'London Calling':

The issue of legal intimidation and SLAPPs against media emanating from the United Kingdom

The Foreign Policy Centre

ARTICLE 19

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[1] The UK Anti-SLAPP Coalition is an informal working group, established in January 2021, comprising a number of organisations (including ARTICLE 19, Reporters without Borders, Justice for Journalists Foundation, the National Union of Journalists, Rory Peck Trust, PEN International, the European Centre for Press and Media Freedom (ECPMF), Transparency International UK, Rights and Accountability in Development (RAID), Spotlight on Corruption, Protect, Whistleblowing International Network, the Campaign to Protect Freedom of Information in Scotland (CFoIS) and The Daphne Foundation) as well as media lawyers, researchers and academics who are monitoring and highlighting cases of legal intimidation and SLAPPs, as well as seeking to develop remedies for mitigation and redress. All views expressed by the representatives of the Foreign Policy Centre as part of this working group are those of Unsafe for Scrutiny Project Director Susan Coughtrie and are based on the findings of publications in the Unsafe for Scrutiny research project series, https://fpc.org.uk/programmes/unsafe-for-scrutiny/

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Executive Summary

This report examines the issue of legal intimidation and legal actions initiated in the United Kingdom (UK) against journalists and media outlets with the purpose, or effect, of stifling scrutiny and debate on matters of public interest. Concern has been growing globally regarding this phenomenon often referred to as strategic lawsuits against public participation (SLAPPs). However, it is the UK, and more specifically London, that has been identified as a leading jurisdiction for domestic and trans-national SLAPP cases against media.

The report begins by focusing on legal cases recently brought to the London High Court against investigative journalists and their publishers that bear the hallmarks of SLAPPs. It explores the challenges that they have faced in defending themselves, highlighting issues within the English and Welsh legal system that can create a more 'claimant friendly' environment, despite reforms in 2013. Typically, however, the intention of a SLAPP claimant is not necessarily to reach the court stage, where the facts of the matter might be examined more closely, but rather to draw out the legal proceedings in order to delay publication and/or exhaust the financial as well as other resources (time, energy and psychological) of the defendant. Journalists and media subject to legal threats understandably therefore may fold under the financial pressure of taking a case to court, where they may lose thousands if not tens of thousands of pounds, even if they were to eventually win. Journalists who have 'won' cases, usually due to the claimant withdrawing at a late stage, can still feel that they have lost due to the level of resources wasted that cannot be reclaimed.

Cases that reach court are, therefore, the 'tip of the iceberg'. Over the last few years, media all over the world have been increasingly reporting that they are subject to legal threats facilitated by UK based law firms, especially when investigating powerful and wealthy individuals. For example, in a 2020 FPC survey, 63 journalists working on financial crime and corruption in 41 countries identified the UK as the leading international jurisdiction for legal threats. More than 60% of respondents were working on corruption investigations with a direct or indirect link to the UK. The role that London plays as a global hub for the super-rich, including those enriched through illicit schemes, appears to be compounding the problem. However, such cases rarely make the public record unless journalists themselves speak out.

The aim of this report is to shed light on this issue and explore how and why cases of legal intimidation and SLAPPs deployed from the UK against media, based both here and abroad, work. It also examines the impact caused, firstly on journalists and wider media freedom, but secondly in delaying or preventing the redress of wrongdoing in society. While the English and Welsh legal system is the primary focus of this report, Scotland and Northern Ireland are also briefly examined. Concerns regarding the chilling nature of their libel laws have led to reform in both countries in the last couple of years. The report concludes that those wealthy enough can evade scrutiny regardless of how effectively a particular law has balanced out rights to privacy and free speech, because it is the process of being subject to abusive legal threats that is the punishment for media and can force them to concede. The right to defend yourself against spurious claims is an important feature of democratic societies. However, the misuse of legal systems to shut down public interest reporting must be seen as undemocratic and having a corrosive effect on our core values, including freedom of expression and right to information.

In a welcome step, in March 2022 the UK Government recognised the issue of SLAPPs, and its impact, by launching a consultation on potential areas for reform. The conclusion drawn from this report's research is that legislative reform is needed to ensure that abusive claims can be disposed of at a much earlier stage, with a high threshold for public interest reporting, keeping the costs to defend a case to a minimum and creating deterrents against the use of SLAPP. Procedural reform should take place in the form of a UK Anti-SLAPP Law, which would apply to all laws utilised for SLAPP, which go beyond libel into privacy and data protection. In addition, greater oversight of law firms and PR companies, together with stronger anti-corruption enforcement measures, are required to ensure dirty money is not being used to stifle investigations into corruption or other crimes. Ultimately, action must be urgently taken to prevent the UK's laws from being abused to suppress information, bully journalists, and restrict media freedom and ensure that access to justice is more equitable for all in society, not just those wealthy enough to afford it.

Key Findings

Profile of Claimants versus Defendants:

- **There is usually a severe power imbalance between the claimant and the defendant.** Claimants are typically members of the political or business elite or large corporate entities, both domestic or foreign, with significant financial resources, for whom the expense of bringing a lawsuit case is relatively negligible. The defendants are typically individual journalists or independent media outlets for whom the cost of defending the lawsuit can risk putting them in financial jeopardy.
- **An inequality in arms can put journalists and media outlets at a disadvantage from the outset.** If a case reaches court the combination of legal costs, fees and potential damages can run into the thousands if not, in some cases, millions of pounds. Claimants can exploit this disparity to force defendants to fold under financial pressure, even if they wanted to defend the case. Settlements often require the information to be removed and an apology thus white-washing the claimant's reputation.

Defending a legal case in the UK can be prohibitively expensive and resource draining for media:

- **SLAPPs can create significant financial jeopardy for journalists and media outlets, with legal costs starting to accrue long before reaching court – if they ever do.** All cases start with legal letters, which can result in weeks, months and even years of back and forth. Thousands of pounds can be spent in these early stages before seeing the inside of a courtroom. Those with in-house lawyers can perhaps more easily respond or call the bluff of the claimant, but this is much more challenging for small newsrooms or independent journalists, especially those based outside of the UK.
- **The process of defending a legal case can itself feel like a 'punishment'.** A common thread running through the experiences of journalists subject to, or threatened with, legal action in the UK courts is a fear of how devastating the financial impact will be. Many speak about the potential of losing their savings, their houses, pensions, as well as potentially their livelihoods if a case goes to court. Individual journalists and small media outlets that do decide to defend cases usually rely heavily on low bono and pro bono support. While some have used crowdfunding campaigns to fund their legal defence, this option may only work for those with a significant public platform.
- **Responding to legal threats and mounting a legal defence diverts resources away from journalism**. Legal challenges are relatively easy for claimants to issue but dealing with them is a hugely time-consuming process, which slows down publication and can eat up valuable, and in the case of smaller newsrooms often limited, financial and other resources that could be spent investigating other stories.

Other challenges within the UK legal system:

- **Libel laws in the UK remain weighted towards the claimant.** The defendant must prove that the statement is true (or that some other defence is available to them). This can create challenges if the legal meaning decided upon by the judge conflicts with what the journalist or media outlet meant. In contrast, in other jurisdictions like the United States, far more of the burden of proof rests on the claimant, who must prove the allegedly libellous statement under claim is untrue.
- **Libel tourism remains an issue in the UK, with the bar to bring a case problematically low.** English courts have appeared to allow libel cases to proceed so long as a foreign claimant can show a reputation in the UK, for example owning a home, business dealings, children in school in this jurisdiction or some other personal or business interest can suffice. This does not fully take into account how easy that is for those with ample funds as well as, effectively buy residency and citizenship via investment visas.
- **As well as libel, privacy and data protection laws are increasingly being used, often in combination**. These laws have weaker journalistic exemptions for public interest reporting and longer statutes of limitation than libel, making them more attractive grounds on which to sue. The recent 2022 Supreme Court Bloomberg v ZXC ruling has raised concerns that privacy arguments in pre-publication legal communication and injunctions will increase.

Common tactics:

- **SLAPPs brought in the UK are often pursued against individuals instead of, or as well as, the organisation they work for.** In some transnational cases, this appears to have made the UK a more desirable jurisdiction. Intentional or not, this can isolate individuals from resources that could help defend their cases, such as insurance which may not be available to them as individuals.
- **Legal threats are being deployed as part of 'bad faith' responses to 'right to reply' requests.** Media report being increasingly drawn into a protracted quasi legal back and forth when they approach the subject of their investigation for comment. There appears to be no intent to answer the requests for information, but rather to divert the media, tire out their resources and delay them from reporting.
- **There is significant concern about this 'hidden problem' of UK law firms sending threatening legal communication prior to any official filings.** This can have a similar effect to SLAPPs on journalists all over the world. Due to the nature of this process, it is hard to get a clear idea of the scale of the issue.

SLAPPs, the 'super-rich' and corruption:

- **The role that London plays as a global hub for the super wealthy appears to have compounded the SLAPPs problem.** This includes but is not limited to those enriched through illicit schemes, meaning British law firms are often in demand from those with deep pockets who seek to protect themselves from any unwanted media scrutiny. It is notable that many of the legal threats and SLAPP actions emanating from the UK are taken against media investigating financial crime and corruption, not necessarily taking place in the UK, although sometimes facilitated by the UK's financial and systems.
- **Threats of legal action utilised as a tool for reputation laundering.** Legal threats appear to be used as a way to clean up a client's image and remove unfavourable information in the public domain. This is seen as an important endeavour as this type of information can feed into due diligence systems at banks and other services that can flag individuals as a potential risky client or politically exposed person, which would make them subject to more stringent anti-money laundering checks.
- **There has been insufficient recognition from the UK Government and official bodies of the connection between protecting media freedom and countering corruption.** In lieu of effective law enforcement, which would see successful criminal convictions and civil actions such as seizures of illicit or unexplained wealth, journalists are often the ones making information about wrongdoing public first, if they are not in fact the only ones uncovering it. If they are sued in response, they have no official criminal or civil enforcement case on record that can support their allegations and underpin their available legal defences. Moreover, in light of the Bloomberg v ZXC Supreme Court judgment they cannot even publicly name those being investigated by law enforcement agencies.
- **The availability of highly skilled expensive British law firms, adept at utilising heavy-handed tactics that are designed to, or have the effect of, intimidating journalists, also plays a role**. Law firms will often state that they are only acting in the best interest of their clients and that they are within their rights to set their own fees. However, the amount that some law firms charge for their services, which could then be required to be covered by the defendant if they lose, sets a 'David and Goliath' tone for engagement from the outset. There also do not appear to be stringent enough anti-money laundering checks in place to ensure dirty money is not being used to fund legal threats.

Impact on journalists and media freedom:

- **Claimants may lose or decide to settle, but that is not necessarily 'good news' for journalists**. Claimants do not in fact win many of the cases they bring. A large number are dropped before they come to trial or occasionally are thrown out at a preliminary hearing. For the media, this is not necessarily 'good news', however, particularly if they were prohibited for the duration of the case of reporting on the issue at stake. If a case is only won after several years, then the story that the journalist sought to report on may no longer be relevant and the media outlet concerned may have been forced to invest time and money in a pyrrhic victory.

- **Legal threats against a journalist or media outlet also often do not come in isolation from other intentional tactics to intimidate and harass.** There are concerns of how UK law firms appear to operate in combination with a network of public relations consultants, corporate investigators and private protection agencies, with journalists reporting being subjected to online harassment and trolling, coordinated or otherwise, as well as smear campaigns and surveillance as legal cases develop.
- **There is psychological impact on journalists subject to legal challenges, which is often not sufficiently recognised**. There is a huge amount of pressure on journalists subject to SLAPPs, beyond the financial strain, including the aforementioned other forms of harassment, which can significantly impact their mental health. Journalists are sometimes unable to continue working, at least to full capacity, while a legal action against them is ongoing. Self-censoring or complying with legal threats can also have an emotional burden. Some journalists feel they are being put into what is in effect Hobson's choice-esque situations – continue to publish the information and face significant financial penalties, and even ruin, or withdraw the story and feel that they are effectively complicit in covering up wrongdoing.

Recommendations

For the UK Government:

- Adopt at a legislative level, in the earliest possible timeframe, and implement measures to counter legal intimidation and SLAPPs. This should include the adoption of a UK Anti-SLAPP Law to strengthen procedural protection, encompassing:
  - Accelerated procedures to dispose of SLAPPs at the earliest possible stage in proceedings;
  - Sanctions to deter and delegitimise the use of SLAPPs and ensure they are no longer considered a viable means of responding to criticism; and
  - Protective measures to safeguard public watchdogs from the worst impacts of SLAPPs and to ensure they are in a position to fight off SLAPPs.
- Recognise the danger of legal intimidation and SLAPPs within the UK's National Action Plan on the Safety of Journalists, creating mechanisms by which monitoring and reporting of this issue can take place at a national level on an annual basis.
- Create a defence fund in the UK, along the lines of the US's recently launched Defamation Defense Fund, to shield investigative journalists from potential SLAPP attempts. As an immediate step, expand admissibility of legal aid for defendants acting in the public interest by extending Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
- Tighten regulatory and ethical standards covering law firms facilitating SLAPPs or issuing baseless legal threats, including by expanding anti-money laundering regulations to cover legal advice provided by law firms when acting for claimants pursuing civil cases against media.
- Ensure the effective funding and enforcement of anti-corruption measures and include anti-SLAPP initiatives within its strategies to tackle corruption to recognise the role that journalists play at the frontline of exposing corruption and to ensure those they investigate for wrongdoing are not able to abuse the UK legal system to intimidate them.
- Stronger scrutiny must be placed over the granting of licenses for individuals subject to sanctions by the UK Government, or by their partners such including the US and EU, to pursue civil legal cases in the UK against media or others speaking out in the public interest.

For the devolved administrations in Scotland and Northern Ireland:

- Engage stakeholders with a view to understanding SLAPPs and the extent to which they are having a chilling effect on freedom of expression and public participation in Scotland and Northern Ireland.
- Adopt relevant Anti-SLAPP legislation and regulation in line with initiatives outlined above.

For UK Parliamentarians:

- Draw attention to the danger of legal intimidation and SLAPPs to freedom of expression and media freedom within Parliament.
- Support the adoption of a UK Anti-SLAPP Law through Parliament, and other legislative initiatives that recognise the impact of SLAPPs, including but not limited to the Economic Crime Bill 2 expected to be tabled later in 2022.
- Push for the adoption of anti-SLAPP initiatives in the forthcoming reiterations of the UK's Anti-Corruption Strategy and Economic Crime Plan both due for renewal from 2023.

For the Solicitors Regulatory Authority, Bar Council and other regulators:

- Prioritise the issue of legal intimidation and SLAPPs as one of serious concern undermining the reputation of the UK legal community and, as part of efforts to limit their use, engage in awareness raising initiatives highlighting the impact on journalists and the broader media freedom environment.

- Provide guidance to lawyers and law firms on how to identify potential SLAPP cases and expand regulatory frameworks to ensure that UK law firms are not complicit in facilitating SLAPPs and that intimidatory and inappropriate behaviour in legal communication is effectively sanctioned. For example, this could be done through the Solicitors Regulatory Authority with the adoption of a specific Anti-SLAPP Warning Notice.
- Remove any requirement to complain to the law firm first about their behaviour from the complaints procedures.
- Monitor complaints regarding behaviour that bears the hallmarks of legal intimidation and SLAPPs and publish data about this annually.

For the UK's legal community:

- Law firms should ensure they have, and comply with, publicly available commitments to use high ethical standards when writing to journalists and media outlets threatening legal action, including being mindful of the position of the recipient (especially if individual journalists or media based overseas) and avoid the use of language or tactics that could intentionally or otherwise be perceived to intimidate or harass.
- Strengthen internal due diligence checks on clients regarding their source of wealth and refrain from accepting funds to pay for legal services, including legal advice, where the origin of is unexplained.
- Encourage the provision of pro bono legal support to journalists and media outlets facing legal intimidation and SLAPPs.

For organisations supporting journalists and defending media freedom in the UK and abroad (including NGOs, donor organisations, trade unions and associations):

- Provide more funding for legal defence and guidance on how to respond to legal communication and litigation (e.g. SLAPPs).
- Support awareness raising initiatives on legal intimidation and SLAPPs, including speaking out publicly about cases of those subject to them to provide solidarity and support.

For journalists and media:

- Respond to the UK Government's Call for Evidence with your experiences of legal intimidation and SLAPPs (by 19th May 2022).[2]
- Report incidences of legal threats made towards you to the appropriate authorities (such as the Solicitors Regulatory Authority) as well as to relevant regional monitoring mechanisms (such as the Council of Europe's Safety of Journalists Platform) and media freedom NGOs. While not all incidences may receive immediate remedy or redress, such reports will create a better understanding of the threats faced, the instigators, and methods used. This can support the development of stronger measures for protection and defence, as well as the prioritisation of funding.
- Put risk protections in place to guard against potential legal challenges. This can include, for example, media liability insurance or pre-arranged pro bono legal support that would be available when incidents arise. Ensure this applies not only to employees, but also to freelancers.
- Support other journalists and media outlets subject to legal threats or SLAPPs by monitoring and reporting on their cases. This creates important solidarity and ensures that intimidation does not happen in darkness.

[2] Ministry of Justice, Strategic Lawsuits Against Public Participation (SLAPPs), Online Survey, March 2022, https://consult.justice.gov.uk/digital-communications/strategic-lawsuits-against-public-participation/

Introduction

Strategic lawsuits against public participation (SLAPPs) are abusive lawsuits pursued with the purpose of shutting down acts of public participation.[3] Typically, the intention by the claimant is not necessarily to reach the court stage, where the facts of the matter might be examined more closely, but rather to draw out the legal proceedings in order to delay publication and/or exhaust the financial as well as other resources (time, energy and psychological) of the defendant. These legal actions, or the threat of them, are directed against individuals and organisations – including journalists, media outlets, whistleblowers, activists, academics and NGOs – in an attempt to shut down discussions around matters of public interest. Often, the aim of SLAPPs is to harass and intimidate them into removing information from the public domain or prevent its publication in the first place.

While SLAPPs have been gaining wider recognition as an issue in several jurisdictions around the world, the UK has increasingly been recognised as a leading jurisdiction for SLAPPs both domestically and transnationally.[4] The UK is seen as a more plaintiff-friendly jurisdiction where mounting a defence is a particularly costly and lengthy process. The potential for significant inequality of arms when it comes to financial resources, between the claimant and the defendant, is notable in the UK where the combination of legal costs, fees and potential damages can run into the thousands if not, in some court cases, millions.

