

ANTI-SLAPPS: COMMON LAW LESSONS ON STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

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I. INTRODUCTION	149
II. GETTING SLAPP-ED IN CANADA AND AUSTRALIA.....	150
III. GETTING SLAPP-ED IN THE UNITED STATES	155
IV. SOLUTIONS TO GETTING SLAPP-ED.....	157

I. INTRODUCTION

Strategic lawsuits against public participation (SLAPPs) are efforts by organizations, corporations, and wealthy individuals to use the costs of litigation to stifle political criticism and dissent.¹ While the term originated in the 1980s, the practice dates back to the period of the American Revolution.² Scholars have suggested several solutions to help judicial decisionmakers identify and dismiss SLAPPs early on.³ And while an ideal anti-SLAPP remedy must facilitate early dismissal, these remedies must balance the statutory and constitutional rights of both plaintiffs and defendants. SLAPPs are a global phenomenon, and this paper seeks to examine different judicial and legislative responses to SLAPPs in common law jurisdictions. While there is no international consensus on how best to deter SLAPPs, the weaknesses in Canadian and Australian anti-SLAPP responses offer unique lessons for American policymakers. In the United States, the First Amendment has broadly been interpreted to protect civic engagement. *New York Times*⁴ and *Philadelphia News*⁵ are two Supreme Court decisions that illustrate how the Court has reallocated evidentiary burdens to remedy the impacts of SLAPPs. I argue that the Supreme Court's focus on burdens of proof misses the point. Nonetheless, I conclude by demonstrating that the Supreme Court's reasoning in these cases supports two creative potential statutory protections for SLAPP

1. Penelope Canan & George W. Pring, *Strategic Lawsuits against Public Participation*, 35 SOC. PROBS. 506–07 (1988).

2. George W. Pring, *SLAPPs: Strategic Lawsuits against Public Participation*, 7 PACE ENV'T L. REV. 3, 7 (1989).

3. *Id.*

4. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

5. *Phila. Newspapers v. Hepps*, 475 U.S. 767, 768 (1986).

defendants: first, more rigorous pleading standards for government and public interest matters; and second, and more ambitiously, the creation of a statutory remedy that awards and allocates extra-compensatory damages to fund counsel for indigent SLAPP defendants.

The objectives of a SLAPP may be achieved across a variety of claims and may be achieved without filing at all. To the SLAPP filer, succeeding on the merits of a claim, or even making it to trial, is inconsequential.⁶ Threatening one's target with the ruinous litigation costs and expenses is the main objective of filing a SLAPP. SLAPPs stand apart from other retaliatory and frivolous lawsuits in that the decision to file a complaint is usually part of a broader political strategy aimed at suppressing a given opponent.⁷ The paradigmatic cases in the United States, Canada, and Australia feature large corporations utilizing their financial and legal standing to attack activists and organizations in court, in response to widespread public protest, dissent, or criticism.⁸ These actions, which usually seek millions of dollars in compensatory damages, attorney's fees, and costs, usually chart out lengthy and complex claims.⁹ For SLAPP filers, the hope is that SLAPP defendants divert their energy away from protest and towards seeking the dismissal of SLAPP claims.

Most commonly, SLAPPs take the form of defamation claims, but also include tortious interference, conspiracy, nuisance, and other business torts.¹⁰ Thus, while scholars have suggested reconceptualizing the qualified privileges standard in defamation claims to stifle SLAPP filers¹¹, the trans-substantive nature of these lawsuits necessitates trans-substantive remedies as well.

II. GETTING SLAPP-ED IN CANADA AND AUSTRALIA

*Daishowa Inc. v. Friends of the Lubicon*¹² is an archetypal example of a SLAPP. Daishowa, a Japanese paper producer entered an agreement with the government of Alberta in the late 1980s to develop a pulp mill in Northern Alberta.¹³ The agreement saw Alberta provide Daishowa with a forest management license encumbering 29,000 square

6. Canan & Pring, *Strategic Lawsuits Against Public Participation*, *supra* note 1, at 507.

7. *Id.* at 506.

8. Pring, *Strategic Lawsuits Against Public Participation*, *supra* note 2, at 5.

9. *Id.* at 6.

10. *Id.* at 9.

11. *Id.* at 15.

12. [1998] 39 O.R. (3d) 620 (Canada).

