundations of a democratic society'[48], but one that must be balanced against competing rights. States are required to justify any interference with free expression. Three conditions must be satisfied before interference can be permitted. These are that the interference must be permitted by law, it must be aimed at protecting one of the listed categories within Article 10(2), and it must be necessary within a

[46] *Handyside v. UK* (1976), 1 EHRR 737.
[47] Ibid., at 49.
[48] Ibid.

democratic society. It is the protection of reputation[49] that operates in relation to the law of libel that so often is used in intimidatory lawsuits. Indeed, this ground is in fact most frequently claimed under Article 10(2) reflecting the fact that almost every legal system provides a remedy in relation to injured reputation. Not all reputations are to be treated alike, however, and the ECtHR has concluded that the interest in reputation is in fact less significant where the complainant is a public figure[50] because of the important social interest in discussing the behaviour and character of such people.

It is at this point that we must return to the *McLibel* case[51] as its final stage was heard in the European Court of Human Rights and raised important questions in relation to the balance between free expression and reputation, and the role of citizens in engaging in protected speech in the political realm. Steel and Morris had applied for leave to appeal to the House of Lords following the Court of Appeal decision[52] in 1999. However, leave was refused,[53] leaving them with all domestic remedies exhausted. As a result they were in a position to be able to file an application with the ECtHR[54] challenging the UK government's policy on legal aid in libel cases and detailing the oppressive nature of libel law in England.

In relation to the overall claim[55] under Article 10, the ECtHR dismissed the claim made by the UK government that the applicants were entitled to less protection than the media. In particular, the court stressed the significant role played by campaigns carried out by such activists. This is an important point, and emphasizes and extends the level of protection previously attached to the

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[49] See discussion of the importance of reputation in A. Mullis and A. Scott, n. 45 above, at 9-10 and by Lord Nicholls in *Reynolds v Times Newspapers*, [2001] AC 127, at 201.

[50] *Lingens v. Austria* (1986), 8 EHRR 103.

[51] *Steel and Morris v. United Kingdom* (2005), 41 EHRR 22.

[52] See discussion of *Steel and Anor v. McDonald's Corporation and Anor* above.

[53] *Steel and Anor v. McDonald's Corporation and Anor* HL (1999-2000) 233, *Judicial Business* (21 March 2000) at 274

[54] Individuals can complain directly to the European Court of Human Rights regarding an alleged breach of their rights under the Convention when the alleged breach falls under the provisions of the ECHR, the act is by a public authority, the applicant has exhausted all domestic remedies and the application is submitted no later than six months after the final decision by the highest competent national authority. See European Convention for the Protect ion of Human Rights and Fundamental Freedom, n. 5 above, Article 34.

[55] Steel and Morris also raised an Article 6(1) complaint related to right to a fair hearing. On this matter the court concluded that the denial of legal aid to the applicants had deprived them of the opportunity to present their case effectively before the Court. There was an unacceptable 'inequality of arms' with McDonald's given the complexity and length of the case and the legal representation the corporation had been able to afford. Ibid., at para. 72. The judgment required the UK government to consider the operation of the law, particularly in relation to the availability of legal aid in libel cases. Today legal aid is available in England only in exceptional cases, see Legal Aid Act 1988 (c. 34) and the Access to Justice Act 1999 (c. 22).

press[56] and to NGOs.[57] These groups are provided with stronger expression protection under Article 10 than an ordinary citizen because of the Court's view of political expression as central to a democratic society. In *Steel and Morris* the ECtHR concluded that:

> [I]n a democratic society even small and informal campaign groups, … must be able to carry on their activities effectively and … [there] exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest such as health and the environment.[58]

Thus the fundamental approach of the ECHR to political speech (which is rooted in public scrutiny and the significance of political debate) allows for campaigners, no matter how few, informal and DIY in character, to still be recognized as upholding democratic principles. This is important in establishing the concept of a right to participate in public political debate within the European free expression debate. An extended understanding of the citizen not only as a recipient of information under Article 10, but also as potential *watchdog* and campaigner in relation to political issues more generally, potentially strengthens the idea of participation as protected under free speech provisions.