It is the UK's libel laws in particular that persist as a risk for media globally despite the introduction of the 2013 Defamation Act in England and Wales. Reference is sometimes made generally to the UK's 'libel laws', especially when speaking about transnational legal cases, but it is important to distinguish the three legal systems within its borders.[5] Libel laws in England and Wales, Scotland, and Northern Ireland have separately progressed through reform, or several reforms, at various stages over the last century. The specific cases referred to in this report are predominantly taking place within the context of the English legal system (in Chapters 1 and 2), although there has been growing concern regarding Northern Ireland being a favourable jurisdiction for SLAPPs and about 'unjustified threats' remaining an issue after the recent defamation reform in Scotland (Chapter 3).

The 'hidden problem' of UK based law firms sending threatening legal communications prior to any official filings, which can have a similar effect to SLAPPs, is also examined (in Chapter 2). The availability of highly skilled British law firms, adept at utilising heavy-handed tactics that are designed to, or have the effect of, intimidating journalists, has appeared to compound the problem. The role that London plays as a global hub for the super wealthy, including but not limited to those enriched through illicit schemes, means these firms are often in demand from those with deep pockets who seek to protect themselves from any unwanted media scrutiny. It is notable that many of the legal threats and SLAPP actions emanating from the UK are taken against journalists and media outlets investigating financial crime and corruption, not necessarily taking place in the UK, although sometimes facilitated by the UK's financial and legal systems.

It is important to underscore that having the right to defend oneself against spurious accusations is not under question in this report. The right to bring a legal claim in defence of such accusations is an important part of a democracy and functioning judicial system. Journalists and media outlets do not always get information right, and sometimes can cause great harm by getting things wrong (see section on 'SLAPPS

[3] The term 'SLAPP' was coined in the United States to refer to lawsuits against citizens that appealed to the Government for a response to an issue of public concern through the Petition clause provided for in the Constitution. These suits are brought by private entities in retaliation for calling governments to respond with the aim to intimidate their opponents and transform a political dispute into a technical and legal one. See e.g. Pring and P. Canan, SLAPPs Getting sued for speaking out, 1996, p.7-10

[4] Susan Coughtrie, Unsafe for Scrutiny: Examining pressures faced by journalists uncovering financial crime and corruption around the world, FPC, November 2020, https://fpc.org.uk/publications/unsafe-for-scrutiny/

[5] The United Kingdom has three separate legal systems: England and Wales, Scotland, and Northern Ireland (and while the legal system is the same as that of England, Wales has, since 2007, its own parliament). There is a substantial overlap between these systems but there are also significant differences. Importantly with regard to SLAPP cases, defamation law is the same in England and Wales, but different in Scotland and different again in Northern Ireland. This report is focused on defamation law in England and Wales, where most SLAPP actions are taken, as well as Northern Ireland, which has seen a rise in the number of SLAPP cases. The Defamation and Malicious Publication (Scotland) Act 2021 has brought significant reform to Scots defamation law; the impact of this will be seen in future cases.

and concerns about access to justice' in Chapter 5). The aim of this report is to highlight the issues within the UK legal system that allow for potential abuse. It examines how this abuse might take place, how the issue of inequality of arms could undermine the right to an adequate defence as well as the balance that must be struck between the right to freedom of expression and the right to privacy.

SLAPPs can allow the rich to evade scrutiny regardless of how effectively a particular defamation law has balanced out rights to privacy and free speech. It is often, as some journalists have described it, the legal process itself that is the 'persecution' – i.e. even if the defendant believes they could win in court under the current laws, the length of time and cost incurred to reach the trial stage may mean they are forced to fold before they can get there. This tips the balance too far in favour of those who wish to suppress information and shut down investigations into potential wrongdoing, thereby preventing discussion of matters of public interest. The examples provided throughout this report highlight the significant challenges faced by journalists and media outlets in their attempts to publish information, which have hitherto been largely hidden from view and what can happen not only to them, but also to wider society if they are delayed in publishing or prevented altogether (Chapter 4).

However, there have been some recent developments that are likely to affect the landscape for SLAPP actions in the UK. While defamation has been the most commonly used law for legal intimidation and SLAPPs, there are also indications of a shift away from libel towards privacy and breach of confidence arguments, which have weaker journalistic exemptions, to shut down public interest reporting. Brexit also has provoked new questions on jurisdictional considerations and created uncertainty regarding the applications of judgments on European Union (EU) nationals.

While anti-SLAPP movements have been building momentum in other jurisdictions, including the US, Canada and the EU, until recently, thus far little had been done to address this issue in the UK. In January 2021, an informal UK working group to address SLAPPs was formed by the Foreign Policy Centre and Index on Censorship, which now comprises a number of freedom of expression, whistleblowing, anti-corruption and transparency organisations, as well as media lawyers, researchers and academics who are researching, monitoring and highlighting cases of legal intimidation and SLAPPs.[6] Members of the working group are also actively seeking to develop remedies for mitigation and redress. In July 2021, 22 members co-signed a joint policy paper entitled *On Countering Legal Intimidation and SLAPPs in the UK* and in November 2021 the working group published proposals for potential legal and regulatory reform (both are attached in full as appendices to this report).[7] These potential steps to mitigate SLAPPs in the UK context are explored in Chapter 5, which also looks at the steps taken in other jurisdictions. The findings of this report underscore why such initiatives are needed in the UK.

What is a SLAPP?

There is no uniform definition of a SLAPP and different definitions are used in laws and advocacy.[8] For example:

- The Supreme Court of Canada recently defined SLAPPs as "*lawsuits initiated against individuals or organisations that speak out or take a position on an issue of public interest. SLAPPs are generally*

[6] All views expressed by the representatives of the Foreign Policy Centre as part of this working groupsgroup are those of Unsafe for Scrutiny project directorProject Director Susan Coughtrie and are based on the findings of publications in the Unsafe for Scrutiny research project series, https://fpc.org.uk/programmes/unsafe-for-scrutiny/

[7] UK Anti-SLAPP Coalition, On Countering Legal Intimidation and SLAPPs in the UK: A Policy Paper, FPC, July 2021, https://fpc.org.uk/wp-content/uploads/2021/07/Policy-Paper-Countering-legal-intimidation-and-SLAPPs-in-the-UK.pdf; UK Anti-SLAPP Coalition, Explanatory Note: Approaches to Countering Legal Intimidation and SLAPPS in the UK, FPC, July 2021, https://fpc.org.uk/wp-content/uploads/2021/07/Explanatory-Note-Approaches-to-Countering-Legal-Intimidation-and-SLAPPS-in-the-UK.pdf

[8] This section regarding definitions is partially taken from ARTICLE 19's report, SLAPPs against journalists across Europe, Media Freedom Rapid Response, March 2022, https://www.article19.org/wp-content/uploads/2022/03/A19-SLAPPs-against-journalists-across-Europe-Regional-Report.pdf

initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a bona fide claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claim is merely a façade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs."[9]

- American Civil Liberties Union (ACLU) defines a SLAPP suit as "*a civil complaint or counterclaim filed against people or organisations who speak out on issues of public interest or concern."*[10]
- Greenpeace International defines SLAPPs as a "*lawsuit brought by a private individual (including those brought by public officials acting in a private capacity) with the intention of shutting down acts of public participation."*[11] Greenpeace International also recognises that identifying these lawsuits is difficult and has outlined a number of indicative criteria (many of which are reflected in the UK anti-SLAPP policy paper outlined below).
- ARTICLE 19 has previously referred to SLAPPs in policies on defamation and protest, describing them as "*situations wherein a plaintiff or claimant (typically a powerful entity) resorts to defamation proceedings in order to silence criticism or political expression. The real objective of the plaintiff or claimant in such cases is not to win their claim and obtain damages, but to drown the defendants in lengthy and costly procedures."*[12]

The UK Anti-SLAPP Coalition, in its joint policy paper *On Countering Legal Intimidation and SLAPPs in the UK* published in July 2021, described SLAPPs as:

> "*SLAPPs are abusive lawsuits pursued with the purpose of shutting down acts of public participation. These legal actions are directed against individuals and organisations – including journalists, media outlets, whistleblowers, activists, academics and NGOs – that speak out on matters of public interest."*

The policy paper also outlined a number of common hallmarks or qualities inherent in SLAPP cases, building on previous criteria outlined by Greenpeace International and others:[13]

- The lawsuit or legal threats are generally based on defamation law, though an increasing number of lawsuits invoke other laws concerning privacy, data protection, and harassment.
- There is an imbalance of power and wealth between the plaintiff and defendant.
- The claimant engages in procedural manoeuvres or exploits resource-intensive procedures such as disclosure to drive up costs.
- The lawsuit often targets individuals instead of, or as well as, the organisation they work for.
- The plaintiffs often have a history of legal intimidation and use many of the same law firms to facilitate their SLAPPs.
- The plaintiff may claim to pursue a disproportionately large amount of compensation from the defendant if they refuse to comply with the plaintiff's demands.
- Legal threats are increasingly being issued in response to 'right to reply' requests and result in journalists being drawn into a protracted quasi-legal communication process prior to publication.

[9] Supreme Court of Canada, 1704604 Ontario Ltd. V. Pointes Protection Association, 2020 SCC 22, Judgement 10 September 2020, [2].
[10] ACLU Ohio, What is a SLAPP suit, https://www.acluohio.org/en/what-slapp-suit#:~:text=At%20its%20most%20basic%20definition,of%20public%20interest%20or%20concern.
[11] University of Amsterdam & Greenpeace International, SLAPP research: provisional conclusions, 2020, https://www.umweltinstitut.org/fileadmin/Mediapool/Downloads/01_Themen/05_Landwirtschaft/Pestizide/Suedtirol/University_of_Amsterdam_GPI_Research_SLAPPs_.pdf
[12] ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, Principle 6, 2017, https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf; ARTICLE 19, The Right to Protest: Principles on the protection of human rights in protests, Principles 16.5 and 16.6, 2016, https://www.article19.org/data/files/medialibrary/38581/Right_to_protest_principles_final.pdf
[13] UK Anti-SLAPP Coalition, On Countering Legal Intimidation and SLAPPs in the UK: A Policy Paper, FPC, July 2021, https://fpc.org.uk/wp-content/uploads/2021/07/Policy-Paper-Countering-legal-intimidation-and-SLAPPs-in-the-UK.pdf

What is legal intimidation in the context of SLAPP?

All SLAPP cases start with letters sent to journalists and/or their media outlets threatening legal action, however they may not progress beyond this point into a claim. The mere threat of legal action, particularly when pursued through what journalists have described as an 'intimidatory' fashion, can force journalists and or media outlets to concede early on.

This can be prior to any official pre-action protocol letter being sent, which requires a claimant to 'properly identify' the issue(s) at dispute and is subject to certain standards which will be taken into account during any subsequent court proceedings.[14] This process can be initiated by lawyers in response to the common practice of 'right to reply' requests, delaying publication. If journalists do not offer a right to reply or fail to engage with any legal letters, it could work against them if the case does later come to court. The 'right to reply' is an important means by which to uphold journalistic standards, and to ensure that journalists are able to check information and provide the subject an opportunity to provide their position. However, it also has the potential when approached in a 'bad faith' manner to be abused to divert journalists into a protracted quasi-legal back and forth to delay publication or the removal, or partial removal, of information from reporting.

What makes this type of legal intimidation particularly difficult to address is that, if successful, the existence of this threat is rarely, if ever, reported. Therefore, it can be very challenging to fully understand the scope and scale of this problem. However, the few examples that are in the public domain, examined in this report, give a glimpse into how this process works and the challenge it poses to journalists and media outlets in the course of their reporting.

[14] Ministry of Justice, Pre-action Protocol for Media and Communications Claims, https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def

Chapter 1. England as an 'ideal' jurisdiction for legal intimidation and SLAPPs

England has long had a reputation as an international libel hotspot, to the extent its capital London has been jokingly referred to as a 'town called Sue'. While several laws have been utilised for the purpose of legal intimidation and SLAPPs, including privacy, breach of confidence and data protection, it is defamation that nevertheless remains the most frequently deployed. Oxford University defines defamation as *"a public statement about individuals, products, groups, or organisations which is untrue and may cause them harm. Termed libel if in written form and slander if spoken."*[15] The purpose of these laws is therefore to allow the victim(s) of defamation, whether in written or spoken form, the opportunity for remedy and redress for the injury caused to their reputation.

There is a question however of striking an appropriate balance between the right to freedom of expression and harm to reputation.[16] Responding to this challenge ARTICLE 19 has developed *Principles on Freedom of Expression and Protection of Reputation*, which are based on the premise that, in a democratic society, freedom of expression must be guaranteed and may be subject only to narrowly drawn restrictions which are necessary to protect legitimate interests, including reputations.[17] Unfortunately, those keen to avoid any scrutiny of their business or personal lives may invoke libel laws in such a way that prevents or delays important discussions about matters of public interest. This chapter aims to examine the elements in English and Welsh law that could potentially tip the balance too far in their favour, unjustly penalising journalists and creating a chilling effect on media more broadly. It does this by examining the challenges that have been highlighted by journalists and lawyers who have defended cases bearing the hallmarks of SLAPPs in the UK High Courts.

Defamation as the traditional basis for legal intimidation and SLAPPs

The adoption of the 2013 Defamation Act, the culmination of a hard fought campaign for reform to English and Welsh libel law, was supposed to rein in the chilling effect on freedom of expression and impede vexatious misuse. In 2009, the free expression groups English PEN and Index on Censorship, the driving force behind the Libel Reform Campaign, released a report called *Free Speech is not for Sale,* which concluded that "*English libel law has a negative impact on freedom of expression, both in the UK and around the world".*[18] The authors stated that "*the law was designed to serve the rich and powerful, and does not reflect the interests of a modern democratic society"* and proposed a number of recommendations for reform.[19]

ARTICLE 19, also a member of the Libel Reform Campaign, outlined four key areas of concern in its January 2009 submission to an inquiry into press standards, privacy and libel by the UK Parliament's Culture, Media and Sport Committee:[20]

[15] Daniel Chandler and Rod Munday, A Dictionary of Media and Communication (1 ed.), Oxford Reference, 2011, https://www.oxfordreference.com/view/10.1093/acref/9780199568758.001.0001/acref-9780199568758

[16] The term 'reputation' is taken to mean the esteem in which a physical person or a legal entity is generally held within a particular community. Taken from p.2 of ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, A Policy Brief, 2017, https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf

[17] Ibid. The Principles, first developed in 2000, set out 'an appropriate balance between the human right to freedom of expression, guaranteed in UN and regional human rights instruments, as well as nearly every national constitution, and the need to protect individual reputations, widely recognised by international human rights instruments and the law in countries around the world.' The general principles are included as an appendix to this report.

[18] English PEN and Index on Censorship, Free speech is not for sale, Inforrm, 2009, https://inforrm.org/wp-content/uploads/2010/03/libeldoc_lowres.pdf

[19] Ibid.

[20] ARTICLE 19, United Kingdom: Submission on Libel Law Reform, January 2009, https://www.article19.org/data/files/pdfs/press/united-kingdom-submission-on-libel-law-reform.pdf

- *To prevent the UK from remaining a 'libel tourism 'destination, rules should be put in place so that UK courts may only consider defamation cases where there is a substantial connection between the statements in question and the UK.*
- *Defamation defendants should benefit from a more generous 'reasonable publication' defence, in line with the practice in many other democracies.*
- *More stringent limitations should be placed on defamation damage awards and more emphasis should be given in this context to non-pecuniary remedies.*
- *Conditional fee arrangements in defamation cases should either be prohibited altogether or subjected to stringent conditions.*

The resulting 2013 Defamation Act placed into statutory form many of the most important common law principles of defamation law, while also making a number of significant substantive changes.[21] The Act adopted some of the key recommendations put forward by the Libel Reform Campaign including a serious harm threshold, a public interest defence and a single publication rule as well as tightening up jurisdictional checks.[22] This latter aspect was aimed at limiting libel tourism, a practice by which people with little to no connection to the UK were taking advantage of the stringent, lengthy and expensive High Court process to intimidate their opponents and seek the maximum penalties. Many of the organisations involved in the campaign for libel reform, together with media defence lawyers, welcomed the introduction of the law as a positive step forward. ARTICLE 19 commented at the time that the new law would mean that *"the media will be able to operate more efficiently and with more scrutiny on issues in the public interest."*[23]

Fast-forward almost a decade, and despite some reports of a drop in the number of libel cases being taken to court, there are however still significant signs to suggest that the 2013 reforms did not go far enough.[24] The enduring challenges for members of the media defending themselves against libel cases include the high costs involved, the burden of proof, linked to a single legal meaning (now decided by the judge), and the lengthy periods of time taken for legal proceedings to come to fruition. All of these aspects continue to make England an 'ideal 'jurisdiction for claimants, perpetuating the phenomenon of 'libel tourism'.

The high cost to defend a libel case in the High Court

Mounting a libel defence in the UK today is still expensive, with leading defamation lawyer Mark Stephens stating that £500,000 is the 'absolute floor' for a full-scale libel trial, with most starting at £1 million.[25] Even preliminary hearings, at which stage defendants might seek to get the case thrown out on meaning or jurisdictional grounds can run anywhere from £50,000-£100,000.[26] The process can also take years before there is a resolution. Even if some assistance is provided by low bono or pro bono lawyers, legal fees can rack up considerably, especially if a journalist or media outlet is dealing with a number of, or successive, legal challenges.[27] If the case reaches court, these costs can spiral into the hundreds of thousands if not

[21] Justice Directorate, Publication – Consultation Paper: Defamation in Scots law: consultation, Scottish Government, January 2019, https://www.gov.scot/publications/defamation-scots-law-consultation/pages/3/; English and Welsh law is based on a common law system and there is no statuary definition of defamation within its legal system. In deciding whether a statement is defamatory, the common law restricts analysis to the words of a statement and prohibits consideration of extraneous evidence about the circumstances of the publication (e.g. the newspaper circulation or the number of unique webpage hits). See: Guest Contributor, "No revolution" says the Supreme Court as it rules on defamation, UK Human Rights Blog, June 2019, https://ukhumanrightsblog.com/2019/06/17/no-revolution-says-the-supreme-court-as-it-rules-on-defamation/

[22] Nik Williams, Laurens Hueting and Pauline Milewska, The increasing rise, and impact of SLAPPs: Strategic Lawsuits Against Public Participation, FPC, December 2020, https://fpc.org.uk/the-increasing-rise-and-impact-of-slapps-strategic-lawsuits-against-public-participation/; Legislation.gov.uk, Defamation Act 2013, https://www.legislation.gov.uk/ukpga/2013/26/contents/enacted

[23] ARTCLE 19, UK: Government promises defamation reform but backslides on expression and surveillance, May 2013, https://articulo19.org/uk-government-promises-defamation-reform-but-backslides-on-expression-and-surveillance/

[24] OUT-LAW NEWS, Range of factors behind fall in number of defamation cases, says experts, Pinsent Masons, June 2017, https://www.pinsentmasons.com/out-law/news/range-of-factors-behind-fall-in-number-of-defamation-cases-says-expert

[25] Howard and Katie Weston, Rachel Riley's legal bill could be more than £1MILLION in fees after losing latest round of libel battle against pro-Corbyn blogger who called the Countdown star 'serial abuser', expert says, Mail Online, May 2021, https://www.dailymail.co.uk/news/article-9581105/Rachel-Riley-spend-1MILLION-legal-fees-libel-case.html

[26] Information provided to the authors by Caroline Kean, Founding Partner at Wiggin.