13. *Id.*

kilometers of area for exacting trees for the mill. However, about a third of that area encompassed the traditional land of a First Nation, the Lubicon.¹⁴

In March 1988, in response to growing national pressures, Daishowa officials met with Lubicon Chief Bernard Ominayak.¹⁵ Although it is unclear what became of those meetings, the Lubicon claimed that Daishowa agreed to halt logging operations pending a determination of land rights; this was contested by Daishowa.¹⁶ The Friends of the Lubicon initiated a boycott of Daishowa paper products in 1991, with the goal of persuading Daishowa to halt logging until a land settlement was achieved.¹⁷ The Friends carried out picketing campaigns and boycotts at businesses of Daishowa customers.¹⁸ The boycott was fiercely successful, and following growing public opposition, Daishowa agreed to stop logging on unceded Lubicon territory.¹⁹

However, in 1994, Daishowa brought suit against Friends of the Lubicon and its lead organizers.²⁰ The complaint alleged that the Friends had committed a variety of economic torts, defamation, and conspiracy against Daishowa, who sought monetary damages of over \$5,000,000 CAD and a permanent injunction on the boycott.²¹

The suit raised the practical implications of defending against a SLAPP.²² For the Friends, the first priority was to find counsel capable of defending against Daishowa.²³ For a group of activists, this meant finding *pro bono* counsel capable of dedicating enough time to reply to Daishowa's complaint within the allotted time period. And while the Friends were able to secure *pro bono* legal services and defend against a preliminary injunction, the law firm they had retained withdrew their services, citing the commitment involved in the case.²⁴

While the Ontario Superior Court of Justice cited the importance of the public issue which the Friends were engaged with, the Court couched its decision to dismiss most of Daishowa's claims in the

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Chris Tollefson, *Strategic Lawsuits and Environmental Politics: Daishowa Inc. v. Friends of the Lubicon*, 31 J. CANADIAN STUD. 1, 119 (1996).

23. *Id.* at 125.

24. *Id.*

public-facing activities of the Friends.²⁵ The court noted that the actions were in public, that they were peaceful, and that they additionally did not have any contracts with the Daishowa that could have been breached.²⁶ The court nonetheless enjoined the Friends from claiming that Daishowa was violating an agreement with the Lubicon in Alberta and enjoined them from using the term ‘genocide’ in their protests describing Daishowa’s logging operations.²⁷

Although the Canadian Charter of Rights and Freedoms protects freedom of expression, the Supreme Court of Canada undercut the applicability of the Charter in *Retail, Wholesale, and Department Store Union, Local 580 v. Dolphin Delivery*.²⁸ In that case, the Supreme Court of Canada held that the Charter does not apply to civil disputes.²⁹ Unlike the United States, where legislative and judicial responses to SLAPPs are consistently tempered by the Petition Clause of the First Amendment, the narrow applicability of the Canadian equivalent to government-based infringements severely undermines the potential strength of anti-SLAPP responses in Canada.

Thus, while only a few provinces have taken to legislate their own anti-SLAPP provisions, the relatively narrow applicability of Charter rights to private interactions may explain why each of these provinces have developed legislative schemes that focus on a plaintiff’s intent in bringing a SLAPP. Québec, for example, sees SLAPPs as a procedural defect rather than an intentional abuse of the courts. Québec’s law focuses on the nature of the proceeding:

Improper proceedings may consist in a claim or pleading that is vexatious or quarrelsome. It may also consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.³⁰

Even though Québec properly identifies the goals of anti-SLAPP legislation, in lumping anti-SLAPP remedies in with all other improper proceedings, it misses the point. There are no tools available for the early dismissal of frivolous claims. Instead, the system is driven by judges. Québec’s legislation grants judges broad powers to intervene

25. See *Daishowa*, *supra* note 13.

26. *Id.*

27. *Id.*

28. See Tollefson, *Strategic Lawsuits and Environmental Politics*, *supra* note 23, at 126–27; [1986] 2 S.C.R. 573 (Canada).

29. *Id.*

30. Civil Code of Québec, S.Q. 2014, c 1., art 54.1 (Can.).

rigorously to ensure that claims do not constitute improper proceedings. Additionally, the burden-shifting mechanism places the burden on the defendant to demonstrate that an action or claim is an improper use of the courts.³¹ At this point, the burden switches to the plaintiff to demonstrate that their claims do not constitute improper proceedings, which requires looking at a plaintiff's intent in bringing a case.³² Although placing the initial burden on the defendant is common across anti-SLAPP regimes, at the very least, plaintiffs seeking to indemnify defendants for public interest-related communications must overcome a greater pleading standard if SLAPPs are to be deterred from the outset. Québec's law indirectly supports SLAPP filers where courts require an examination of the plaintiff's intent in bringing about a case. Litigating intent will almost always be burdensome, so these provisions misunderstand the purposes of SLAPPs. The suits do not "work" because they involve meritorious claims; they work because they drag defendants into court and force defendants to pay litigation costs and fees associated with defending against nonsense claims. Thus, having to litigate intent at this early stage is a poor response to SLAPPs and cannot effectively deter would-be plaintiffs from using tort liability to stifle political expression.