However, in relation to the applicants' challenge to the ability of multinational corporations to sue under libel law in England, the court rejected the view that businesses should be treated in the same way as public authorities:[59]

> It is true that large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and … the limits of acceptable criticism are wider in the case of such companies. However, in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success

[56] See *Lingens*, n. 50 above.
[57] *Vides Aizsardzības Klubs v. Latvia*, no. 57829/00 (27 May 2004). This case involved *Vides Aizsardzības Klubs* (an environmental NGO). The group had been ordered to pay damages to a local official for critical remarks made about it in a newspaper article. The Court concluded that the participation of NGOs is essential to a democratic society and that for them to perform their functions, they should be able to divulge information of public interest and also to comment.
[58] See *Steel and Morris*, n. 51 above, at para. 89.
[59] In *Derbyshire County Council v. Times Newspapers*, [1993] AC 534, the House of Lords held that bodies performing government functions, such as public bodies, have no standing to sue in defamation because of the importance of protecting political communication.

and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good.[60]

This approach balances the right to free expression under Article 10 with other rights. Critiques of allowing corporations to bring libel suits are rooted in seeing them as aggressors with either little valid claim to reputation protection, or other methods at their disposal to protect reputation.[61] Yet as the court points out, corporations have a reputation that is directly linked to their commercial success, which requires strong argument to defeat their access to the protection of the law on an absolute basis.

Libel cases in England and Wales – A SLAPP by any other name?

The discussion above in relation to the operation of Article 10 protection for free speech has been centred on the issue of libel and the balancing of free expression with other rights. The remainder of this article will look in some detail at recent debates and events in England and Wales related to libel law and cases which have raised significant concern, as the *McLibel* case did about the operation of the law in this area.

At the time of the *McLibel* case, England was described as being 'ripe for SLAPPs',[62] particularly because of the plaintiff-friendly nature of its libel laws. Indeed, *McLibel* seemed to herald the arrival of such cases and there was perhaps an assumption outside England that it would join other common law jurisdictions such as Canada and Australia in needing to tackle the SLAPP phenomenon head on.

In fact, there has been little discussion of the SLAPP suit in the English context.[63] This is not to say that lawsuits are not brought to intimidate, silence and punish political speech and action; it is that they are not categorized as SLAPPs. No generic problem of intimidatory litigation has been identified and so no impetus to combat them as a class has developed. Instead the more specific issue of the law relating to libel is debated in relation to free speech more generally.

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[60] See *Steel and Morris*, n. 51 above, at para. 94.
[61] See *Free Speech is not For Sale* (English PEN and Index on Censorship, 2009), at 11, found at <http://www.libel reform.org/our-report >.
[62] J. Wells, 'Exporting SLAPPs: International Use of the U.S. SLAPP to Suppress Dissent and Critical Speech', 12 *Temp. Int'l & Comp. L.J.* (1998), 457, at 496
[63] See F. Donson, n. 4 above, particularly chapters.6 and 9.

Concerns about libel law have ebbed and flowed over the last few years. The Defamation Act 1996 was passed in order to simplify the law and respond to complaints from both complainants and defendants.[64] Ironically, the 1996 Act and other legal developments have generally strengthened the protection of (media) defendants in relation to libel actions. For example, the 1996 Act allows a court to reject weak cases at an early stage. Under section 8 - 'Summary disposal of claim' – the court can summarily dispose of a case where it appears to 'no real prospect of success'.[65]

Equally, the decisions of the House of Lords in the case of *Reynolds v. Times Newspapers*[66] and *Jameel v. Wall Street Journal Europe*[67] established a defence of privilege in cases where the area under discussion in the publication is a matter of public interest and where those involved in the publication acted in a responsible manner in relation to determining the accuracy of the material. In *Jameel*, the court concluded that this defence should apply 'to anyone who published material of public interest in any medium'.[68]

If the law in this area has been improved, then why is the demand for reform of the law of libel in England and Wales once more at fever pitch? This was evidenced in 2009 by campaigns for anti-SLAPP protection being run in national newspapers as well as by campaign groups,[69] reports published,[70] Parliamentary debates[71] and the establishment of an expert review panel by the House of Commons Select Committee on Culture, Media and Sport.[72] Libel is currently

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[64] For a full discussion of the background and changes that the 1996 Defamation Act introduced, see N. Braithwaite, 'The United Kingdom Defamation Act 1996', 15 *Comm. Law.* (1997-1998) at 12-13. In particular, the complainants were concerned about the lack of legal aid and the overall costs of bringing libel actions; whilst the defendants complained about levels of damages and the fact that they bore the burden to prove the truth of a claim.