[27] "The phrase' pro bono' comes from the Latin phrase 'pro bono publico' – which means not for free but for the public good." While lawyers sometimes work for free, pro bono does not mean necessarily that all costs are covered 'for free' but usually at a reduced or 'low rate' (sometimes

millions – some of which will not be recoverable even if you win.[28] There are guidelines for solicitors' hourly rate, which recently set the top rate for a London-based lawyer with over eight years of experience at £512.[29] Barristers, on the other hand, are allowed to set their own prices for their services and there is no standard amount that a barrister will charge.[30]

Aside from the legal fees, there is also the question of damages if a case is successful. Following Mr Justice Warby's decision in the 2017 Barron v Collins case, which was reaffirmed by His Honour Judge Lewis in his 2020 judgment in Gilham v MGN Ltd, the current ceiling for damages awards in libel actions is £300,000.[31] In 2020, the Media and Communications List of the High Court (MAC-List) restated the factors it takes into account in calculating and discounting damages awards in defamation claims, including:[32]

- Evidence showing that the claimant suffered negative treatment or 'shunning' as a result of the defamatory publication;
- The impact on the claimant's reputation, as it was at the time of publication;
- The level of credibility attributed to the publication making the defamatory statement;
- Whether the statement was published to family or the general public;
- The potential for the defamatory content to circulate via social media; and
- Damages may be aggravated if the defendant acts maliciously.

When it comes to an action with more than one claim of libel, the court has discretion to compensate the claimant by a single award of damages.[33]

Recent cases that reached the High Court in London brought against journalists such as Catherine Belton, Tom Burgis, Carole Cadwalladr, Paul Radu and Clare Rewcastle Brown, discussed in this report, all cost from hundreds of thousands of pounds to millions (in Belton's cases) to defend. Only Cadwalladr's case actually came to trial (in January 2022, with the judgment still pending at the time of writing), while all the others were either settled or dismissed (in the case of the Tom Burgis and HarperCollins case), without the journalists and/or their publishers recouping all the costs expended to defend them.

It is possible to see how cost alone is a huge deterrent against media defending cases, or in fact in some cases may simply rule them out from considering a defence unless they have access to significant financial backing. Unfortunately, the recommendations made by the Libel Reform Campaign to limit the costs involved were largely ignored during the 2013 reforms. As such the issues relating to costs raised by Index and English PEN in their 2009 *Free Speech is not for Sale report* are still relevant today:[34]

referred to as 'low bono'). See: David Allen Green, 'What 'pro bono' means, what 'pro bono' does not mean, and what 'pro bono' will not,'solve', The Law and Policy Blog, September 2021, https://davidallengreen.com/2021/09/what-pro-bono-means-what-pro-bono-does-not-mean-and-what-pro-bono-will-not-solve/

[28] In England and Wales, the winning party in civil litigation is entitled to recover costs from the losing party. However, there is sometimes a discrepancy between the actual costs of litigation, which are the costs that each party pays to its own lawyers for running the case, and the recoverable costs, which the winning party recovers from the losing party by order of the court or by agreement. See: Right Honourable Lord Justice Jackson, Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs, Judiciary of England and Wales, July 2017, https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-3.pdf

[29] HM Courts & Tribunals Service, Guidance: Solicitors' guidelines hourly rates, Gov.uk, April 2010, https://www.gov.uk/guidance/solicitors-guideline-hourly-rates

[30] Bar Standards Board, Barristers and their fees, https://www.barstandardsboard.org.uk/for-the-public/finding-and-using-a-barrister/barristers-fees.html

[31] Carruthers Laws, Carruthers Law Solicitors are based in Liverpool but act for clients nationwide, Damages Awards in Defamation Claims, https://www.carruthers-law.co.uk/our-services/defamation/damages-awards-in-defamation-claims/; Carter-Ruck, Neutral Citation Number: [2020] EWHC 2217 (QB), https://www.carter-ruck.com/wp-content/uploads/2021/03/Approved_Judgment_Gilham_EWHC_QB_2020_2217.pdf

[32] Stewarts, How to (not) get rich quick: factors used to quantify damages awards in defamation cases, August 2020, https://www.stewartslaw.com/news/defamation-cases-factors-used-to-quantify-damages-awards/

[33] Ibid

[34] English PEN and Index on Censorship, Free speech is not for sale, Inforrm, 2009, https://inforrm.org/wp-content/uploads/2010/03/libeldoc_lowres.pdf

"Because of the high hourly rates of many libel lawyers, coupled with the 100% uplift that some lawyers impose upon the successful completion of a case where Conditional Fee Agreements (CFAs) are used, defendants may face extortionate legal bills for the other party.

Coupled with their own costs – which even if successful they may have no hope of recovering from the other party – this can make a trial impossible to contemplate. Conditional fee agreements were introduced in order to secure wider access to justice. The irony is that so far as libel is concerned, CFAs have diminished access to justice for newspapers, publishers, NGOs and writers who cannot afford to defend a libel action against a claimant lawyer acting on a CFA.

We propose abolishing the recovery of success fees from losing defendants in libel cases and mandatory cost-capping of base costs to limit the level of fees.

Libel insurance costs also deter many publishers from contesting a claim. Knowing that their premium will reflect any costs incurred by their insurers, publishers may be extremely unwilling to contest a libel action, and are once again inclined to settle out of court.

Meanwhile, claimants are currently able to take out 'After the Event' (ATE) insurance in the knowledge that if their case is successful, their premium will be paid by the losing party. We suggest that ATE premiums should not be recoverable."

Definitions:[35]

A Conditional Fee Agreement (CFA) is an agreement with a legal representative which provides for his or her fees and expenses, or any part of them, to be paid only in certain circumstances – usually only if the client wins the case.

After the Event (ATE) insurance is taken out after the 'event' i.e. legal challenge has been identified but normally before any significant legal costs are incurred. It can be taken out by either side, but most commonly by claimants. ATE insurance covers the legal costs that a claimant must pay to a defendant when a claim is unsuccessful – when the claim is either lost at trial, or abandoned/settled after the defendant has incurred costs, which the claimant is liable to pay.

In order to address the high costs of civil litigation generally, the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 reformed the operation of 'no win no fee' CFAs, with Section 44 of the LASPO Act providing that a lawyer's success fee would no longer be recoverable from the losing party.[36] However, originally Section 44 of LASPO did not apply to defamation and privacy cases, and that position only changed in 2018.[37] While this amendment was welcome, the existing costs regime for these types of cases otherwise remained unchanged and ATE premiums are still recoverable. Those subject to defamation cases are also not covered by legal aid so, as discussed in more detail in Chapter 5, the expansion of LAPSO to cover those defending cases in the public interest would be a helpful step to support journalists and media defend cases when they would otherwise be forced to fold due to financial constraints.

Ultimately, the cost issue is a driving factor behind the success of SLAPP cases, with claimants often being wealthy businessmen or well-resourced politically connected figures for whom the expense of bringing a

[35] Thomson Reuters Practical Law, Glossary – Conditional fee agreement, https://uk.practicallaw.thomsonreuters.com/8-380-0693?transitionType=Default&contextData=(sc.Default)&firstPage=true; Box Legal, What is After The Event (ATE) Insurance?, https://www.boxlegal.co.uk/what_is_ate_insurance

[36] Ibid.

[37] Ministry of Justice and The Rt Hon David Gauke, Controlling the costs of defamation cases, Gov.uk, November 2018, https://www.gov.uk/government/speeches/controlling-the-costs-of-defamation-cases

lawsuit case is relatively negligible. The defendants, on the other hand, are typically individual journalists or independent media outlets, for whom the cost of hiring lawyers and investing resources in defending the lawsuit is very significant. Claimants exploit this disparity to force defendants to settle the lawsuits, abandon the criticism (usually a report or a series of reports in a newspaper or online media platform) and issue an apology, thus white-washing the claimant's reputation and shielding them from criticism.[38]

For freelance journalists or a small independent investigative outlets, this is a very daunting prospect. This can be true even for bigger media organisations, which may have in-house counsel, particularly at a time of shifting media revenue models and diminished returns. Giving evidence to the House of Lords' Communications and Digital Select Committee on 31st March 2022, Gill Phillips, Director of Editorial Legal Services at The Guardian, illustrated how it can be a challenge for well-established media outlets:

> *"For us to pay lawyers is quite expensive, and we have some sort of bargaining points… I've got a case in Italy at the moment, which is a libel case against a journalist that will go to trial. The costs on that, I'm told by the Italian lawyer, will be 15,000 EUR and I said 'Have you missed a nought off, or two?' – compared to what it would cost us to defend a case here…*
>
> *It's got completely out of kilter somewhere along the line. Damages awards here are generally, much more than they are in Europe, again, so [the UK] becomes a more attractive place. Feed into that the burden of proof issue and the issue of people being able to use not just defamation now, but privacy and data protection and you have a very toxic mix that has all come together."*[39]

Inevitably, across newsrooms decisions have to be made regarding whether a particular case is worth spending, increasingly limited, financial resources towards defending. And conversely, which to concede on. The financial challenge facing the media when responding to legal threats is examined in more detail in the section 'Are the English Courts the playground of the 'super-rich'?' on page 32.

Burden of proof and the challenge of single 'legal meaning'

A notable aspect within English and Welsh libel law is that the burden of proof is on the defendant – i.e. it is not up to the plaintiff to prove that the statement in question is false, rather the defendant must prove that the statement is true (or that some other defence is available to them).[40] This is in contrast to other jurisdictions, such as the United States and Germany, where far more of the burden of proof rests on the claimant, who must prove the allegedly libellous statement under claim is untrue.[41] Moreover, because of the 'seminal' US Supreme Court case of New York Times v Sullivan (1964) a claimant must prove actual malice before press reports about public figures can be considered to be libellous.[42]

In England and Wales, since the effective abolition of jury trials in defamation cases in 2013, it falls upon a High Court judge to decide the true single 'legal meaning' of what was expressed in the publication under claim.[43] On the one hand, this change can been seen as a positive one, as Caroline Kean, a leading media defence lawyer at Wiggin recently explained: *"It used to be that in a libel case that you could not have a hearing on meaning at an early stage. It was prerogative of the jury to decide to what the words meant…*

[38] From ARTICLE 19's report,", SLAPPs against journalists across Europe, Media Freedom Rapid Response, March 2022, https://www.article19.org/wp-content/uploads/2022/03/A19-SLAPPs-against-journalists-across-Europe-Regional-Report.pdf

[39] Communications and Digital Committee, Thursday 31 March 2022, Parliament live TV, https://parliamentlive.tv/event/index/65aa862f-356f-4766-8cc2-3822fc8c4e97?in=12:18:10

[40] David Carnes, Libel Law: past, present and future, All About Law, December 2019, https://www.allaboutlaw.co.uk/commercial-awareness/legal-spotlight/libel-law-past-present-and-future-

[41] Persephone Bridgman Baker,The Law Gazette, Libel actions – here or the United States?, November 2018, https://www.lawgazette.co.uk/libel-actions-here-or-the-united-states/5068173.article; https://www.indexoncensorship.org/2014/01/eus-commitments-free-expression-libel-privacy/

[42] Ibid.

[43] Section 11 of the Defamation Act 2013, amended libel law so that that defamation claims made on or after 11st January 2014 are heard without a jury unless the judge orders otherwise. See: Legislation.gov.uk, Defamation Act 2013, https://www.legislation.gov.uk/ukpga/2013/26/section/11/enacted#:~:text=11Trial%20to%20be%20without%20a%20jury%20unless%20the%20court%20orders%20otherwise

[so] you would have to go all the way to trial before you knew what the person was going to say the words meant and whether your defence was actually going to stack up. Post the 2013 Act, the Judges now at a very early stage say 'I'll decide what the meaning is'."[44] However, while having one person decide the meaning might seem relatively innocuous, it can still have its pitfalls, with the subjective nature of deciding what an 'ordinary reader' might think already long acknowledged in case law:

> "*The Court's task is to determine the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words bear. It is well recognised that there is an artificiality in this process because individual readers may understand words in different ways."* – Lord Diplock (1968)[45]

Paul Radu**,** the co-founder of the Organised Crime and Corruption Reporting Project (OCCRP), who was pursued through the UK libel courts between 2018-2020, picked up on this aspect when writing about his experience: "*[I]n British courts, a judge determines what your carefully crafted wording means to them as a legal matter. They may decide the 'legal meaning' was that someone was the new godfather and had taken over the local crime group. Now you have to prove that judge's legal meaning in court with real proof, even though you never said it, and maybe never meant it."*[46]

This was the challenge facing British journalist Carole Cadwalladr, best known for her work uncovering the Facebook – Cambridge Analytica scandal in 2018 and investigations into campaign funding around the 2016 Brexit referendum.[47] Businessman Arron Banks, who co-founded and funded the Leave.EU campaign, filed a defamation case against Cadwalladr in July 2019 regarding two tweets and two public talks she made between April and July 2019. After a preliminary ruling in December 2019, in which the judge decided the legal meanings of the contested publications, Banks withdrew two of his claims in January 2020.[48] The judge had found Cadwalladr's words in those two publications to mean that:

- *"Mr. Banks had been offered money by the Russians and that there were **substantial grounds to investigate** whether he would be willing to accept such funds in violation of prohibitions on foreign electoral funding."* (In the case of one talk, emphasis added); and
- *"There is **a proper basis to investigate** whether Mr. Banks' contact with Russia involved any criminal conduct just as the Italian government is investigating Lega's contact with the Russians."* (In the case of one tweet, emphasis added. To note, Lega is an Italian political party).

However, the judge had found statements made within Cadwalladr's TED talk, and a tweet that linked to it, to mean that:

- "*On more than one occasion Mr Banks told untruths about a secret relationship he had with the Russian Government in relation to acceptance of foreign funding of electoral campaigns in breach of the law on such funding."*[49]

Cadwalladr contested this last interpretation, stating in an interview in November 2020: "*But these are not words I have ever said. On the contrary, I've always been very clear that there is no evidence that Banks*

[44] Communications and Digital Committee, Thursday 31 March 2022, Parliament live TV, https://parliamentlive.tv/event/index/65aa862f-356f-4766-8cc2-3822fc8c4e97
[45] Slim -v- Daily Telegraph Ltd [1968] 2 QB 157, 173D– E, per Lord Diplock.
[46] Paul Radu, How to Successfully Defend Yourself in Her Majesty's Libel Courts, GIJN, February 2020, https://gijn.org/2020/02/26/how-to-successfully-defend-yourself-in-her-majestys-libel-courts/
[47] The Cambridge Analytica Files, The Guardian, https://www.theguardian.com/news/series/cambridge-analytica-files; Carole Cadwalladr, The great British Brexit robbery: how our democracy was hijacked, The Guardian, May 2017, https://www.theguardian.com/technology/2017/may/07/the-great-british-brexit-robbery-hijacked-democracy
[48] Owen Bowcott, Arron Banks drops two parts of libel claim against Carole Cadwalladr, The Guardian, January 2020, https://www.theguardian.com/uk-news/2020/jan/23/arron-banks-drops-two-parts-of-libel-claim-against-carole-cadwalladr
[49] Bailii, England and Wales High Court (Queen's Bench Division) Decisions, Banks v Cadwalladr, December 2019, https://www.bailii.org/ew/cases/EWHC/QB/2019/3451.html

accepted Russian funding."[50] This has impacted her defence strategy as she would need to prove the truth of the 'legal meaning' defined by the judge to utilise the 'truth defence'. In November 2020, Cadwalladr decided to drop the 'truth defence', along with the limitation defence, and as a result she had to pay Banks £62,000 in costs.[51] Much has been made of this by Cadwalladr's detractors, and Banks himself, to imply she does not believe in her own reporting.[52] Far less widely reported was the judge's comments calling Bank's interpretation of the two claims he ultimately dropped "*far-fetched and divorced from the specific context in which those words were used."*[53]

At an event on SLAPPs at the Frontline Club, held on 21st February 2022, Kean, who also defended HarperCollins and their authors Catherine Belton and Tom Burgis in their recent libel cases, explained that: *"[Claimants] inevitably put a very high meaning on the words. They will say that the words to an ordinary reasonable reader will mean something that is astronomically worse than the author ever intended them to be. So the first thing we have to do is analyse what we think the words mean, and more importantly what evidence have you got to back it up? Because we immediately have to run through whether we are going to go for truth or fair comment [defence] and if we cannot go for one of those then public interest. You do not particularly want to only do public interest because then it's your journalist on trial."*[54]

Cadwalladr defended the outstanding claims against her on 'public interest' grounds, when the case brought by Banks reached trial in January 2022. Observers monitoring the five days of proceedings commented, as did Cadwalladr herself, how it appeared that she herself as an individual – rather than her words – were on trial.[55] Free expression groups have particularly criticised Bank's decision to sue Cadwalladr individually, for comments made on social media and for 'one line in a TED Talk', while no case was taken against The Observer that originally published her investigations or the TED platform, upon which the talk is still available.[56]

Rebecca Vincent, Director of International Campaigns at the international media freedom organisation Reporters without Borders (RSF), while observing Cadwalladr being cross-examined by Banks' lawyer during the trial, commented: *"this whole line of questioning – and the extraordinarily chastising tone – really personifies one of the key aims of SLAPP cases: to isolate journalists, make an example of them, and create a chilling effect on others."*[57] Peter Jukes, CEO and Executive Editor of the media outlet Byline Times, also remarked that *"two facts from the trial that should stand out for any journalist in the world when it comes to due diligence as a reporter. In court it was said [Carole's] original witness statement was 50,000 words long, and she provided 180,000 documents to her lawyers."*[58] The impact of the case on Cadwalladr, her work as well as wider public interest reporting on Banks since he launched the legal action against her is looked at in more detail in Chapter 4. At the time of publication, on 25th April 2022, the judgment in the Banks v Cadwalladr trial is still pending. Banks has denied accusations that he is pursuing a SLAPP suit.[59]

[50] Charlotte Tobitt, Carole Cadwalladr drops truth defence in Arron Banks libel battle but insists claims were in public interest, PressGazette, November 2020, https://www.pressgazette.co.uk/carole-cadwalladr-drops-truth-defence-in-arron-banks-libel-battle-but-insists-claims-were-in-public-interest/

[51] Ibid.