Another paradigmatic example of a SLAPP in Australia is *Gunns Ltd. v. Marr*.³³ The plaintiffs, a group of timber businesses engaged in Tasmania, filed suit against 17 environmentalists and three environmental activist groups. The complaint set forth hundreds of allegations; so many allegations, in fact, that the plaintiffs actually struggled to provide a bill of particulars early on in the proceedings.³⁴ The actions were aimed at the plaintiffs' environmental campaigns against Gunns and sought \$6,360,000 AUD in damages.³⁵ This case demonstrates the necessity for exacting higher pleading standards on public interest-related communications. Although Australian law requires that pleadings state all material facts upon which a claim depends, as well as any necessary particulars of any fact or matter, the Tasmanian court refused to describe the defects in the plaintiffs' pleading because the complaint was several hundred pages long and comprised hundreds of frivolous allegations of tortious misconduct,

31. See Norman Landry, *From the Streets to the Courtroom: The Legacies of Quebec's anti-SLAPP Movement*, 19 REV. EUR. CMTY. & INT'L ENV'T L. 58, 66 (2010).

32. *Id.*

33. *Gunns Ltd. v. Marr*, [2005] VSC 251 (Australia).

34. *Id.*

35. *Id.*

conspiracy, unlawful business interference, and unlawful contractual interference.³⁶ The court said:

It is not the function of the Court to draw or settle a party's pleading. The Court is confined to the function of ensuring that the pleadings are within the rules and fulfil the functions for which they exist. In particular, it must ensure that one party is not placed at a disadvantage by the failure of another to provide a proper, coherent, and intelligible statement of its case. In this case, it would be unfair to the defendants to require them to plead to this amended statement of claim.³⁷

Given that courts are reluctant to insert themselves at the pleading role, there must be a legislative response on the front-end for public interest matters. However, like many Canadian provinces, Australia also incorporates a plaintiff's intent into its definition of a SLAPP suit.³⁸ However, Australia goes further by incorporating the merits of a potential case into its definition as well.³⁹ This has had fundamental consequences for SLAPP reform and litigation in Australia.⁴⁰ Unlike Canada and the United States, Australia's constitution does not have a freedom of speech provision.⁴¹ Instead, the main protection against SLAPPs is derived from the constitution's guarantee of representative government, a right which has been qualified to extend only to government and political communications.⁴²

Additionally, instead of creating a separate statutory law to facilitate early identification, dismissal, and deterrence of SLAPPs, Australia responded to SLAPPs by reforming its defamation law.⁴³ This is a problem, because, as noted, SLAPPs, although frequently appearing as such—are not tied to defamation cases. The *Protection of Public Participation Act*, which was signed into law in 2008, requires SLAPP defendants to demonstrate that a claim is brought for an improper purpose to receive damages.⁴⁴ Requiring litigation about the purposes and merits of a case ultimately renders this response deficient. Additionally, where complaints state both frivolous and meritorious

36. *Id.*

37. *Id.*

38. Greg Ogle, *Anti-SLAPP Law Reform in Australia*, 19 REV. EUR. CMTY. & INT'L ENV'T L. 35 (2010).

39. *Id.* at 41.

40. *Id.* at 35.

41. *Id.* at 36.

42. *Id.*

43. *Id.*

44. *Id.* at 41.

claims, Australia's statute will not protect SLAPP defendants.⁴⁵ While claims brought in good-faith should be protected, SLAPP plaintiffs who seek to weaponize their financial standing and access to the courts against defendants who comment on issues of public concern must be accounted for. More importantly, the Act requires intense litigation about a plaintiff's intent in bringing a case to be effective. Like the Canadian legislative responses, this legislative regime, in attempting to cut a balance between the rights of plaintiffs and defendants, totally fails to not only effectively deter SLAPPs, but also to recognize the broader chilling effect that SLAPPs have.