[65] The court can also give judgment for the plaintiff and grant him summary relief 'if it appears to the court that there is no defence to the claim which has a realistic prospect of success, and that there is no other reason why the claim should be tried.' See Defamation Act 1996 (c.31) Section 8.

[66] See *Reynolds v. Times Newspapers,* n. 49 above.

[67] *Jameel v. Wall Street Journal Europe*, [2006] IKHR 44.

[68] Ibid., at para. 54

[69] See the *Sense about Science* website found at <http://www.senseaboutscience.org.uk/index.php/site/project/333/> and the *Bad Science* website found at <http://www.badscience.net/2009/12/libel-reform/>

[70] See Index/PEN, at n. 61 above.

[71] Debate – Libel Laws, 485 HCDeb cols 69-93 (17 December 2008) and English libel law (Parliamentary Proceedings), 497 HCDeb cols 272-295WH (21 October 2009).

[72] The Committee monitors policy, administration and expenditure of the Department for Culture, Media and Sport in the UK. Its website can be accessed at <http://www.parliament.uk/parliamentary_committees/culture__media_and_sport.cfm>.

dominating the issue of free speech in England and Wales and beyond. However, it is interesting to note that the misuse of libel law, which has been a key element of SLAPP suits, has been transformed into an attack on the law itself. The motivations of the complainants have received less attention and critique than the lawyers representing them and the law they are using. The debate is therefore perhaps missing its real target. Demands for reform of libel law may have some useful points but it fails to acknowledge the real problem – the intimidatory and chilling effect of attacks on free speech particularly the speech of concerned citizens, campaigners and critical experts.

In many ways, it was a criticism of the law of libel voiced by the United Nations Committee on Human Rights in August 2008 that prompted this latest round of concern. The Committee noted that libel law in England 'served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work, including through the phenomenon known as libel tourism'.[73]

Simon Singh – A SLAPP victim?

If *McLibel* was the case that previously illustrated the dangers of SLAPPs in the UK, it is the Simon Singh case that is currently being held up as exemplifying the dangers of libel in relation to free and effective public debate. As the discussion below will illustrate, however, understood in the light of the SLAPP action, the Singh case is also an example of the continuing use of SLAPPs in the UK. The case is said to highlight the dangers of what can happen when the open exchange of ideas is attacked. The case was brought in the context of critical discussion related to science and medicine. Singh himself has stated that there is a public interest in being able to write

[73] UN Human Rights Committee (HRC), Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, 30 July 2008 (CCPR/C/GBR/CO/6, 30 July 2008), Paragraph 25, found at <http://www.unhcr.org/refworld/docid/48a9411a2.html>. Libel tourism is a term used to describe forum shopping in libel cases. This process involves plaintiffs choosing to sue in a jurisdiction which is considered to be most favourable to their claim. See Y. Lahlou, 'Libel Tourism: A Transatlantic Quandary', 2 J. Int'l Media & Ent. L. 199 (2008-2009)

scientific criticism without fear of ending up in court.[74] Simon Singh has specialized in writing about science in an open and accessible way, and is the author of the *Fermat's Last Theorem*. He is currently being sued by the British Chiropractic Association (BCA) after publishing an article in *The Guardian* newspaper in which he described claims made by some chiropractors that they could treat common childhood conditions such as asthma as 'bogus'.

When the case first arose, *The Guardian* supported him on the basis that an out-of-court settlement with the BCA would be pursued. However, rather than back down, Singh chose to fight the case citing the importance of the public interest in debate on science as a key reason. Warned that he could face possible legal bills of up to £1 million and large amounts of time eaten up by fighting a long and complex case, he, like the *McLibel* defendants before him, is aware of the dangers both financial and temporal. However, he is also conscious of the importance of fighting the case, and of the benefits it might deliver in terms of the wider public interest in free expression. Another similarity with the *McLibel* case has also developed, the growth of a campaign around the case, although one that is less DIY and more establishment-based.[75]

The case is now in its second year but has yet to come to trial. A preliminary hearing was held in May 2009 at which Mr. Justice Eady concluded that the use of the word 'bogus' in the article meant that author was saying that the BCA 'knowingly' promoted fake treatments. He also concluded that the material was a statement of fact and not comment. This decision will mean[76] that Singh has to prove the factual correctness to the claim that the BCA *deliberately* put forward treatments which it knew did not work. That may prove to be a very difficult task.