[52] Media Guido, EXCLUSIVE: Oh Carole: Admits Russia Claims Untrue, Agrees to Pay Bank's Cost, November 2020, https://order-order.com/2020/11/26/exclusive-oh-carole-admits-russia-claims-untrue-agrees-to-pay-banks-costs/; Arron Banks, Twitter Post, Twitter, November 2020, https://twitter.com/Arron_banks/status/1331911286599376896

[53] Bailii, England and Wales High Court (Queen's Bench Division) Decisions, Banks v Cadwalladr, December 2019, https://www.bailii.org/ew/cases/EWHC/QB/2019/3451.html

[54] Comments made by Caroline Kean at an event 'Kleptoscope: SLAPP' held on 21st February 2022 at the Frontline Club https://frontlineclub.glueup.com/event/kleptoscope-slapp-49769/

[55] Carole Cadwalladr, Twitter post, Twitter, January 2022, https://twitter.com/carolecadwalla/status/1484803438034796547

[56] Jonathan Perfect, Index calls on Arron Banks to drop SLAPP lawsuit against Carole Cadwalladr, Index on Censorship, December 2019, https://www.indexoncensorship.org/2019/12/index-calls-on-arron-banks-to-drop-slapp-lawsuit-against-carole-cadwalladr/

[57] Rebecca Vincent, Twitter post, Twitter, January 2022, https://twitter.com/rebecca_vincent/status/1483089855496212493

[58] Peter Jukes, Twitter post, Twitter, January 2022, https://twitter.com/peterjukes/status/1483227631202054152

[59] Charlotte Tobitt, 'I did not think I was saying anything controversial', journalist Carole Cadwalladr tells court in Arron Banks libel case, PressGazette, January 2022, https://pressgazette.co.uk/carole-cadwalladr-witness-arron-banks-libel/

Under the 2013 Defamation Act there are a number of defences. Below is a useful summary of written by the law firm Blake Morgan.[60] To note a summary of the main provisions of the Defamation Act by Thompson Reuter's Practical Law are included as an appendix to this report.

- **Truth** – Truth provides a full defence to an action of defamation. It requires the defendant to show that that the imputation conveyed by the statement complained of is substantially true. Therefore the onus is on the defendant.

- **Honest Opinion** – replaced the previous common law defence of fair comment. A defendant will have to meet the following three conditions to establish the defence of honest opinion:
    - The statement complained of must be an expression of opinion
    - The statement complained of must indicate the basis of the opinion
    - The opinion must be one that an honest person could have held on the basis of a fact which existed at the time the statement was published or a privileged statement published before the statement complained of.

- **Privilege** – Privilege acts to balance the human rights of those who are the subject of the defamatory material and freedom of information and in certain circumstances can be raised as a defence to defamation. There are two standards of privilege: absolute and qualified. If absolute privilege applies, an action for libel or slander cannot succeed irrespective of dishonesty or motive. Qualified privilege is a lesser protection and manifests *"where the person who makes a communication has an interest or a duty, legal, social or moral to make it to th person to whom it is made" Adam V Ward [1917] AC 309.* The duty and interest test is: whether the media had a duty to publish the information and whether the public had an interest in receiving it.

- **Publication of Matter for Public Interest** – This defence applies to those who are publishing material which they reasonably believe is in the public interest. The defendant must show that: the statement complained of, or formed part of a statement on a matter of public interest; and the defendant reasonably believed that publishing the statement complained of was in the public interest, Section 4 of the Act provides a non-exhaustive list of matters and circumstances the court should have regard to when determining whether the defendant acted responsibly in publishing the information.

- **Limitation** – A claimant has one year to bring an action for defamation against the alleged defendant from the date the defamatory material surfaced. The court has the discretion to hear a claim if this period has lapsed but only in limited circumstances where it is deemed equitable to do so. The individual who is the subject of the defamatory material should seek to bring an action as soon as practicable.

[60] Ben Evans, A brief guide to the tort of defamation, Blake Morgan, July 2014, https://www.blakemorgan.co.uk/a-brief-guide-to-the-tort-of-defamation/

The problematic nature of ascribing a single meaning in defamation claims has already reached the Supreme Court, the highest court in the UK. In his review of the Supreme Court judgment handed down in April 2019 on the Stocker v Stocker case, David Hart QC noted: "*A lot of what we say in everyday life is to a greater or lesser extent ambiguous. But the law of defamation has set its face against this when determining meaning, whilst recognising its artificiality*".[61] The Stocker v Stocker case related to a Facebook post made by a woman in which she claimed she had been strangled by her husband, who subsequently sued her for defamation. The Supreme Court decision overturned an earlier ruling which had found the post to be defamatory because the meaning ascribed to it by the judge was that the husband meant to kill his wife (which she could not prove) as opposed to grasping her by the throat and applying force (actions for which she had documented evidence). The earlier ruling had ordered the wife to pay £5,000 in damages and £200,000 towards her husband's legal fees, and if her Supreme Court appeal had failed this could have soared to half a million. Ahead of the appeal, sexual abuse campaigners were outspoken about how the high costs involved could deter other victims from speaking out.[62]

The Supreme Court ruling in the Stocker v Stocker case also highlighted the challenge of evaluating comments on social media, as Hart noted: "*For some years now, the judges have been assessing the meaning of statements on social media, and how they arise. They are conversational pieces. Readers tend to scroll through quickly, and their reactions to posts, impressionistic and fleeting. An analogy is with people chatting in a bar. They are often uninhibited, casual, and ill-thought out."*[63]

While social media is not, and should not be, exempt from defamation laws there clearly remain concerns regarding how meaning is ascribed in a context altogether different from published articles. Intentionally or not, the approach of pursuing journalist for comments they make on social media has the effect of isolating them from resources that could help defend cases that could more likely be afforded by their publisher, including through insurance, which are not available to them as individuals. A current case initiated against the Bellingcat founder, Eliot Higgins, by Russian oligarch Yevengy Prigozhin, for five tweets Higgins made linking to articles on Bellingcat, CNN and Der Spiegel, none of which are subject to legal action, is outlined on page 37.

Length of proceedings

Cadwalladr's case has been ongoing since July 2019, meaning there was two and half years between when the case was filed with the High Court and when it reached trial. While its progress may have been impacted by the COVID-19 pandemic, proceedings running over several years are not uncommon in High Court cases. Journalists Paul Radu and Clare Rewcastle Brown, who runs the independent media website The Sarawak Report, were both subject to cases filed at the High Court that ran for two years. Neither came to trial, with the claimants in both cases ultimately deciding to withdraw and make settlements with terms considered favourable to the journalists, including that the materials under claim stay online.

In January 2020, the libel case against Radu, was dropped on the eve of the trial opening at the Royal Courts of Justice in London.[64] The agreed settlement meant the articles that had sparked the defamation claim against him stayed on OCCRP's website albeit with a qualifying statement that the claimant "*categorically denies involvement in money laundering or any unlawful activity."*[65] During the two years, it took the case to reach the trial stage, OCCRP journalists continued their investigation, collecting new

[61] David Hart QC, "He tried to strangle me", UK Human Rights Blog, April 2019, https://ukhumanrightsblog.com/2019/04/03/he-tried-to-strangle-me/; Supreme Court Judgment, Stocker v Stocker, April 2019, https://www.supremecourt.uk/cases/docs/uksc-2018-0045-judgment.pdf

[62] Ruth Green, Freedom of expression: UK libel regime failing abuse victims, IBA, https://www.ibanet.org/article/07565660-1393-4528-a4c0-5bdc973f8b7c

[63] David Hart QC, "He tried to strangle me", UK Human Rights Blog, April 2019, https://ukhumanrightsblog.com/2019/04/03/he-tried-to-strangle-me/

[64] Jonathan Price, Jennifer Robinson & Claire Overman, Azerbaijan MP discontinues defamation case against investigative journalist Paul RadiRadu, Doughty Street Chambers, January 2020, https://www.doughtystreet.co.uk/news/azerbaijan-mp-discontinues-defamation-case-against-investigative-journalist-paul-radu

[65] OCCRP, Azerbaijani Laundromat – Agreed Statement, January 2020, https://www.occrp.org/en/azerbaijanilaundromat/the-agreed-statement

information and strengthening their story, which, due to disclosure rules, they were required to share with their opponent who ultimately decided to withdraw.[66]

In February 2019, Rewcastle Brown, a British journalist living in London who was instrumental in uncovering one of the world's largest financial corruption scandals in Malaysia, known as 1MDB, also had a long running legal case against her withdrawn.[67] In 2017, the President of Malaysia's PAS Islamic Party, represented by London-based law firm Carter-Ruck, initiated legal proceedings and according to Rewcastle Brown: "*constructed an argument that [she] had implied without saying it that the money had gone directly to the personal use of the actual President of the PAS, who was not named in the article and had only been referred to once before on my platform by a separate writer some months previously."*[68] Rewcastle Brown had been subject to several legal threats prior to this, but noted in this case: "*Those wishing to pursue legal action against me in 2017 were advised, according to someone involved in the conversations, that for an outlay of no more than £200,000 I could be forced to issue the sort of retraction that could be spun into a total discrediting of myself and my wider reporting on corruption in Malaysia."* [69] However, Rewcastle Brown refused to concede. By the time the case settled, the fallout from 1MDB had resulted in bringing down the previous Malaysian government, as well as the arrest (and later conviction) of the former Malaysian Prime Minister, Najib Razak.

Carter-Ruck also represented the claimant in a longer running, wholly domestic case, brought by former MP Charlie Elphicke. In March 2022, Elphicke dropped a four-year libel case against The Sunday Times, initiated after the paper had published articles revealing that Elphicke was under police investigation for allegations of sexual assaults.[70] One article, published on 22nd April 2018, revealed that a victim named 'Jane', who had spoken to journalists at the newspaper, had accused Elphicke of rape and that the police had not even told the MP of this.[71] Gabriel Pogrund, Whitehall Editor at The Times, explained the background to the case in an article published on 26th March 2022, writing that in response to the 2018 articles: "*Elphicke went on the attack. He announced he was suing The Sunday Times over both articles and an accompanying comment piece. For the next four years, Elphicke used the libel and privacy laws to fight The Sunday Times*."[72]

Elphicke was charged in July 2019 with three counts of sexual assault relating to two women and in July 2020 he was convicted of all charges.[73] At the meaning hearing of Elphicke's case against The Sunday Times, held in December 2019, the High Court judge found that two paragraphs from separate articles about the allegations made by 'Jane' on 22nd and 29th April 2018 meant, in their respective contexts, and *"when taken as a whole…that there were reasonable grounds to suspect that the Claimant was guilty of rape."*[74] As Pogrund went on to explain:

> *"After the intervention of Carter-Ruck and the decision to sue for libel, the burden was on The Sunday Times to defend its decision to publish, rather than on Elphicke to prove why we should not have done so. Carter-Ruck and Elphicke had signed a conditional fee arrangement, meaning that it stood to gain financially by pursuing the newspaper for as long as possible. The newspaper has spent countless hours and more than £500,000 defending itself over the April 2018 articles. It*

[66] Paul Radu, How to Successfully Defend Yourself in Her Majesty's Libel Courts, GIJN, February 2020, https://gijn.org/2020/02/26/how-to-successfully-defend-yourself-in-her-majestys-libel-courts/
[67] Sarawak Report, Hadi Discontinues London Court Case Against Sarawak Report, February 2019, https://www.sarawakreport.org/2019/02/hadi-discontinues-london-court-case-against-sarawak-report/
[68] Clare Rewcastle Brown, A scandal of corruption and censorship: Uncovering the 1MDB case in Malaysia, FPC, December 2020, https://fpc.org.uk/a-scandal-of-corruption-and-censorship-uncovering-the-1mdb-case-in-malaysia/
[69] Ibid.
[70] Gabriel Pogrund, Charlie Elphicke – the predator MP and his protection racket, The Times, March 2022, https://www.thetimes.co.uk/article/charlie-elphicke-the-predator-mp-and-his-protection-racket-3kb30pl6w
[71] Ibid.
[72] Ibid.
[73] Ibid.; Eleni Courea and Esther Webber, Charlie Elphicke faces prison and divorce after sex assaults conviction, The Times, July 2020, https://www.thetimes.co.uk/article/charlie-elphicke-faces-prison-and-divorce-after-sex-assaults-conviction-z7p5zv3lv
[74] Bailii, England and Wales High Court (Queen's Bench Division) Decivions), Elphicke v Times Newpapers Ltd, December 2019, https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2019/3563.html&query=(title:(+Elphicke+))

mounted two defences in court, saying that not only were the reports in the public interest, but that they were true. Meanwhile, Jane has had to relive her alleged trauma to provide a more detailed account than she gave to police."

The libel case against was eventually withdrawn by Elphicke almost on the eve of trial after being presented with the woman's first-person account. Elphicke claimed he had taken the decision so as to protect the woman from the trauma of testifying and maintains that the allegations in 2018 articles are untrue.[75]

There has been limited public discourse in the UK regarding the impact that these lengthy court cases have on journalists, how it affects their ability to continue working as well as their mental well-being while the proceedings are ongoing. Even less on how such delays can impact the victims of crimes, sometimes directly caught up in the litigation themselves, as in the case above, and can potentially inhibit the redress of alleged wrongdoing in wider society. These aspects are explored in more detail in Chapter 4.

Libel tourism

In October 2013, ahead of the Defamation Act coming into force (on 1st January 2014) lawyers were reported to have *"heralded the death of so-called libel tourism"* when two cases, one initiated by retired Moscow policeman Pavel Karpov and the other by Serbian tobacco magnate Stanko Subotic, were both thrown out of the High Court as the connection to England and Wales was ruled to be too tenuous.[76] However, jurisdiction shopping still appears to be alive and well, partly aided by the proliferation of the internet, the extent to which perhaps could not be envisioned even a mere decade ago. In an increasingly globalised world, and with most news published online, the ability to establish the reputational 'standing' necessary to bring a case in England is perhaps far easier than ever before.

In the aforementioned case, Paul Radu, a Romanian journalist not based in the UK, was sued by an Azerbaijani politician and businessman over articles regarding corruption in Azerbaijan published by OCCRP, a media outlet also not based in the UK.[77] The plaintiff, Janashir Feziyev, despite being a sitting MP in Azerbaijan, was able to establish a standing because he has property in the UK and has family members who live here full time. As Radu has himself pointed out: "*London is a major real-estate hub that attracts the wealthy and powerful from all over the world — including many people of interest to those reporting on corruption… and it's not hard to demonstrate a few British IP addresses accessed the investigative materials."*[78]

In November 2020, a Swedish business publication, Realtid, which is published in Swedish, became the subject of legal action filed in the UK. Under Swedish law it is not possible to sue journalists independently of their publication. However, by bringing the case to London Svante Kumlin, a Swedish businessman domiciled in Monaco, has also been able to sue Realitd's Editor in Chief, Camilla Jonsson, as well as the two freelance journalists, Per Agerman and Annelie Östlund, who were behind the investigation into Kumlin's business dealings. It is worth noting that Kumlin's London-based solicitors, TNT, also warned the journalists of the potential for criminal defamation proceedings to be pursued in Monaco in what has been seen as exceptionally heavy-handed effort to stop their reporting.[79] Swedish freedom of expression campaigners have pointed out that despite the negligibility of Realtid's readership outside of Sweden, Kumlin has chosen to pursue claims in foreign jurisdictions but not in Sweden itself.[80] The justification put forward for the libel

[75] Gabriel Pogrund, Charlie Elphicke – the predator MP and his protection racket, The Times, March 2022, https://www.thetimes.co.uk/article/charlie-elphicke-the-predator-mp-and-his-protection-racket-3kb30pl6w

[76] Josh Halliday and Lisa O'Carroll, Libel tourism at an end, says lawyers following high court rulings, The Guardian, October 2013, https://www.theguardian.com/media/2013/oct/15/libel-tourism-high-court-karpov-subotic-foreign-sue

[77] Azerbaijani Laundromat, a money -laundering scheme.

[78] Paul Radu, How to Successfully Defend Yourself in Her Majesty's Libel Courts, GIJN, February 2020, https://gijn.org/2020/02/26/how-to-successfully-defend-yourself-in-her-majestys-libel-courts/

[79] ARTICLE 19, SLAPP lawsuit suing Swedish online magazine Realtid filed in London, December 2020, https://www.article19.org/resources/slapp-realtid-in-london/

[80] Robert Aschberg, Svante Kumlin should withdraw the lawsuit against Realtid, Debatt, December 2020, https://www.expressen.se/debatt/nytt-fulspel-hotar-svensk-pressfrihet/

claim, estimated to be worth more than £13 million, to be heard in the UK is that Kumlin resides in the UK part-time, while his company EEW Energy, listed as a second plaintiff, is registered in London (since 2019). A hearing to decide the jurisdiction admissibility was held on 24th and 25th March 2021, presided over by Justice Julian Knowles.[81] At the time of this report's publication, the judgment in the Realtid jurisdictional hearing is still pending, more than a year later. Again such a wait is indicative of the overall lengthy process of defending a libel claim in the UK.