III. GETTING SLAPP-ED IN THE UNITED STATES

There is no federal anti-SLAPP legislation in the United States. However, courts have relied on defamation law to remedy the impacts of SLAPPs. In *New York Times*, the Supreme Court was confronted with a challenge brought by the New York Times and other student-group petitioners; the student groups were protesting anti-Black discrimination at the height of the Civil Rights movement in Alabama.⁴⁶ Their protest materials were printed in the New York Times on March 29, 1960.⁴⁷ Sullivan, an elected commissioner in Montgomery, Alabama, brought a libel action against the New York Times and the student groups in Alabama state court.⁴⁸ Titled "Heed their rising voices," the advertisement was part of a racial justice campaign for Black students in the South. Sullivan claimed that the statements made as part of the advertisement were libelous.⁴⁹

Although none of the statements in the advertisement explicitly mentioned Sullivan as the commissioner of the Montgomery Police Department, at trial, the judge instructed the jury that, because the statements were *per se* libelous, legal injury was implied by the very fact of publication.⁵⁰ The Alabama Supreme Court affirmed. On appeal, appellants challenged the Alabama court's jury instruction.⁵¹

Justice Brennan's majority opinion held that, in an action brought by a public official, Alabama's libel rule abridged the freedoms of speech and press guaranteed by the First and Fourteenth

45. *Id.*

46. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

47. *Id.*

48. *Id.* at 258.

49. *Id.* at 258–60.

50. *Id.* at 262.

51. *Id.* at 256.

Amendments.⁵² The court noted that “the maintenance of the opportunity for free political discussion to the end that the government may be responsive to the will of the people . . . ‘is a fundamental principle of our constitutional system.’”⁵³ The Supreme Court characterized the advertisement as “an expression of grievance and protest on one of the major public issues of our time.”⁵⁴ The Supreme Court also rejected the State’s assignment of the burden of proof onto the defendant to prove the truth of their statements; the Constitutional protection accorded to speech is separate from the truth of ideas or beliefs offered.⁵⁵ Additionally, the Court circumscribed the ability of public officials to bring SLAPP claims by requiring that plaintiffs demonstrate statements were made with “actual malice.”⁵⁶

While raising the evidentiary burden reduces the possibilities of SLAPPs being filed and lightens the burden of proof on SLAPP defendants, the focus on government officials is incredibly limiting. Additionally, while raising the burden of proof on the SLAPP plaintiff means that there will be less successful SLAPP cases, it does not mean that SLAPP filers, who file irrespective of merit, will be deterred from filing in the first instance. Unless such substantive provisions are accompanied by procedural mechanisms that facilitate early dismissal of frivolous claims targeting public interest matters, then they do not deter SLAPP plaintiffs.

In *Philadelphia Newspapers*, the Supreme Court reviewed a challenge to a Pennsylvania decision involving a defamation suit by Maurice Hepps against the Philadelphia Inquirer.⁵⁷ The newspaper published a series of articles which said that General Programming Inc., a corporation for which Hepps was a principle stockholder, had substantial links to organized crime networks.⁵⁸ Pennsylvania previously employed the common law presumption that defamatory statements are presumptively false, which the Supreme Court rejected in *New York Times*.⁵⁹

Here, the Supreme Court elucidated a tripartite framework for determining the standard for evaluating a defamation claim: (1) when an issue is of public concern and involves a public figure plaintiff, courts will employ the *New York Times* framework; (2) when the issue

52. *Id.* at 268.

53. *Id.* at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

54. *Id.* at 271.

55. *Id.*

56. *Id.* at 281.

57. *Phila. Newspapers v. Hepps*, 475 U.S. 767, 769 (1968).

58. *Id.*

59. *Id.* at 770.

is of public concern and involves a private figure plaintiff, the burden of falsity is shifted onto the plaintiff, although the standard is less forbidding and; (3) when the issue is of private concern and involves a private figure plaintiff, the common law standard is undisturbed.⁶⁰ Shifting the burden of proof in relation to the nature and target of communications illustrates how defamation law prioritizes protecting public interest communications, in accordance with the Petition Clause of the First Amendment. At the same time, while this might be an adequate mechanism for adjudicating a SLAPP claim at trial, by itself litigation over the correct calibration under *New York Times*, if anything, facilitates frivolous claims. Additionally, for SLAPP purposes, it should not matter who the target of the criticism is, so long as the speech concerns an area of public concern. However, the shortcomings of this standard are likely because it inheres within defamation law. SLAPP lawsuits have proven to be trans-substantive, and while they are most commonly defamation claims, when those claims involve issues of public concern, they require special procedural mechanisms aimed at deterring SLAPPs.