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[74] A similar case is being pursued against Dr. Peter Wilmshurst, an eminent British cardiologist, who is being sued for libel by an American corporation NMT Medical. The case, *NMT Medical v. Wilmshurst*, concerns his questioning of trial data relating to Starflex, a device which is supposed to close a hole between the right and left atriums of the heart and help reduce migraine. See M. Henderson, Cardiologist will fight libel case 'to defend free speech', *The Times* (26 November 2009), found at <http://business.timesonline.co.uk/tol/business/law/article6932252.ece>.

[75] The *Sense about Science* website notes the following list of supporters, many of whom are well known figures from entertainment and science: Stephen Fry, Lord Rees of Ludlow, Ricky Gervais, Martin Amis, Jonathan Ross, James Randi, Professor Richard Dawkins, Penn and Teller, and Professor Sir David King, former Chief Scientific Adviser to the UK Government. *Sense about Science* has joined with Index on Censorship and English PEN to campaign for Libel reform. They are also supporting Singh. Information regarding the campaign can be found at the organization's website at <http://www.senseaboutscience.org.uk/index.php/site/project/333/>.

[76] At the time of writing, the decision is being appealed in the Court of Appeal. C. Tryhorn, 'Simon Singh in court to appeal against ruling over Guardian article', *The Guardian* (23 February 2010), found at <http://www.guardian.co.uk/media/2010/feb/23/simon-singh-appeal>.

The Singh case is the latest high profile example of how libel actions are being used against those who speak out in relation to matters of public importance in England. The concerns being expressed by the critics of the libel law now are the same as those expressed by anti-SLAPP campaigners in other jurisdictions, that speech is chilled and critical debate stifled by threats of legal action. The belief in relation to the Singh case that the case is about preventing real debate on issues of public importance serves to reinforce the SLAPP nature of such cases.

Indeed, the law relating to libel is thought to be particularly vulnerable to misuse in this area because it has for many years been seen as being particularly troublesome in the realm of free speech in England. Much of this unease relates to media generated speech, but concerns are not confined to the traditional media and can clearly be very relevant to activist and citizen speech. In their report entitled 'Free Speech is Not for Sale' on the impact of libel law on freedom of expression, Index on Censorship and English PEN note the changing nature of today's media environment.[77] The growth in 'citizen journalism' and the hosting of post-moderated material on newspapers websites has given private citizens access to a media platform only previously serviced by pamphlets, petitions and local newspapers. The report concludes that 'this means that, increasingly, private citizens without the resources of a newspaper or publisher are being forced to defend themselves in an expensive, complex and unfair environment, in which their basic rights are not respected.'[78] The parallels with the *McLibel* case are clear, yet rarely if ever drawn upon in the discussion.

Index on Censorship and PEN highlight ten major problems in their report which offers a resounding critique of the state of the law claiming that it is becoming 'increasingly unbalanced' and hinders 'the free exchange of ideas and information'. [79] The problem it is claimed is greater even than the local jurisdiction, because the phenomenon of libel tourism allows foreign cases to be heard in London. Key issues include jurisdictional concerns, the cost of litigation, the claimed lack of a strong public interest defence, the limited scope of fair comment within the law. It is also

[77] See Index/PEN, at n. 61 above.
[78] Ibid., at 6.
[79] Ibid., at 2.

interesting to note that Index/PEN voice the same concerns as the *McLibel* case before the ECtHR had with regards to corporation's ability to sue for libel.[80] Yet, others have suggested caution in relation to quick reform. For instance, Mullis and Scott welcome the opportunity to further review the law of libel but counter that the overall critique has been 'too one-sided and the reforms proposed ill thought-out, too sweeping and indiscriminate.'[81] The fear is that protection of reputation that is protected by the law of libel is being forgotten in the clamour for reform.

What role does the SLAPP concept have in Europe?