English courts have appeared to allow libel cases to proceed so long as a foreign claimant can show a reputation in the UK, for example owning a home, business dealings, children in school in this jurisdiction or some other personal or business interest can suffice. The bar to meet the criteria to bring a case therefore seems to have become problematically low, not taking into account those with ample funds who can not only easily set up businesses or purchase property in the UK, but also effectively buy residency and eventually citizenship via investment visas.[82] The UK is also home to companies ready to facilitate these services for those rich enough to afford it.[83]

It is worth noting that at the time that Radu's case was ongoing and when the case was filed at the High Court against Realtid and its journalists, the UK was still a member of the EU. Section 9 of the Defamation Act (2013) was intended as a check on international claimants using England and Wales as a legal jurisdiction, stating: *"A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement."*[84] However, that Section explicitly excludes claimants domiciled in EU member states or contracting parties to the EU's Lugano Convention, which meant that previously it was more straightforward to bring cases against defendants domiciled in those jurisdictions.[85]

When the Brexit transition period ended on 31st December 2020, the UK also was no longer subject to the Lugano Convention and as of yet its request to rejoin has not been granted by the EU. This means that moving forward English courts would have to rule on the appropriateness of EU-based claimants bringing actions in the UK. This would place a great deal of importance on English courts to ensure that defamation cases heard in England are there for a legitimate reason and not for the plaintiff to try to take advantage of the benefits of the jurisdiction, namely substantial damages and high costs for defendants.[86]

Serious harm test

A development that emerged out of the 2013 reforms viewed more positively was the establishment of a 'serious harm' test. Section 1 of the 2013 Defamation Act created a new requirement that statements must have caused, or would be likely to cause serious harm, to the claimant's reputation in order to be deemed defamatory:

[81] Blueprint for free speech, Swedish journalists from Realtid face defamation suit in the UK, March 2021, https://www.blueprintforfreespeech.net/en/news/swedish-journalists-from-realtid-face-defamation-suit-in-the-uk; Blueprint for free speech, Realtid case: UK court asked to consider "serious harm", March 2021, https://www.blueprintforfreespeech.net/en/news/realtid-case-uk-court-asked-to-consider-serious-harm

[82] Susan Coughtrie, The UK as a key nexus for protecting media freedom and preventing corruption globally, FPC, December 2020, https://fpc.org.uk/the-uk-as-a-key-nexus-for-protecting-media-freedom-and-preventing-corruption-globally/

[83] Transparency International UK, At your service, October 2019, https://www.transparency.org.uk/publications/at-your-service

[84] Legislation.gov.uk, Defamation Act 2013, https://www.legislation.gov.uk/ukpga/2013/26/section/9/enacted

[85] *"The Lugano Convention 2007 is an international treaty negotiated by the EU on behalf of its member states (and by Denmark separately because it has an opt-out) with Iceland, Norway and Switzerland. It attempts to clarify which national courts have jurisdiction in cross-border civil and commercial disputes and ensure that judgments taken in such disputes can be enforced across borders. The UK has applied to accede to the convention as an independent member now that it has left the EU. This would require the agreement of all signatories, but the EU has recommended that member states to say no to the UK's accession."* — See: UK in a Changing Europe, What is the Lugano Convention?, May 2021, https://ukandeu.ac.uk/the-facts/what-is-the-lugano-convention/

[86] Nik Williams, Laurens Hueting and Paulina Milewska, The increasing rise, and impact, of SLAPPs: Strategic Lawsuits Against Public Participation, FPC, December 2020, https://fpc.org.uk/the-increasing-rise-and-impact-of-slapps-strategic-lawsuits-against-public-participation/

- *A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.*
- *For the purposes of this section, harm to the reputation of a body that trades for profit is not 'serious harm' unless it has caused or is likely to cause the body serious financial loss.*[87]

In June 2019, the Supreme Court, in its ruling on the case Lachaux v Independent Print Limited & Others, affirmed the position that in order to bring a defamation case 'serious harm' must have been suffered.[88] This places an onus on claimants to produce evidence that their reputation has been 'seriously harmed', with profit-making entities required to show that they suffered serious financial loss. This Supreme Court ruling overturned an earlier Court of Appeal judgment, which "*had watered down the 'serious harm' threshold... transforming section 1 into a presentational gloss of the common law rather than a substantive provision"*.[89] While the media involved in that case lost on the facts – i.e. the serious harm threshold was found to have been met – it nevertheless served to strengthen the threshold and has been welcomed on that basis.

However, a counter-point to the positive take on the 'serious harm' test is that it is possible for serious harm to be caused when uncovering or calling out crimes, particularly if they relate to issues such as corruption or sexual abuse.[90] On its own therefore it seems unlikely to be act as an effective enough filter to weed out potentially unjustified or vexatious threats and even if it does, most likely not until a point when significant costs and time have been incurred. In her review of the 2019 Lachaux judgment Clare Duffy, a pupil barrister at Doughty Street Chambers, saw the ruling as "*unlikely to revolutionise"* the practice of litigating defamation claims and that the media would remain more likely to contest whether statements bear defamatory meaning than contend that they did not cause serious harm. Duffy notes this is because "*In the majority of cases, proving serious harm will be a simple exercise and not require lengthy evidence: the circumstances of publication will readily permit an inference (e.g. national newspapers with wide circulation figures)."*[91]

The Supreme Court ruling on the Lachaux case perhaps, however, influenced the decision by private intelligence firm Black Cube to withdraw its £15 million libel case against an Israeli investigative television show in November 2020. A representative for Black Cube stated: "*The company has been advised that since its income in the year following the broadcast has increased, the argument that the company has suffered financial loss because of the broadcast has fallen away. The company continues to state that the broadcast was wrong and seriously misleading and always acts strictly according to the law in every jurisdiction in which it operates."* [92] When filing the case at the High Court in June 2019, Black Cube had argued that, despite the show having been broadcast in Israel, its standing in the UK was affected as the country where one of its founders and many of its clients are based. As a result of withdrawing the case, Black Cube were ordered to pay £350,000 in costs to the television show's maker Keshet Broadcasting Limited and five of the group's journalists.[93] While this outcome was positive for the media outlet, the process took a year and

[87] Ben Evans, A brief guide to the tort of defamation, Blake Morgan, July 2014, https://www.blakemorgan.co.uk/a-brief-guide-to-the-tort-of-defamation/; Legislation.gov.uk, Defamation Act 2013, https://www.legislation.gov.uk/ukpga/2013/26/crossheading/requirementofseriousharm/enacted

[88] Jane Croft, UK libel claimants must prove 'serious harm 'to reputation, says court, Financial Times, June 2019, https://www.ft.com/content/337408bc-8d02-11e9-a24d-b42f641eca37; Judgement – Lachaux (Respondent) v Independent Print Ltd and another (Appellants), United Kingdom Supreme Court, June 2019, https://www.bailii.org/uk/cases/UKSC/2019/27.html; Guest Contributor, "No revolution" says the Supreme Court as it rules on defamation, UK Human Rights Blog, June 2019, https://ukhumanrightsblog.com/2019/06/17/no-revolution-says-the-supreme-court-as-it-rules-on-defamation/

[89] Ibid.

[90] Ruth Green, Freedom of expression: UK libel regime failing abuse victims, IBA, https://www.ibanet.org/article/07565660-1393-4528-a4c0-5bdc973f8b7c

[91] Guest Contributor, "No revolution" says the Supreme Court as it rules on defamation, UK Human Rights Blog, June 2019, https://ukhumanrightsblog.com/2019/06/17/no-revolution-says-the-supreme-court-as-it-rules-on-defamation/

[92] Stephanie Kirchgaessner and Owen Bowcott, Intelligence firm Black Cube ordered to pay £350,000 to Israeli TV show, The Guardian, November 2020, https://www.theguardian.com/law/2020/nov/25/intelligence-firm-black-cube-ordered-to-pay-350000-to-israeli-tv-show

[93] Ibid.

half and accrued thousands of pounds worth costs, further underscoring why the threat of libel action in London's High Courts is so significant.

An increase in the use of data protection, breach of confidence and privacy claims

In recent years, media have reported a shift away from just using of libel law for SLAPPs towards claims brought for violations of data protection law (which allows a claimant to sue over any inaccuracy even if the publication is not defamatory, malicious or clearly private or confidential), breach of confidentiality or privacy law more broadly. These have weaker journalistic exemptions for public interest reporting than libel, making these laws more attractive grounds on which to sue.[94] The use of multiple grounds only adds to the convoluted nature of SLAPP cases, making it even more complicated and expensive for those on receiving end of SLAPPs to mount a proper defence.

In 2017, when the main company implicated in the Paradise Papers scandal, Appleby, a law firm based in Bermuda, initiated legal proceedings against the BBC and The Guardian in England they cited a breach of confidentiality. The Paradise Papers had uncovered how "*hundreds of politicians, multinationals, celebrities and individuals with a high net worth use complex structures to avoid paying higher taxes."*[95] The two British news organisations which released the investigations alongside 94 other news organisations worldwide were the only ones sued by Appleby in England.[96] Neither media organisation had been involved in obtaining the information, which had been leaked by hackers. In May 2018, the law firm and the two media agencies released a joint statement announcing a settlement had been agreed, the terms of which were confidential.[97]

What constitutes 'private' and 'confidential' information may overlap but are not necessarily the same. Private information usually regards an individual's personal life, in which they might have a reasonable expectation of privacy. Meanwhile, confidential information is effectively 'secret' information, for example created through the signing of an agreement (e.g. an employment contract) or because of established relationship that might carry a confidential aspect (e.g. doctor-patient relationship).[98]

Since then there has been indications of a broader trend towards using laws other than libel, particularly pre-publication. The answers given by two UK based respondents to FPC's 2020 global survey of investigative journalists who report on financial crime and corruption were reflective of this:[99]

> *"Lawyers have become more adept at using anti-privacy and GDPR laws to hinder reporting, request information and slow things down with bureaucratic processes."*
> – Male respondent, aged 35 – 44, in full-time employment in the UK.

> *"In the UK, as well as threatening defamation action, they also turn to privacy/data laws and breach of confidence. The law firm's use of private investigators/private intelligence operatives is also noteworthy."*
> – Male respondent, aged 25 – 34, working part-time in the UK.

[94] Slater Gordon, UK legal advice guides for download online, https://www.slatergordon.co.uk/media/87853/breach-of-confidence.pdf ;; Timothy Pinto, The rise of GDPR in media law, Taylor Wessing, February 2019, https://www.taylorwessing.com/download/article-rise-of-gdpr-in-media-law.html ;; Channel 4, Media Law: Legal Protection of Privacy, https://www.channel4.com/producers-handbook/media-law/privacy-confidence-and-data-protection/legal-protection-of-privacy

[95] EFJ/IFJ, AEJ, Index and EBU, United Kingdom: BBC and The Guardian Taken to Court over Paradise Papers, CoE's Safety of Journalists Platform, December 2017, https://go.coe.int/tBExx

[96] Ibid.

[97] BBC News, Paradise Papers: BBC, Guardian and Appleby agree settlement, May 2018, https://www.bbc.co.uk/news/uk-44001176

[98] Brett Wilson, Privacy, https://www.brettwilson.co.uk/services/defamation-privacy-online-harassment/misuse-of-private-information/

[99] Susan Coughtrie, Unsafe for Scrutiny: Examining the pressures faced by journalists uncovering financial crime and corruption around the world, FPC, November 2020, https://fpc.org.uk/publications/unsafe-for-scrutiny/

The General Data Protection Regulation (GDPR) and the Data Protection Act 2018 (DPA 2018) form the UK's data protection regime, which is regulated by the Office of the Information Commissioner (ICO), an independent authority that upholds information rights in the public interest and data privacy for individuals.[100] The ICO describes personal data as *"data that relates to a living individual who can be identified, or who is identifiable, from that data."*[101] The GDPR gives individuals a right to claim compensation from an organisation if they have suffered damage as a result of it breaking data protection law, which includes both 'material damage' (e.g. a loss of money) or 'non-material damage' (e.g. caused distress). [102]

An example of this can be seen in communications between UK law firm Shillings and MaltaToday. As a result their client's name being included in an article published by MaltaToday in December 2019, Schillings sent the outlet a letter threatening legal action in October 2020. [103] In December 2021, an alert was published on the Council of Europe's Media Freedom Platform which states that *"Schillings [was] demanding upon instructions from Farnoush Farsiar that an article allegedly contravening the Data Protection Act 2018 and the General Data Protection Regulation (GDPR) be removed from the outlet's website",* and that *"Schillings stated that MaltaToday's reporting reporting does not contribute to the public interest and that the publication of [Ms] Farsiar's name amounts to unlawful processing of her personal data, causing her distress."* [104] MaltaToday defended their reporting stating that it quoted verbatim from the Maltese Magisterial Inquiry launched into allegations made by journalist Daphne Caruana Galizia, who was assassinated in October 2017. As MaltaToday did not respond to the letter, the news outlet reported that *"Schillings started calling, monthly at first, and almost daily throughout October, November and December 2021."*[105] The transnational nature of threats emanating from the UK, but that do not progress to the court stage, is examined further in Chapter 2.

In July 2021, the publisher HarperCollins settled two cases brought on GDPR grounds related to the book *Putin's People: How the KGB Took Back Russia and Then Took on the West*, by the British journalist Catherine Belton, released in April 2020. Two Russian billionaires, Petr Aven and Mikhail Fridman sued HarperCollins claiming the book contained inaccurate personal data concerning them (Fridman also sued for libel). During a preliminary hearing, which brought together two other libel cases being pursued by the Russian oligarch Roman Abramovich and the Kremlin backed oil company Roseneft against both HarperCollins and Catherine Belton, the publisher decided to settle with Aven and Fridman.[106] HarperCollins agreed to make minor amendments to wording within four paragraphs and a footnote in future editions of the book and said it regretted that the subject had not been discussed with Aven and Fridman prior to initial publication.[107] However, HarperCollins made no admission that the texts were defamatory. In March 2022, while giving oral evidence to the Foreign Affairs Select Committee about the legal challenges she experienced, Catherine Belton explained how she felt the law on GDPR can be misused:

> *"In the Fridman and the Aven cases, for instance, they were essentially using GDPR claims… to whitewash their histories… For instance, in Aven's case, he said the fact that we had written that he had supported Vladimir Putin in the well-known oil-for-food deals of the early 1990s was inaccurate.*

[100] ICO, Complaining to the ICO about a media organisation, https://ico.org.uk/your-data-matters/data-protection-and-journalism/complaining-to-the-ico-about-a-media-organisation/
[101] ICO, Terms used in this guidance, https://ico.org.uk/your-data-matters/data-protection-and-journalism/terms-used-in-this-guidance/#definition2
[102] ICO, Taking your case to court and claiming compensation, https://ico.org.uk/your-data-matters/data-protection-and-journalism/taking-your-case-to-court-and-claiming-compensation/
[103] ECPMF, Malta: MaltaToday Threatened with Data Protection Legal Action, CoE's Safety of Journalists Platform, December 2021, https://fom.coe.int/alerte/detail/107636681?langue=en-GB
[104] ECPMF, Malta: MaltaToday Threatened with Data Protection Legal Action, CoE's Safety of Journalists Platform, December 2021, https://fom.coe.int/alerte/detail/107636681?langue=en-GB
[105] Ibid.
[106] Kadhim Shubber, Alex Barker, Henry Foy and Max Seddon, Russian billionaires file lawsuits over book on Putin's rise, Financial Times, May 2021, https://www.ft.com/content/a355a200-4b90-4d73-b193-b73650ab8b77
[107] Dan Sabbagh, High court hears opening salvos in libel case brought by Roman Abramovich, The Guardian, July 2021, https://www.theguardian.com/uk-news/2021/jul/30/high-court-hears-opening-salvos-in-libel-case-brought-by-roman-abramovich

> *Actually, it was accurate and it was a question that went to his reputation. We had letters in which Putin had written to Petr Aven, the Alfa oligarch, saying, "Please grant me permission to issue these licences to conduct Alfa food deals." At the top was Aven's signature, saying, "Yes, you may operate in this way."*
>
> *It was a reputation issue for him. He did not want to be seen as having supported Putin in any way. However, because he personally was behind on the statute of limitations [for libel]—it was already beyond the year, his lawyers issued a data protection claim saying it was inaccurate. It was accurate. It was an issue of reputation rather than accuracy."*[108]

There is a much longer statute of limitations on filing a GDPR claim of six years, compared to one year for libel cases.[109]

In what is believed to be the first appellate decision on the territorial reach of the UK GDPR on 21st December 2021, the Court of Appeal gave a UK based Israeli businessman Walter Soriano permission to bring a data protection claim, together with libel and misuse of private data claims, against Forensic News, a US-based news website, and four US-based journalists.[110] The court held that subscriptions to Forensic News' website, facilitated through the Patreon platform – which could be paid in sterling or euros – amounted to 'stable arrangements' to satisfy article 3(1) of the GDPR.[111] According to information given to court, since opening up its Patreon subscriptions from USD-only in August 2020 Forensic News had received three Patreon subscriptions in Euros and three in Sterling.

Between June 2019 and June 2020, Forensic News had published six articles and a podcast about the business affairs of British-Israeli security consultant and businessman Walter Soriano, after he was summoned by the US Senate Intelligence Committee. The Committee was reportedly interested in Soriano's connections to several people of interest, including the Russian oligarch Oleg Deripaska, who had been a former business associate of Donald Trump's campaign chairman Paul Manafort.[112] In evidence given to the US Congress in April 2022, Stedman noted that US based lawyers for Mr Deripaska initially wrote to him and threatened legal action while also demanding that Stedman provide information about this sources and any documentation (public or otherwise). However, legal action against Stedman and Forensic News, which is based in California, which has an anti-SLAPP law, never materialised.[113]

Soriano launched his lawsuit in London against Forensic News and several of its journalists as individuals in July 2020. A total of five claims were made in relation to data protection, libel, misuse of private information, harassment, and malicious falsehoods, relating to ten internet publications and various social media postings, including on Facebook and on Twitter. He made allegations against all of the defendants on the basis of breaches of the Data Protection Act 2018/GDPR and under the Protection from Harassment Act, with libel and malicious falsehood on a global basis, but with the damage having been caused in England and Wales due to the claimant residing and having his main business there.[114]

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[108] Foreign Affairs Committee, Oral evidence: Use of strategic lawsuits against public participation, HC 1196, House of Commons, Tuesday 15 March 2022, https://committees.parliament.uk/oralevidence/9907/pdf/

[109] LexisNexis, Starting a UK GDPR compensation claim – a practical guide, https://www.lexisnexis.co.uk/legal/guidance/starting-a-gdpr-compensation-claim-a-practical-guide#:~:text=A%20compensation%20claim%20under%20the%20UK%20GDPR%20and%20DPA%202018,date%20the%20damage%20is%20suffered

[110] England and Wales Court of Appeal (Civil Division) Decisions, Soriano v Forensic News LLC & Ors (Rev1) [2021] EWCA/ Civ/2021/ 1952. (21 December 2021), https://www.bailii.org/ew/cases/EWCA/Civ/2021/1952.html; Sam Tobin, Landmark jurisdiction ruling on data protection and libel claims, Law Gazette, December 2021, https://www.lawgazette.co.uk/news/landmark-jurisdiction-ruling-on-data-protection-and-libel-claims/5111012.article

[111] Ibid.