IV. SOLUTIONS TO GETTING SLAPP-ED

A broader reading of the Petition Clause might work towards expanding the category of communications that are evaluated under the *New York Times* framework. And while scholars have certainly argued for doing so, the rigid formalism embedded in this tripartite framework leaves much to be desired. Additionally, anti-SLAPP remedies that take the form of legalistic standards are not SLAPP remedies at all. If the filer can have a case survive long enough to be evaluated under the framework, then the objectives of filing a SLAPP have likely already been achieved. Solutions must be aimed at early identification & summary dismissal to deter and remedy the financial and administrative harms associated with SLAPPs.

On the other hand, 32 states have passed anti-SLAPP legislation.⁶¹ California and New York have taken contrasting approaches to legislating protections against SLAPPs. New York's SLAPP law applies *only* to actions involving public petition and participation. Actions involving public petition and participation involve communications made in public in connection with issues of public interest.⁶² The catchall provision in § 76-a(2), in contrast, is

60. *Id.* at 775.

61. See Pamela Shapiro, *SLAPPS: Intent or Content?: Anti-SLAPP Legislation Goes International*, 19 REV. EUR. CMY. & INT'L ENV'T L. 14, 19 (2010).

62. N.Y. C.P.L.R. § 76-a(1).

anchored by the Petition Clause.⁶³ This statute needs to contain procedural mechanisms that facilitate the early dismissal of lawsuits and provide sufficient deterrents to SLAPP filers. It must also go beyond the defamation context and address the various other claims by which SLAPP plaintiffs seek to achieve the objects of SLAPPs. State legislatures' priority on defamation risks creating perverse incentives for SLAPP plaintiffs to channel other tort actions to chill speech.

California's anti-SLAPP statute protects communications that are made before or in connection with issues under consideration by a legislative, executive or judicial body or other communications made in public in connection with an issue of public interest.⁶⁴ California's anti-SLAPP regime is unique in that it contains special motions to expedite the dismissal of frivolous claims.⁶⁵ The motion allows for SLAPP defendants to raise all issues that fall under the protection of the anti-SLAPP statute and dismiss those claims.⁶⁶ Once defendants make that showing, the burden then shifts to the plaintiff to demonstrate that there is some probability of winning the claim.⁶⁷ Allowing defendants to move for the special motion early in the proceedings is a good way to avoid the threatening costs of litigation that give rise to SLAPPs.⁶⁸ On the other hand, California courts are balancing the available remedies for SLAPP defendants against plaintiffs' rights. For example, in *Wilcox v. Superior Court*,⁶⁹ the California Court of Appeals held that judges reviewing whether the probability standard is met must only look to whether there is a prima facie showing of the evidence, not weigh that evidence.⁷⁰

California and New York's focus on public interest protections are anchored by the Petition Clause, in contrast to statutory anti-SLAPP protections in Canada and Australia, which do not apply to the private context or contain similar speech protections at all. Specifically, California's approach reveals a fundamental problem in tackling SLAPPs. On one hand, combatting SLAPPs requires early dismissal of frivolous claims. On the other hand, it is impossible to develop a SLAPP protection that filters out frivolous claims at the outset, without requiring defendants to respond. Thus, the battle shifts to focus on how much the defendant must engage with frivolous claims before the

63. N.Y. C.P.L.R. § 76-a(2).

64. Cal. Code Civ. Pro. § 425.16.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. 27 Cal. App. 4th 809, 813 (Cal. Ct. App. 1994).

70. Shapiro, *supra* note 62, at 23.

objects of the SLAPP are achieved. While this certainly changes with each case, judges and legislators can support SLAPP defendants by lessening the financial burdens imposed upon them by filers.

Additionally, courts and legislatures have indirectly assisted SLAPP filers' goals of undermining freedoms of speech by maintaining procedural and substantive obstacles to early dismissal of SLAPPs. To avoid facilitating these unconstitutional objectives, courts and legislatures must be well-equipped to recognize SLAPPs, their objectives, and their consequences. The enactment of § 425.16 of California's Code of Civil Procedure illustrates progress on this front. However, many other jurisdictions still fail to empower SLAPP defendants with early dismissal mechanisms. As demonstrated, some even require litigation over the plaintiff's intent and the merits of their claims. Ultimately, a successful response to SLAPPs will require legislative and judicial solutions that recognize the First Amendment interests at risk in SLAPP litigation.