Libel law is usually understood to involve the competing interests of free speech and protection of reputation, and this is certainly the case in relation to Article 10(2) of the ECHR where the protection of reputation or rights of others is an acceptable basis for the limitation of free speech. That balancing must recognise the tension between seeking honest speech that is not harmful and the requirement within a democratic society that speech is not chilled by a fear of litigation.

The final resolution of the *McLibel* case in the ECtHR illustrates some of these elements. In *Steel and Morris v United Kingdom*[82] the Court considered that, although the plaintiff in the case was a very large multinational company, this should not exempt the applicants from the requirement to prove the truth of the statements made. A company was not the same as a public authority, nor would it be prevented from taking libel actions to defend its reputation. Thus, any public questioning of a business should be balanced against the competing interest in its success and viability for the benefit of shareholders and employees as well as for the wider economic good. As a result, States are given a wide margin of appreciation to decide how to approach the rights in this area. However, the State is still obliged to ensure a measure of procedural fairness and 'equality of arms' in granting a remedy to a corporate body to safeguard the competing interest in freedom of expression. In the *McLibel* case, the ECtHR concluded that the failure to provide legal aid for the applicants in the domestic system was a significant factor in assessing the proportionality of the interference under Article 10. Also of importance was the size of the award

[80] The recommendation in the report is not a complete removal of the right to sue but rather a limitation to cases of malicious falsehood.
[81] See A. Mullis and A. Scott, n. 45 above, at para. 3.
[82] See *Morris and Steel*, n. 51 above.

against the applicants. These two key issues were significant in the Court's decision that the interference by the State was disproportionate in this case leading to a violation of Article 10.

An alternative view is to see defamation cases within the context of power. It is in this area that the SLAPP action has been identified to include defamation cases. Gray and Martin state:

> Defamation issues are matters …of power, including the opportunity to publish one's views to mass audiences, the economic resources to pursue or defend legal actions, the social power to mobilise support and wage campaigns, and the coercive power to intimidate opponents.[83]

If threats of libel are on the increase in England, and almost all those who are threatened back away from the fight, and potentially also back off from their research and publication strategy, then some reflection on the SLAPP concept will be valuable. The parallels between the classic SLAPP case and the debate about recent libel cases are clear. If these cases were being brought in the USA, for example, they would be identified as SLAPPs and dealt with accordingly. This would either involve the use of anti-SLAPP legislation, or a SLAPP-back strategy.[84] However, in England, the attention is focused very much on the context of libel actions. In the United States, the talk would be of public participation in the political sphere, whereas in England the idea is rooted in the 'public interest'. As noted by Grayling:

> Consider the effect of, say, a pharmaceutical giant pitted against clinicians or small academic research departments who venture to criticize its products or the protocols of its drug trials. Can it be right that a "claimant friendly" libel law should so easily silence critical evaluation in an area of indisputable public importance?[85]

This raises a number of questions for the English context, and the wider European one too, in relation to what value can be gained from re-locating the discussion in the SLAPP context. It may practically offer a solution to intimidatory actions brought under the law of libel that does not necessarily involve the overhaul of the entire system. If a libel action is brought in order to chill

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[83] T. Gray and B. Martin, 'Defamation and the Art of Backfire', 11 *Deakin L. Rev.* (2006), 115, at 116.
[84] A SLAPP-back it a counter suit brought by the target of a SLAPP for example claiming malicious prosecution or abuse of process. See D. Merriam and J. Benson, 'Identifying and Beating a Strategic Lawsuit against Public Participation', 3 *Duke Envtl. L. & Pol'y F.* (1993) 17, 28-34.
[85] A C Grayling, 'Philosophically Speaking – End Libel Law's chilling effect on science', *BMJ* (2010) 340:c339

speech and intimidate participation, the system needs to arm the target with powers to counter this abuse of process. Whilst courts and legislators in the USA, Canada and Australia have been responding to the acknowledged threat of intimidation, the English courts have done little.