[112] Index on Censorship, Fifteen organisations condemn lawsuit against Forensic News, deeming it a SLAPP, February 2022, https://www.indexoncensorship.org/2022/02/organisations-condemn-forensic-news-lawsuit-as-slapp/

[113] Helsinki Commission, Helsinki Committee session on 'Countering Oligarchs, Enablers, and Lawfare', YouTube, April 2022, https://www.youtube.com/watch?v=m0YPcXB1W8I

[114] Kevin Modiri, Do The Courts Of England & Wales Have Jurisdiction To Hear Cases Involving News Articles Published Online By A News Publication Based Out Of The EU?, Nelsons, February 2021, https://www.nelsonslaw.co.uk/soriano-forensic-news/

A preliminary ruling by Mr Justice Jay in January 2021 on jurisdiction dismissed the GDPR, harassment and malicious falsehood claims, but allowed Soriano to proceed with his libel claim and privacy claim (although this latter claim only pending the success of a libel claim).[115] The Court of Appeal judgment said of this privacy claim: "*taken in isolation, that claim would have been too trivial to justify the grant of permission to serve outside the jurisdiction, but taken in conjunction with the libel claims it was appropriate to exercise his [the Judge's] residual discretion by granting permission. The grant of permission was therefore parasitic on permission to serve the claims in libel."*[116]

The Court of Appeal judgment overturned Mr Justice Jay's earlier dismissal of the GDPR claim, and denied the appeal by the defendants to have the libel claims thrown out and the cross-appeal by the claimant to have the malicious falsehood claim reinstated. The remaining libel claim relates to seven articles and a podcast that appeared on Forensic News outlets between 5th June 2019 and 16th June 2020, which referred to him in 'unflattering terms'.[117] Some of these included photographs of Soriano that he claims were stolen from social media accounts, and from which the misuse of private data claim is derived.

While the Court of Appeal Judge, Lord Justice Warby, found that the claimant had the *"real as opposed to a fanciful prospect of success"* needed to proceed, he also added that the issues in the case required further and definitive consideration and suggested that the Information Commissioner should be invited to intervene.[118] After the court's ruling, journalist Scott Stedman, founder of Forensic News and the second defendant in the case, stated: *"The decision today is of historic importance to all U.S. media. If you publish an article about a U.K. citizen, even if you are physically only based in the U.S., you may be sued in the U.K. for breach of data protection laws."*[119] The case is expected to proceed within the next year, subject to further appeals.

As a result of losing the December 2021 appeal, Forensic News has to pay Walter Soriano costs, which amount to the tens of thousands. As Stedman has explained: *"For over a year, we contested the jurisdiction of the lawsuit. I have never stepped foot in the United Kingdom. Forensic News has no corporate presence in the UK and the vast majority of my readers are in the US."*[120] Yet there is an expectation that the media outlet and its journalists are expected to pay out to Soriano for losing this appeal, before even reaching a trial.

In comments given to the Washington Post in March 2022, Anne Champion, a lawyer at the firm Gibson Dunn representing Stedman, said she will argue that any judgments against her client on data privacy grounds should be unenforceable in the US.[121] Since 2010, the SPEECH (Securing the Protection of our Enduring and Established Constitutional Heritage) Act has made foreign libel judgments unenforceable in US courts, unless either the relevant foreign legislation offers at least as much protection as the US First Amendment or the defendant would have been found liable under US law.[122] The SPEECH Act was created directly in response to issues with libel tourism, in particular after the American academic Dr Rachel

[115] Bailii, England and Wales High Court (Queen's Bench Division) Decisions, Soriano v Forensic News LLC & Ors [2021] EWHC 56 (QB) (15 January 2021), https://www.bailii.org/ew/cases/EWHC/QB/2021/56.html
[116] Bailii, England and Wales Court of Appeal (Civil Division) Decisions, Soriano v Forensic News, LLC & Ors (Rev1) [2021] EWCA Civ 1952 (21 December 2021), https://www.bailii.org/ew/cases/EWCA/Civ/2021/1952.html
[117] Ibid.
[118] Sam Tobin, Landmark jurisdiction ruling on data protection and libel claims, Law Gazette, December 2021, https://www.lawgazette.co.uk/news/landmark-jurisdiction-ruling-on-data-protection-and-libel-claims/5111012.article
[119] Scott Stedman, Twitter post, Twitter, December 2021, https://twitter.com/ScottMStedman/status/1473409447053512710
[120] Helsinki Commission, Helsinki Committee session on 'Countering Oligarchs, Enablers, and Lawfare', YouTube, April 2022, https://www.youtube.com/watch?v=m0YPcXB1W8I
[121] Reed Albergotti, Some Russian oligarchs are using U.K. data privacy law to sue, The Washington Post, March 2022, https://www.washingtonpost.com/technology/2022/03/31/oligarchs-data-privacy-law/
[122] US Congress, Public Law 111-223 – AUG. 10, 2010, https://www.congress.gov/111/plaws/publ223/PLAW-111publ223.pdf

Ehrenfeld was sued in London by an Arab businessman Sheikh Khalid bin Mahfouz in 2008.[123] GDPR is not covered by the SPEECH Act, and Champion stated of her plan to defend Stedman in the US against judgments made in the UK: *"I think it's extremely important. People are always looking for ways around defamation protections."*[124]

To note, Soriano is also pursuing another transnational case in London, against Le Point, a French magazine, and one of its journalists Marc Leplongeon, based in Paris. In an meaning hearing held in November 2020, Mr Justice Nicol found that the meaning of the article under question, published by Le Pont in 2019, was that Soriano *"is a spy or a spook and there are grounds to investigate whether he has directly or indirectly used surveillance, military methods or data interception technology in his work; whether he was involved in the surveillance of police officers investigating President Netanyahu; and whether he was involved in Russia's attempt to interfere in the 2016 election in the USA."*[125] At time of publication in April 2022, this case is also understood to still be ongoing. Mr Soriano has denied all wrongdoing alleged against him.[126]

Meanwhile, the full impact of a February 2022 Supreme Court ruling in a long-running privacy related case Bloomberg v ZXC is probably yet to be seen, there are already concerns it will increase the use of privacy arguments in pre-publication legal communication and pre-publication injunctions moving forward. The case started when 'ZXC' a US citizen, and his employer, a company, operated overseas, were the subject of a criminal investigation by a UK Legal Enforcement Body (LEA). A confidential Letter of Request was sent by the LEA to the authorities of a foreign state seeking, among other things, information and documents relating to 'ZXC'. In 2016, 'ZXC' brought a successful claim against Bloomberg for the misuse of private information, after the media outlet obtained a copy of the Letter of Request, which it used as the basis for an article detailing the matters for which 'ZXC' was being investigated.[127]

On 16th February 2022, the Supreme Court upheld previous decisions by the lower courts to grant claimant 'ZXC', who was under investigation by a law enforcement agency, an injunction to prevent Bloomberg from revealing their identity.[128] A previous High Court judgment held that 'ZXC' was entitled to an injunction "*in part* because *of the damage that would be caused to his reputation from being known to be under investigation by the state."*[129] The Supreme Court ruling held that *"in general, a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation."*[130]

Responding to the Supreme Court judgment, John Micklethwait, Editor-in-Chief of Bloomberg News, commented that the decision was *"something that should frighten every decent journalist in Britain — as well as anybody who cares about justice, the conduct of capitalism or freedom of speech."*[131] In a comment piece, published by Bloomberg, he outlined how this judgment could mean that the rich and powerful now have a path to keep their names out of print for years, stating:

[123] Only 23 copies of Ehrenfeld's book '*Funding Evil*' were sold in the UK compared to thousands distributed in the US, yet Mahfouz did not launch action in the US seemingly due to First Amendment Free Speech Protections. Roy Greenslade, Obama seals off US journalists and authors from Britain's libel laws, The Guardian, August 2010, https://www.theguardian.com/media/greenslade/2010/aug/11/medialaw-barack-obama
[124] Reed Albergotti, Some Russian oligarchs are using U.K. data privacy law to sue, The Washington Post, March 2022, https://www.washingtonpost.com/technology/2022/03/31/oligarchs-data-privacy-law/
[125] Bailii, England and Wales High Court (Queen's Bench Division) Decisions, Soriano v Societe D'exploitation De L'hebdomadaire Le Point SA & Anor [2020] EWHC 3121 (QB) (20 November 2020), https://www.bailii.org/ew/cases/EWHC/QB/2020/3121.html
[126] Jonathan Ames, Soriano sues French magazine which called him a 'spook', The Sunday Times, November 2020, https://www.thetimes.co.uk/article/soriano-sues-french-magazine-which-called-him-a-spook-mk7cnq56d
[127] The Supreme Court, Bloomberg LP (Appellant) v ZXC (Respondent) [2022] UKSC 5 On appeal from [2020] EWCA 611, February 2022, https://www.supremecourt.uk/press-summary/uksc-2020-0122.html
[128] Ibid.
[129] Adam Speker QC, How to get a libel injunction, 5RB, September 2020, https://www.5rb.com/article/libel-injunction/
[130] The Supreme Court, Bloomberg LP (Appellant) v ZXC (Respondent) [2022] UKSC 5 On appeal from [2020] EWCA 611, February 2022, https://www.supremecourt.uk/press-summary/uksc-2020-0122.html
[131] John Micklethwait, U.K. Judges Are Helping the Next Robert Maxwell, Bloomberg, February 2022, bloomberg.com/opinion/articles/2022-02-16/bloomberg-v-zxc-protects-powerful-people-from-accountability?srnd=premium-europe

> *"Let's be clear about what privacy means in this case… This was reporting on his business activities — and an investigation by the authorities into possible malfeasance at a huge company that could have an effect on many people who invested in it…. If you can't report about potential wrongdoing before any charge is brought, then, once somebody has been charged (and ZXC has not), all the proceedings become sub judice with potential reporting restrictions added…*
>
> *This right to privacy is only for those who can afford it; strangely enough, these often tend to be those who have the most to hide."* [132]

The Editorial Board at the Financial Times, in light of the Supreme Court ruling, also raised similar concerns:

> *"The media, it is clear, have a duty not to spread accusations recklessly. The principle of "innocent until proven guilty" should be respected in reporting law enforcement investigations. There may be an argument to shield the identity of those probed over, say, alleged sex offences, where lives can be destroyed by accusations that prove baseless.*
>
> *This is much less true, however, of businesspeople being probed over fraud or malfeasance claims. Especially in white-collar crimes, years can pass between legal probes opening and charges being issued. The interests of shareholders, investors, customers or creditors may, meanwhile, be at stake."*[133]

It is important to note that pre-publication injunctions are not applicable on defamation grounds, but the Supreme Court decision in the Bloomberg v 'ZXC' case could make pre-publication injunctions on privacy more common. Injunctions have previously been subject to criticism, particularly as only the super-wealthy can afford to utilise them.[134] The cost for an injunction is estimated to start, as a minimum, at around £75,000 including lawyers' fees and court fees.[135]

Are the English courts the playground of the 'super-rich'?

Prompted in part by the cases against Belton and HarperCollins, in June 2021 The Times journalist Sean O'Neill wrote an op-ed published entitled *Abuse of British courts is killing free speech*. In it, he argued that "*the most potent threat to courageous journalism is not from baying mobs of conspiracy cranks or toxic Twitter trolls. It comes from super-rich men who cannot bear their personal and business affairs to be questioned, probed or criticised. When these men feel aggrieved they turn to big London law firms who will do their bidding for a very fat fee."*[136]

The UK has been well recognised as a hotspot for high net worth individuals, with one study published in 2015 calculating that it has attracted more of the world's super-rich than any other country in the world, with more than 100,000 of the world's wealthiest individuals having moved to its shores over the previous decade.[137] Successive investigations such as the Panama Papers, the Paradise Papers and the Pandora Papers, by global networks of journalists like OCCRP and the International Consortium of Investigative Journalists (ICIJ) have uncovered the extent to which the UK is a clearing house for money laundering and the millions, if not billions that end up in the UK property market.

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[132] Ibid.
[133] The editorial board, UK media investigations are under serious threat, Financial Times, February 2022, https://www.ft.com/content/d9afbd3b-610b-4653-bedf-a858bd4de148
[134] Jane Martinson, Are privacy injunctions on the brink of a comeback?, The Guardian, April 2016, https://www.theguardian.com/world/2016/apr/23/why-are-privacy-injunctions-back-in-the-news-celebrity-threesome-father
[135] From information provided by Caroline Kean, at Wiggin.
[136] Sean O'Neill, Abuse of British courts is killing free speech, The Times, June 2021, https://www.thetimes.co.uk/article/abuse-of-british-courts-is-killing-free-speech-92x9mdbnm
[137] Lynsey Barber, The UK is a playground for super-rich foreigners, attracting more millionaires than any other country in the world, City A.M., July 2015, https://www.cityam.com/uk-super-rich-foreigners-playground-attracting-more-millionaires-any-other-country-world/

Media outlets have also documented how many of the world's super-rich have used the English and Welsh courts as their preferred choice for settling legal disputes from divorces and child custody to business matters. A recent investigation by The New York Times and the Bureau of Investigative Journalism (TBIJ), published in June 2021, revealed the extent to which London's courts are "*being used by autocrats to wage legal warfare against people who have fled their countries after falling out of favour over politics or money."*[138] Their joint investigation found that "*Authoritarian governments, or related state entities, are often pitted against wealthy tycoons who have fallen from favour and fled. Neither side elicits much pity — but both pay generous legal fees."*[139]

This chapter has already outlined how the nature of the English libel system creates a challenge for the media, particularly because of the financial risk. Even if there is a genuine grievance to be resolved, the inequality of arms, and the crushing impact that this can have on journalists and media outlets subject to legal challenges, should be of serious concern. Law firms will often state that they are only acting in the best interest of their clients and they are within their rights to set their own fees. However, the amount that some law firms charge for their services – which could then be required to be covered by the defendant if they lose – sets a 'David and Goliath' tone for engagement from the outset. Individual journalists and small media outlets that do decide to defend cases, usually rely heavily on low bono and pro bono support in order to do so.

Unlike the legal cases against Paul Radu and Clare Rewcastle Brown, which received little to no media coverage while they were ongoing, the cases against Catherine Belton and HarperCollins attracted greater public attention. This is likely because of the number of cases they had to defend as well as the profile of the claimants bringing legal action against them. Between March and April 2021, four very wealthy Russian oligarchs, including the owner of Chelsea football club Roman Abramovich, as well as the Russian state-owned oil company Rosneft, stated their intention to sue Belton and/or her publisher HarperCollins in relation to the book *Putin's People*. Of these five cases, four of them were filed at the High Court and reached the 'meaning' hearing held on 28th and 29th July 2021.[140]

As described on page 28 above, HarperCollins decided to settle with businessmen Fridman and Aven during the first day of the preliminary hearing in July 2021, halving the number of cases remaining. On 24th November 2021, the judgments regarding the 'legal meaning' in the cases brought by Roman Abramovich and Rosneft were handed down by Justice Tipples. In relation to the claims brought by Rosneft, Justice Tipples found that three of the four passages complained about were not defamatory and two days later Rosneft decided to discontinue its claim.[141] A spokesperson for HarperCollins said at the time that: *"To put an end to this case without delay and so it can concentrate on the remaining claim against the book from Mr Abramovich, HarperCollins has taken the decision not to pursue costs against Rosneft to avoid wasting further time on this meritless claim."*[142]

In relation to the claims brought by Abramovich, Justice Tipples ruled against Abramovich on one meaning claiming that the book meant that he had a corrupt relationship with Putin.[143] Instead, she found the book

[138] Franz Wild, Isobel Koshiw, Jane Bradley and Andrew Higgins, The power of money: How autocrats use London to strike foes worldwide, TBIJ, June 2021, https://www.thebureauinvestigates.com/stories/2021-06-18/the-power-of-money-how-autocrats-use-london-to-strike-foes-worldwide
[139] Ibid.
[140] Dan Sabbagh, High court hears opening salvos in libel case brought by Roman Abramovich, The Guardian, July 2021, https://www.theguardian.com/uk-news/2021/jul/30/high-court-hears-opening-salvos-in-libel-case-brought-by-roman-abramovich
[141] Judgement in Rosneft v HarperCollins and Catherine Belton, [2021] EWHC 3141 (QB), 24 November 2021, https://www.judiciary.uk/wp-content/uploads/2021/11/Rosneft-v-HarperCollins-judgment-241121.pdf
[142] Sian Bayley, Russian oil giant Rosneft discontinues claim against Putin's People, The Bookseller, November 2021, https://www.thebookseller.com/news/rosneft-discontinues-remaining-claim-against-putins-people-1291595
[143] Judgement in Abramovich v HarperCollins and Catherine Belton, [2021] EWHC 3154 (QB), 24 November 2021, https://www.judiciary.uk/wp-content/uploads/2021/11/Abramovich-v-HarperCollins-judgment-241121.pdf; Jonathan Ames, Roman Abramovich strikes first blow over Chelsea claim in Putin's People book, The Times, November 2021, https://www.thetimes.co.uk/article/roman-abramovich-strikes-first-blow-over-chelsea-claim-in-putins-people-book-b5clfdt7r

said that he was under Putin's control. However, on other meanings she ruled that the allegations in the book were presented as statements of fact, rather than expressions of opinion as the lawyers for HarperCollins and Belton had argued.[144]

A month later, on 22nd December 2021, it was announced that Abramovich had decided to settle the case with HarperCollins and Catherine Belton.[145] In a statement the publisher offered an apology that *"some aspects of the book were not as clear as they would have liked them to have been and are happy to have now clarified the text."* Adding: *"While the book always included a denial that Mr Abramovich was acting under anybody's direction when he purchased Chelsea, the new edition will include a more detailed explanation of Mr Abramovich's motivations for buying the club."*[146] The settlement meant that both sides covered their own legal fees and no damages were awarded, minor amendments were made but the main claims remained intact in the book.[147] However, HarperCollins agreed to make a payment to charity in relation to one error involving Abramovich's ownership of the company Sibneft. In an additional statement shared by HarperCollins, the publisher commented that they had been *"under attack"* from five oligarchs and a state owned oil company all with *"vast resources at their disposal",* and stressed that *"each of these claims has been resolved with no damages or costs payable by HarperCollins."*[148]

The plaintiffs strongly denied any coordination occurred between them in pursuing the cases against HarperCollins and Ms Belton.[149] In early July 2021, Mr Justice Nicklin, the Judge in Charge of the Media and Communications list at the Royal Courts of Justice, had ordered the initial meaning hearing to be held together for case management reasons so the issues on meaning could be determined by one judge.[150] While the claimants might have denied any collusion in their actions, having to defend multiple cases brought at once through the High Court is certainly an unenviable challenge. HarperCollins and Catherine Belton's lawyer Caroline Kean, a Partner at the law firm Wiggin, later commented that while she had previously *"worked on cases as complex as one of these…never ever have we come across a coordinated attack on a book in this way."*[151]

Ultimately the agreed changes to future editions of the book were relatively minimal. On 23rd December 2021, Catherine Belton shared a screen shot on Twitter the extent of the amendments agreed, relating to Abramovich's acquisition of Chelsea football club.[152] It has been estimated that if the libel trial had gone ahead in the High Court and Australia the legal bill was likely to have exceeded over £5 million.[153]

In June 2021, Abramovich had also lodged a defamation action in the Federal Court of Australia against HarperCollins Australia.[154] The Daily Mail reported at the time that: "*The action in Australia is intended to close a loophole which could allow HarperCollins to continue distributing the book down under even if the High Court ruled in his favour. Injunctions granted by the English courts generally would not be binding in*

[144] Ibid
[145] Luke Harding, Roman Abramovich settles libel claim over Putin biography, The Guardian, 22 December 2021, https://www.theguardian.com/world/2021/dec/22/roman-abramovich-settles-libel-claim-over-putin-biography
[146] HarperCollins, Putin's People: settlement reached in Roman Abramovich v HarperCollins and Catherine Belton, 22 December 2021, https://corporate.harpercollins.co.uk/press-releases/putins-people-settlement-reached-in-roman-abramovich-v-harpercollins-and-catherine-belton/
[147]Catherine Belton, Twitter post, Twitter, December 2021, https://twitter.com/CatherineBelton/status/1473825261774901252
[148] HarperCollins UK, Twitter post, Twitter, December 2021, https://twitter.com/HarperCollinsUK/status/1473598851307413509/photo/1
[149] Nick Cohen, Are our courts a playground for bullies? Just ask Catherine Belton, The Guardian, May 2021, https://www.theguardian.com/commentisfree/2021/may/08/are-our-courts-a-playground-for-bullies-just-ask-catherine-belton
[150] Judgement in Rosneft v HarperCollins and Catherine Belton, [2021] EWHC 3141 (QB), 24 November 2021, https://www.judiciary.uk/wp-content/uploads/2021/11/Rosneft-v-HarperCollins-judgment-241121.pdf
[151] Comments by Caroline Kean, at a Frontline Club event (20 min mark).
[152] Catherine Belton, Twitter post, Twitter, December 2021, https://twitter.com/CatherineBelton/status/1473825261774901252
[153] Luke Harding, Roman Abramovich settles libel claim over Putin biography, The Guardian, December 2021 ,https://www.theguardian.com/world/2021/dec/22/roman-abramovich-settles-libel-claim-over-putin-biography
[154] Max Mason, Billionaire Abramovich sues Australian publisher over Putin claims, Financial Review, July 2021, https://www.afr.com/companies/sport/chelsea-owner-sues-australian-arm-of-harpercollins-over-putin-claims-20210701-p585uf

Australia."[155] While the Australia case was withdrawn as part of the settlement, HarperCollins has asked the Australian courts to rule on whether filing the same claims in two jurisdictions was an abuse of process, given it essentially would have doubled the costs of defending the book and Abramovich had no business interests, and therefore no reputation to protect, in Australia.[156]

The issue of legal action being issued in multiple jurisdictions was also an aspect in a separate case against HarperCollins and another of their authors, Tom Burgis, whose book *Kleptopia: How Dirty Money Is Conquering the World* was released in September 2020. The Eurasian Natural Resources Corporation Limited (ENRC), whose business dealings are examined in *Kleptopia*, initiated a case in the US courts against the US arm of HarperCollins seeking disclosure of wide-ranging information relating to Burgis' book in September 2020.[157] In August 2021, ENRC launched legal action in the UK, claiming Burgis and HarperCollins had made a series of 'untrue' and 'highly damaging' allegations made about the company. Burgis was also jointly named in a separate legal case against his employer the Financial Times, in relation to articles they published related to the issues raised in Burgis' book.[158] Both cases were recognised by leading media freedom, anti-corruption and transparency NGOs as SLAPPs.[159]

ENRC has a track record of utilising legal action having initiated more than 18 legal proceedings in the US and the UK, against journalists, lawyers, investigators as well as the UK's Serious Fraud Office (SFO).[160] On 25th April 2013, the SFO launched a criminal investigation into ENRC Ltd ("ENRC", previously ENRC PLC – now called ERG). The investigation is focused on allegations of fraud, bribery and corruption surrounding the acquisition of substantial mineral assets in, according to press reports, the Democratic Republic of Congo. Following the announcement of the SFO's investigation, ENRC went private and registered in Luxembourg. Concern has been raised by ARTICLE 19 and 14 other civil society groups about the approach taken by ENRC to sue nearly all who mention or publish details about the allegations against the company has been, in a joint statement they stated this seems to be "*a deliberate attempt to shift the focus away from ENRC's alleged corruption to those conducting legitimate investigations, whether journalists or public authorities."*[161] The judgment in ENRC's case against SFO, which concluded proceedings in September 2021, has not yet been released. However, reports that ENRC has spent $397m (£296m) since 2014 on 'professional fees and other exceptional litigation costs', according to financial accounts are staggering.[162] In November 2021, the last financial year alone, the company reportedly spent $86m (£63m), more than the SFO's entire operational budget (£52m) over the same period.[163]

However, in March 2022, in a positive development Burgis and his co-defendants HarperCollins and the Financial Times managed to successfully see off both of their cases. On 2nd March 2022, Justice Nicklin threw out the first case against Burgis and HarperCollins during an initial meaning hearing after finding the claimants' argument to be fundamentally flawed.[164] Nicklin found that ENRC's claim that Burgis had defamed the corporation in his book, by implying that the company had three men murdered to protect its business interests, was not sustainable as only individuals not corporate entities could be held liable for

[155] Dan Sales, Chelsea boss Roman Abramovich sues Australian arm of HarperCollins over author's claims he bought the club on the orders of Vladimir Putin, Mail Online, June 2021, https://www.dailymail.co.uk/news/article-9737395/Chelsea-boss-Roman-Abramovich-sues-authors-claims-bought-club-Putins-orders.html

[156] Max Mason, Financial Review, Billionaire Abramovich sues Australian publisher over Putin claims, July 2021, https://www.afr.com/companies/sport/chelsea-owner-sues-australian-arm-of-harpercollins-over-putin-claims-20210701-p585uf ; Catherine Belton, Twitter post, Twitter, December 2021, https://twitter.com/CatherineBelton/status/1473709528638238720

[157] Reporters 'Committee for Freedom of the Press, In Re: Ex parte Application of ENRC Limited Pursuant to 28 U.S.C. § 1782 for Leave to Take Discovery for Use in Foreign Proceedings, December 2020, https://www.rcfp.org/briefs-comments/enrc-harper-collins-section-1782/

[158] Index on Censorship, Index condemns lawsuits brought by ENRC against Tom Burgis, October 2021, https://www.indexoncensorship.org/2021/10/index-condemns-lawsuits-brought-by-enrc-against-tom-burgis/

[159] Ibid.

[160] Index on Censorship, Index on 21 other organisations condemn lawsuits brought by ENRC against public watchdogs, June 2021, https://www.indexoncensorship.org/2021/06/lawsuits-brought-by-enrc-against-uk-serious-fraud-office-and-dechert-llp/

[161] Ibid.

[162] Ed Siddons and Simon Lock, City law firms make millions while top corruption cases tumble, TBIJ, November 2021., https://www.thebureauinvestigates.com/stories/2021-11-15/city-law-firms-make-millions-while-top-corruption-cases-tumble

[163] Ibid.

[164] Dominic Casciani, Journalist wins 'kleptocrat' book High Court libel case, BBC News, March 2022, https://www.bbc.co.uk/news/uk-60595266;

murder.[165] That early ruling meant the case could not proceed to a full libel trial and the judge awarded £50,000 in costs against ENRC, while also refusing it permission to appeal.[166] In a statement welcoming the judgment, HarperCollins reaffirmed its commitment to *"defend our authors in the face of legal attacks from those who would seek to use the UK courts to silence them."*[167] Upholding this principle had required significant investment. According to information provided by Harper Collins to the FPC, by this point, it had already spent £197,000 defending Burgis' book in the UK and another £136,000 in the US. If the case had gone to trial in the UK, HarperCollins were expecting to pay another £500,000 in legal fees and if they had lost the case £100,000 in damages and around £900,000 in legal fees to Taylor Wessing, ENRC's lawyers.

Perhaps in light of Justice Nicklin's judgment, ENRC decided to withdraw their case against Burgis and the Financial Times less than two weeks later on 14th March 2022. Roula Khalaf, FT Editor, stated in response to the announcement: *"I'm pleased to hear of ENRC's decision to withdraw a claim that was always without merit and had put Tom Burgis under enormous strain. The FT and all our reporters, including Tom, will continue to investigate the activities of businesses and individuals, however powerful or wealthy."*[168] Burgis himself added: *"It's harder to imagine a higher public interest than reporting on the deaths of potential witnesses in a major criminal corruption case. I'm delighted that this attack on our journalism has failed."*[169]

ENRC released a statement in conjunction with their decision to drop the case, stating that *"we continue to dispute many allegations contained within the book, including corruption, in the strongest possible terms"*, but adding in a rather bizarre interpretation of Justice Nicklin's earlier judgment, that the company felt *"somewhat vindicated"* in taking legal action in light of the fact the ruling *"does not contain the allegation of murder against us."*[170]

Remarkably, in his ruling on the ENRC v Burgis and HarperCollins case Justice Nicklin pointed out that more generally he would accept that the book bears other meanings that are defamatory of ENRC. He had added at the end of the judgment that *"Most strikingly, the impression I got from reading the Book was that ENRC was the corporate front – "a charade" – for the Trio, and it was used by them for criminal activities including corruption, money laundering, theft and embezzlement*."[171] Justice Nicklin goes on to add *"At the hearing I asked Ms Page [ENRC's barrister] whether the Claimant's decision not to complain of this or any similar meaning was deliberate. She confirmed that it was."*[172] An ordinary reader might perhaps understand this ruling as a judgement also on the tactical misuse of law to target critical voices.

Sanctions against Russians - what do they mean for SLAPP?

While the issue of SLAPPs has been steadily gaining attention in the UK over the last couple of years, without doubt, the recent developments surrounding the Russian invasion of Ukraine in February 2022 has accelerated that interest. Moreover, in an ironic twist of fate, many Russian oligarchs, including those who pursued HarperCollins and Catherine Belton now find themselves on sanctions lists issued by the UK, the US and the EU, their assets frozen and ultimately their reputations in tatters for their links to President Putin.[173]

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[165] Judgement in ENRC v Tom Burgis and HarperCollins, [2022] EWHC 487 (QB), March 2022, https://www.judiciary.uk/wp-content/uploads/2022/03/ENRC-v-Burgis-Another-judgment-020322.pdf

[166] Dominic Casciani, Journalist wins 'kleptocrat' book High Court libel case, BBC News, March 2022, https://www.bbc.co.uk/news/uk-60595266

[167] HarperCollins UK, Twitter post, Twitter, March 2022, https://twitter.com/HarperCollinsUK/status/1499050568232353793?ref_src=twsrc%5Etfw

[168] Jane Croft, ENRC drops lawsuit against FT and journalist Tom Burgis, Financial Times, March 2022, https://www.ft.com/content/289f2603-1069-4554-af29-8d0af072edd2

[169] Ibid.

[170] Sam Tobin, ENRC drops second libel claim over 'dirty money' allegations, Law Gazette, March 2022, https://www.lawgazette.co.uk/news/enrc-drops-second-libel-claim-over-dirty-money-allegations/5111860.article#:~:text='We%20continue%20to%20dispute%20many,firms%20to%20silence%20the%20press.

[171] Judgement in ENRC v Tom Burgis and HarperCollins, [2022] EWHC 487 (QB), March 2022, https://www.judiciary.uk/wp-content/uploads/2022/03/ENRC-v-Burgis-Another-judgment-020322.pdf

[172] Ibid.

[173] FCDO, UK sanctions relating to Russia, Gov.uk, April 2022, https://www.gov.uk/government/collections/uk-sanctions-on-russia; U.S. Department of the Treasury, Treasury Sanctions Kremlin Elites, Leaders, Oligarchs, and Family for Enabling Putin's War Against Ukraine, March 2022,

Observers might see this as a vindication for HarperCollins and Catherine Belton, but it must be seen as a pyrrhic victory. The wakeup call as to how the UK law courts have been in service to foreign interests is long overdue. Writing in The Guardian shortly after the Russian invasion started, Nick Cohen argued, that *"truth is meant to be the first casualty of war"*, but that "*foreign oligarchs can manipulate the truth [in the UK] as surely as Putin can in Russia."*[174]

Cohen contrasted the case against Belton with that of Parisian intellectual Nicolas Tenzer who was sued last year by the Kremlin backed RT media outlet after he tweeted that those who agree to speak on the channel acted as the Kremlin's *"useful idiots"*.[175] The French courts found against RT, which had tried to claim that not only had Tenzer libelled the station, but that he was guilty of an *"encroachment on the dignity"* of its journalists. Cohen commented: *"Astonishingly to anyone involved in the struggles for free speech in the UK, the cost of the case was just €10,000 (£8,400)."*[176] The contrast with the £11.5 million paid out already by HarperCollins to just reach the preliminary hearing stage in defending Belton's book *Putin's People* last year, speaks for itself.

Many articles published about Abramovich in particular in the weeks after the invasion seemed to indicate that media outlets once afraid of potential legal threats were perhaps buoyed by the sanctions regime. On 14th March 2022, the BBC investigations series Panorama finally released an episode entitled *Roman Abramovich's Dirty Money*, which had reportedly been in the works since 2018.[177] It was a point that Catherine Belton picked up on her oral testimony to the Foreign Affairs Select Committee on SLAPPs, in March 2022, when responding to a question on whether the UK law courts are becoming tools of intimidation:

> *"You can see that in coverage of Russian oligarchs now compared with two weeks ago. It is as different as night from day. Before, it was almost like a reign of terror. A lot of the oligarchs were deploying aggressive reputation managers and lawyers. You certainly never heard about Abramovich being close to Vladimir Putin or being an enabler of his regime until very recently. I do not think it can be a coincidence that the "Panorama" programme about the sources of Abramovich's wealth and how he had acquired his fortune through rigged privatisations and corrupt payments was aired just yesterday evening. It seemed to take an inordinate amount of time to be broadcast."*

So what do sanctions mean for SLAPPs? Will sanctioned individuals no longer be able to access services in the UK to deploy legal threats against media that write about them?

The picture is not currently that clear. On 27th September 2021, Eliot Higgins founder of open source investigative media outlet Bellingcat tweeted that *""Putin's Chef" Yevgeny Prigozhin announces he really really wants to sue me and Bellingcat in the UK, but because of sanctions against him he can't. Finally, sanctions work."*[178] Prigozhin, was sanctioned by the UK Government in October 2020 for significant foreign mercenary activity in Libya and multiple breaches of the UN arms embargo, has been linked to the Wagner

https://home.treasury.gov/news/press-releases/jy0650; Council of Europe, EU imposes restrictive measures on 160 individuals as a consequence of Russia's military aggression against Ukraine, March 2022, https://www.consilium.europa.eu/en/press/press-releases/2022/03/09/eu-imposes-restrictive-measures-on-160-individuals-as-a-consequence-of-russia-s-military-aggression-against-ukraine/

[174] Nick Cohen, Putin has used British rich man's law to avoid scrutiny, at a crippling cost to us all, The Guardian, February 2022, https://www.theguardian.com/commentisfree/2022/feb/26/putin-british-rich-mans-law-avoid-scrutiny-crippling-cost

[175] Nicolas Tenzer, "Le regime russe tente d'appliquer dans les democraties ses pratiques intimidantes", Le Monde, September 2021, https://www.lemonde.fr/idees/article/2021/09/17/le-regime-russe-tente-d-appliquer-dans-les-democraties-ses-pratiques-intimidantes_6094978_3232.html

[176] Nick Cohen, Putin has used British rich man's law to avoid scrutiny, at a crippling cost to us all, The Guardian, February 2022, https://www.theguardian.com/commentisfree/2022/feb/26/putin-british-rich-mans-law-avoid-scrutiny-crippling-cost

[177] Panorama, Roman Abramovich's Dirty Money, BBC, March 2022, https://www.bbc.co.uk/iplayer/episode/m0014jm8/panorama-roman-abramovichs-dirty-money

[178] Eliot Higgins, Twitter post, Twitter, September 2021, https://twitter.com/EliotHiggins/status/1442501201468264452

Group, a private military company.[179] In order to be able to access legal services in the UK under sanction, he would have needed a licence from the Office of Financial Sanctions Implementation (OFSI), in HM Treasury. This licence was seemingly given as in December 2021 Prigozhin succeeded in serving Higgins with the lawsuit in London's High Court.[180] The claims related to five tweets, published in August 2020, in which the Bellingcat founder had the linked to investigations published by Bellingcat, CNN and Der Spiegel that reported on Prigozhin's connections with the Wagner Group. None of the media outlets are being sued. The Wagner Group has also now been sanctioned as of March 2022.[181]

In a letter submitted to the court in late March 2022, Higgin's lawyers McCue Jury and Partners called the case a SLAPP and said that their client: *"has maintained throughout these proceedings that bringing the claim against him personally is a tactic designed to cause maximum personal distress*."[182] At an early hearing, on 23rd March 2022, Edward Miller from Discreet Law LLP successfully applied to withdraw the law firm from representing Prigozhin and asked for said withdrawal to be discussed in private with the judge as it regarded confidential information.[183] The first substantive hearing in the case was scheduled for 13th April 2022 but was postponed due to a last minute request from Prigozhin due to his lack of legal representation following Discreet Law's withdrawal. At the time of this report's publication, no date has been set for the rescheduled hearing.