However, as Mullis and Scott point out, the courts in England have a right to assess the motivations underlying a lawsuit under paragraph 2(b) of Rule 3.4 of the Civil Procedure Rules.[86] This power allows the court to strike out a statement of claim where it amounts to 'an abuse of the court's process'; that is something that is 'vexatious, scurrilous or obviously ill-founded'.[87] The courts have concluded that it would occur when a plaintiff has been 'using that process for a purpose, or in a way significantly different from its ordinary and proper purpose'[88] or where there is coercion of the defendant. As Mullis and Scott note:

> [E]ven a claim with an apparent foundation in the law of tort may be struck out should a judge deem such action appropriate. The power has been exercised where a claimant has brought proceedings with no intention of bringing them to a conclusion. It might also be utilized in the face of SLAPPs.[89]

One other solution that the English jurisdiction needs to consider is the possibility of the SLAPP-back where a defendant counter-sues the claimant; the recent case of Henrik Thomsen is helpful in showing the power of this even in the English courts. Thomsen, a Danish radiologist, was sued by GE Healthcare, an American company, for libel.[90] The case arose out of a 2007 presentation Thomsen made in Oxford, and later statements published in his name by a European scientific journal in 2008. In both he described his experiences in a Copenhagen hospital in 2006, when 20 kidney patients injected with the GE Healthcare drug, Omniscan, developed a rare condition called nephrogenic systemic fibrosis (NSF). GE Healthcare sued Thomsen for libel and he then

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[86] Civil Procedure Rules, SI 1998/3132, as amended.
[87] See A, Mullis and A. Scott, n. 45 above, at para 73.
[88] Per Lord Bingham in *Attorney General v Barker,* [2000] 1 FLR 759, para, 19.
[89] See A. Mullis and A. Scott, n. 45 above, at para 73, referencing the case of *Grovit v Doctor*, [1997] 1 WLR 640. To date there are no known cases within the jurisdiction of this power being used in relation to a SLAPP suit.
[90] *G.E. Healthcare and ors v. Thomsen and anor.* (High Court) Claim No. HO 08X01610 (undated), found at <http://documents.propublica.org/ge-v-thomsen-a-british-libel-case/page/94#p=53>.

counter-sued GE also for libel.[91] Although the immediate response of GE was that they would 'vigorously defend' any claim, the case was settled within days.[92]

What role for the SLAPP concept in Europe?

Much of the discussion in this article has been focused on libel suits in the English courts as an example of how SLAPPs do operate in Europe. However the term SLAPP has been seldom used to describe the actions, and there has been little real discussion been given over to the possibility of anti-SLAPP legislation. This accurately reflects the current state of legal and political debate surrounding free speech in England specifically, and also in relation to Europe generally. The effect of the libel law in England and Wales has meant that lawsuits can be easily initiated to stifle criticism and debate in a variety of situations, with the current high profile context being in relation to science and medicine.

A question to be considered is whether regarding such actions as SLAPPs would be beneficial to the furtherance of this debate and the protection of free speech more generally. Problems are certainly present in relation to a shift in attention to the SLAPP. For example, the fundamentals of how free speech and public participation is currently understood in the European/English context may cause hurdles in embedding the idea within the free speech debate. The limited emphasis on the right of public participation in the political sphere, whether in and of itself or as a corollary to free speech, is a clear conceptual challenge to this idea. Equally the current jurisprudence of the ECtHR in relation to Article 10 suggests that whilst activism is becoming increasingly recognized as political speech, it does not currently have the same protection as would be afforded under the U.S. First Amendment.

However, if scholars, commentators and targets come to appreciate such cases as SLAPPs, and therefore recognize their effects in both attacking individual speech and inhibiting healthy democratic debate and public participation, we in Europe may be better placed to find appropriate

[91] D. Leigh, 'Danish scientist sued by drug firm under British libel laws to counterclaim', *The Guardian* (16 February 2010), found at <http://www.guardian.co.uk/science/2010/feb/16/scientist-libel-law-henrik-thomsen>.

[92] D. Leigh, 'US firm drops libel action against scientist', *The Guardian* (18 February 2010), found at <http://www.guardian.co.uk/science/2010/feb/18/ge-healthcare-henrik-thomsen-libel>.

responses to this type of intimidatory litigation. The recognition of SLAPPs will not offer a quick fix, just as a reform of the law of libel will not prevent abusive claims being brought. However, it will allow for a refocusing of attention on the motivations of SLAPP filers and away from the intricacies of any perceived flaws in the libel law and its operation. More broadly, it will also require further scrutiny on the level of protection afforded to public participation in the political sphere and its link with the right to free speech.

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