It is unknown why Mr Miller decided to withdraw his services from Prigozhin, but the ongoing war in Ukraine has also led to criticism of lawyers representing Russian oligarchs and a wider discussion of the role of lawyers as potential enablers of legal intimidation and SLAPPs. On 1st March 2022, in a Parliamentary debate on Sanctions, Bob Seely, the MP for the Isle of Wight, questioned the efficacy of 'know your clients' checks at law firms, and named individual lawyers involved in the Belton cases – John Kelly at Harbottle and Lewis; Geraldine Proudler at CMS; Nigel Tait at Carter-Ruck; and the QC Hugh Tomlinson – and questioned whether *"perhaps their amorality will really begin to bite their reputations in a way that will be uncomfortable."*[184]

Seely commented: *"I just wonder: how on earth have we allowed this to happen? I would love an answer from a lawyer in Government. A free press should be intimidating kleptocrats and criminals. Why have we got to this position in our society—a free society, the mother of Parliaments—where we have kleptocrats, criminals and oligarchs intimidating a free media?"*[185]

Government lawyers experienced an element of this themselves, with Foreign Secretary Liz Truss reportedly telling MPs in late February 2022, that *"London law firms"* were delaying the Government efforts to implement sanctions against Russian oligarchs.[186] Labour MP Ben Bradshaw told the Independent newspaper that Truss had explained that the Government *"had to make certain their actions were legally watertight, because of the litigiousness of the London law firms representing these men. It's absolutely*

[179] FCDO and The Rt Hon Dominic Raab MP, UK sanctions Alexey Navalny's poisoners, Gov.uk, October 2020, https://www.gov.uk/government/news/uk-sanctions-alexey-navalnys-poisoners
[180] Index and EFJ/IFJ, United Kingdom: British Journalist Eliot Higgins Facing SLAPP from Russian Oligarch in London, CoE's Safety of Journalists Platform, April 2022, https://fom.coe.int/en/alerte/detail/107637414;globalSearch=true
[181] FCDO and The Rt Hon Elizabeth Truss MP, Foreign Secretary announces 65 new Russian sanctions to cut off vital industries fueling Putin's war machine, Gov.uk, March 2022, https://www.gov.uk/government/news/foreign-secretary-announces-65-new-russian-sanctions-to-cut-off-vital-industries-fuelling-putins-war-machine
[182] Tom Ball, Head of Wagner Group mercenaries sues Bellingcat founder Eliot Higgins, The Times, March 2022, https://www.thetimes.co.uk/article/head-of-wagner-group-mercenaries-sues-bellingcat-founder-eliot-higgins-f8l5cmg5b
[183] Ibid.
[184] House of Commons, Sanctions, Volume 709: debated on Tuesday 1 March 2022, Hansard, https://hansard.parliament.uk/Commons/2022-03-01/debates/6EF274E3-57A6-46ED-BFE2-348AEB926501/Sanctions?highlight=hugh%20tomlinson#contribution-37215CA0-06FE-41F5-B21E-97EDC11AA92A
[185] Ibid.
[186] John Hyde, Truss blaming lawyers for blocking Russia sanctions, says MP, Law Gazette, February 2022, https://www.lawgazette.co.uk/news/truss-blaming-lawyers-for-blocking-russia-sanctions-says-mp/5111665.article

outrageous – the British public have a right to know which legal firms based here in London are trying to prevent the sanctioning of Putin's cronies."[187]

One of the law firms called out by Seely, Carter-Ruck was seemingly unhappy with how Seely and others' comments may reflect on them and issued the following statement to clarify their position:[188]

- *"Carter-Ruck is not working for any Russian individuals, companies or entities seeking to challenge, overturn, frustrate or minimise sanctions.*
- *Carter-Ruck has never acted for Russian individuals, companies or entities seeking to challenge sanctions.*
- *Carter-Ruck is not acting for, and will not be acting for, any individual, company or entity associated with the Putin regime."*

However, in response to Carter-Ruck's statement, Clare Rewcastle Brown, posted an article in her publication The Sarawak Report, pointing out the potential for this statement to be misleading, given Carter-Ruck had represented Russian oligarchs in the past, including Gennady Timchenko (who was sanctioned by the UK in February 2022), as well as until recently the Russian state oil company Rosneft in their case against HarperCollins and Belton.[189] Rosneft has been under sanctions from the US and EU since Russia annexed Crimea in 2014.[190] The company's Chief Executive Igor Sechin was amongst those sanctioned in March 2022 by the UK, along with Roman Abramovich and Oleg Deripaska.[191]

While the war in Ukraine may have changed the thinking of those at some UK law firms, sanctions are not a new tool. In July 2020, Dominic Raab, the then UK Foreign Minister announced a Global Human Rights Sanctions regime, stating that *"that those with blood on their hands, the thugs of despots, or the henchmen of dictators, won't be free to waltz into this country to buy up property on the Kings Road, or do their Christmas shopping in Knightsbridge, or frankly to siphon dirty money through British banks or financial institutions*."[192] As of December 2021, the UK had sanctioned 180 Russian individuals and 48 companies, as well 108 Belarusian individuals and ten companies, and prior to the recent events there had already been criticism as to how that translates into enforcement action.[193]

In February 2022, the New Statesman contrasted a report released that month by OFSI, which showed it had levied just £20.7m in fines since 2016, against another government report which stated in 2019-2020 alone the total value of breaches reported to OFSI was just under £1bn.[194] Similarly the National Crime Agency (NCA) has a poor record on criminal enforcement, obtaining fewer than five convictions a year for economic crimes over the past five years. These figures were featured in a report *Closing the UK's economic*

[187] Ibid; Sam Tobin, Minister names more law firms acting for Russians on sanctions, Law Gazette, March 2022, https://www.lawgazette.co.uk/news/minister-names-more-law-firms-acting-for-russians-on-sanctions/5111993.article
[188] Carter-Ruck, Russia: Carter-Ruck statement, https://www.carter-ruck.com/news/russia/
[189] The Sarawak Report, Specialists In Meaning Balk At Being Termed 'Servants Of The Rich', March 2022, https://www.sarawakreport.org/2022/03/specialists-in-meaning-balk-at-being-termed-servants-of-the-rich/; Julian Delia, Sanctioned Russian oligarch used Joseph Muscat's preferred reputation laundering firm, The Shift, March 2022, https://theshiftnews.com/2022/03/14/sanctioned-russian-oligarch-used-joseph-muscats-preferred-reputation-laundering-firm/
[190] BBC News, BP to offload stake in Rosneft amid Ukraine conflict, February 2022, https://www.bbc.co.uk/news/business-60548382
[191] FCDO, Prime Minister's Office, 10 Downing Street, The Rt Hon Elizabeth Truss MP and The Rt Hon Borish Johnson MP, Abramovich and Deripaska among 7 oligarchs targeted in estimated £15 billion sanction hit, Gov.uk, March 2022, https://www.gov.uk/government/news/abramovich-and-deripaska-among-seven-oligarchs-targeted-in-estimated-15bn-sanction-hit
[192] FCO and The Rt Hon Dominic Raab MP, Global Human Rights Sanctions regime: Foreign Secretary's statement to Parliament, Gov.uk, July 2020, https://www.gov.uk/government/speeches/statement-on-the-global-human-rights-sanctions-regime
[193] Emma Haslett, "There is no enforcement": the awkward truth about the UK's sanctions on Russia, The New Statesman, February 2022, https://www.newstatesman.com/business/2022/02/there-is-no-enforcement-the-awkward-truth-about-the-uks-sanctions-on-russia; FCDO, Sanctions Regulations: Report on Annual Reviews 2021, January 2022, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1052217/The_Sanctions_Regulations_Report_on_Annual_Reviews.pdf
[194] HM Treasury Office of Financial Sanctions Implementation, Annual review, April 2019 to March 2020, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925548/OFSI_Annual_Review_2019_to_2020.pdf ;; HM Treasury and Office of Financial Sanctions Implementation, Enforcement of financial sanctions, Gov.uk, February 2022, https://www.gov.uk/government/collections/enforcement-of-financial-sanctions

crime enforcement gap, published in January 2022 by the campaign group Spotlight on Corruption, who also found that the UK's total budget for fighting economic crime is £852m a year, equivalent to 0.09% of total government spending, and 0.042% of the UK's total GDP.[195]

What does this mean for journalists and media? That in lieu of effective law enforcement, which would see successful criminal convictions and civil actions such as seizures of illicit or unexplained wealth, journalists are often the ones making information about wrongdoing public first, if they are not in fact the only ones uncovering it. If they are sued in response, they have no official criminal or civil enforcement case on record that can support their allegations and underpin their available legal defences. Moreover, in light of the Bloomberg v ZXC Supreme Court judgment they cannot even publicly name those being investigated by law enforcement agencies.

Tom Burgis, touched upon this aspect in his oral evidence on SLAPPs to the Foreign Affairs Select Committee, in March 2022: *"What is happening here is that, especially in this moment when we are realising what a terrible threat dirty money is to our democracy, we turn to journalists and say, "Ride to the rescue. This is your job. Please root out this dirty money wherever it is," and what do we find? Our greatest obstacles are not GRU [the Russian military intelligence agency] hit squads or cyber-attack teams; it is firms in London working, day in and day out, to attack free speech in the interests of very rich and powerful people who rightly deserve scrutiny."*[196]

It is of course often easier to definitively classify a case, or set of cases as SLAPPs, once they have concluded, which is often why there is hesitancy to discuss ongoing legal proceedings, along with concerns that commenting on them may itself attract unwanted legal threats. However, a by-product of that hesitancy is a lack of awareness of what the journalists or media outlets subject to the threat are going through. It can create a chilling climate in which publishers become risk-averse and media outlets and journalists self-censor even just discussing other legal cases, in order to avoid being subject to similar legal challenges.

[195] Daniel Beizsley and Susan Hawley, Closing the UK's economic crime enforcement gap, Spotlight on Corruption, January 2022, https://drive.google.com/file/d/1UzymaDZZSVF8By1WYGtahRN-gvBI2R-_/view

[196] Foreign Affairs Committee, Oral evidence: Use of strategic lawsuits against public participation, HC 1196, House of Commons, March 2022, https://committees.parliament.uk/oralevidence/9907/pdf/

Chapter 2. Legal intimidation and reputation management

There is growing concern that journalists and media outlets attempting to uncover wrongdoing in various spheres of life, whether based in country or abroad, are being hampered in their work by legal threats emanating from the UK. As outlined in the previous chapter, being subject to legal action in England can pose a serious jeopardy to a journalist or media outlet's financial security and sustainability. Yet legal costs start accruing not just at the point when a case is filed at the High Court but from the time that legal letters start to be exchanged: weeks and sometimes months beforehand.

Critically, this also means the impact of legal intimidation is felt long before cases reach a court – if in fact they ever do. As the British journalist Oliver Bullough wrote in his 2018 book, *Moneyland*, "*this is not a case of publications being censored by overzealous courts, but of publications censoring themselves in a legal process of second guesswork."*[197] While a journalist can believe wholeheartedly in the veracity of their reporting, and even in their prospects of winning in English court, the risk, as Bullough notes, is of" *being bankrupted before they get there."*[198]

The fact that the question of costs was not addressed by the 2013 libel reforms has severely undermined their effectiveness in preventing a serious chill on freedom of expression. Dr Andrew Scott, Associate Professor of Law at the London School of Economics, has also commented on the impact of the expensive nature of legal proceedings: *"Even preliminary legal arguments can cost tens of thousands of pounds. The cost of a full trial can run into hundreds of thousands, even millions of pounds. Understandably, this prompts many publishers to settle any complaints brought, sometimes irrespective of the merits of the case. Over time, many publishers have chosen simply to avoid publishing anything relating to certain individuals or particular themes for fear of legal repercussions."*[199]

Therefore many, if not most, instances of SLAPPs do not reach the courts – and as such do not receive the public attention a court hearing provides. If journalists and media outlets feel they have no choice but to give in and accept settlements, for fear of losing a case in court and then facing costs that could bankrupt them, then there is normally no public record at all. Moreover, pre-emptive legal intimidation can be an effective strategy to stop information from being published in the first place. This chapter explores how and why this is happening through examples that have made their way into the public domain and helped to provide insight into this 'hidden process'.

Stopping the story short: starting with the 'right to reply'

Lawyers start by sending letters on behalf of their clients threatening legal action prior to publication, either in response to a right to reply request – a common practice in British journalism – or afterwards in an attempt to get published information about their client taken down. This can result in considerable communication back and forth between the claimant and the defendant's lawyers (assuming the defendant has a lawyer) that can, but does not always, result in an official pre-action letter, stating an actual intent to go to court. Dealing with these letters can drain the financial and emotional resources of journalists, eating up their time and distracting them from their investigations.

If journalists do not offer a right to reply or fail to engage with any legal letters, it could work against them if the case does later come to court. This stacks the odds in the claimant's favour. The 'right to reply process' is intended to ensure the person or company being written about has a fair chance to defend themselves against any allegations and/or provide any clarifications. Journalists by and large want to get the story correct and avoid making factual errors, so in principle this can be a very useful process if engaged

[197] Oliver Bullough. 2019. Moneyland: Why Thieves & Crooks Now Rule The World & How to Take It Back, London, UK: Profile Books Ltd, p.172.
[198] Moneyland: Why Thieves & Crooks Now Rule The World & How to Take It Back, p.172
[199] Dr Andrew Scott, Research impact: making a difference, Reforming England's libel law, LSE, 2014, https://www.lse.ac.uk/Research/Assets/impact-pdf/reforming-england-libel-law.pdf

in with good faith by both sides. However, journalists are reporting that 'bad faith' responses to the' right to reply' process can directly divert into threats of legal action. For example, in the case of the Realtid journalists being sued in London (described in Chapter 1). After being denied an interview, their request for further information from the subject of their story was met directly by a letter threatening legal action from UK law firm TNT solicitors.[200]

At an event organised by the FPC and Index on Censorship in May 2021, Franz Wild, an editor at The Bureau of Investigative Journalism, described how legal intimidation has evolved during his time as a journalist:

> "*About ten or eight years ago, you would have uncovered some alleged allegations against a public official or a corrupt businessman or whatever it might be, and you might approach them, send them some questions, possibly go to their spokesperson and that is how you would engage. Now what almost always happens, and this is really stark, in the last five years, you almost always get a letter from a lawyer specifically. And that letter is usually marked confidential, not for publication and it very often [although not in every case] is designed essentially to shift the conversation from something that is happening out in the open, in a transparent fashion, to a sort of confidential, behind the scenes undermining of a particular story or a narrative."*[201]

Wild cited an example of an investigation TBIJ had published, for which they knew an organisation featured had paid £100,000 towards lawyers in order to try to stop the story from coming out.

Wild noted that most of the people affected by this type of abusive action are journalists working in the public interest. There is no intent to actually answer the requests for information or questions during this 'right to reply' stage, but rather investigative journalists are getting diverted into effectively 'closed' legal processes. Many more experienced journalists and media outlets may be able to navigate such challenges more readily, especially if they have in-house lawyers, and can perhaps more easily decide what poses a less legal risk to pursue or call the bluff of the claimant. It is nevertheless a time-consuming process, which slows down publication and can eat up valuable – and, in the case of smaller newsrooms, often very limited – resources.

While everyone should have the right to raise concerns regarding potential defamatory claims made about them, examples in the public domain, including those highlighted below, suggest law firms are taking an increasingly aggressive approach to the right to reply process. Responses to journalists' requests for comment – as part of their professional duty to ensure accuracy – have in some instances questioned their motives, integrity and occasionally sometimes made allegations against the journalist themselves.

In September 2020, the Financial Times journalist Dan McCrum described how during the course of his five-year investigation into Wirecard, a German financial technology firm, he had been subject to "*some of London's most expensive lawyers."*[202] In July 2018, when he went to Wirecard seeking comment on the claim that a large part of its business was fabricated, before the FT went to print, McCrum noted:

> "*A reply finally arrived, rejecting everything outright and asserting that I'd used a forged document to make these claims. But there was a sting in the tail. To quote from a Herbert Smith letter: "We are instructed to inform you that our client has recently obtained evidence in the form of an audio recording, which has been provided to the criminal authorities in the UK and Germany, showing that*

[200] Index on Censorship, SLAPP lawsuit against Swedish magazine Realtid filed in London, December 2020, https://www.indexoncensorship.org/2020/12/slapp-lawsuit-against-swedish-magazine-realtid-filed-in-london/
[201] FPC, Suppressing Stories event, Facebook, May 2021, https://www.facebook.com/ForeignPolicyCentre/videos/485474952907751
[202] Dan McCrum, Wirecard and me: Dan McCrum on exposing a criminal Enterprise, Financial Times, September 2020, https://www.ft.com/content/745e34a1-0ca7-432c-b062-950c20e41f03

> *the publication foreshadowed by Mr McCrum's email is intended to form part of a short selling strategy and that its forthcoming publication has already been communicated to short sellers."*[203]

Despite the challenges, which encompassed not only legal threats but also hacking and surveillance, McCrum and the FT continued to investigate and were vindicated in 2020 when Wirecard collapsed in what has since been described as "*biggest accounting fraud case since the Enron scandal in 2011."*[204]

Even academics have experienced pre-publication issues, despite having a certain level of protection offered in principle though through Section 6 of the 2013 Defamation Act (for scientists and academics publishing in peer-reviewed journals, although it has so far been untested). In 2014, Professor Karen Dawisha, a Russia scholar was dropped by her long-time publisher Cambridge University Press (CUP) over concerns that her book, *Putin's Kleptocracy: Who Owns Russia?,* would attract libel cases in London.[205] In an open letter to CUP, published in The Economist, Dawisha wrote: "*at the very time that the US and EU governments, obviously fully in possession of intelligence that points to precisely this conclusion, puts members of this group [Putin's associates] on a visa ban and asset freeze list, one of the world's most important and reputable publishers declines to proceed with a book not because of its scholarly quality …but because the subject matter itself is too hot to handle."*[206] She added that the Russian President's friends had succeeded in building channels of influence in British institutions, prompting CUP to "*cower and engage in pre-emptive book-burnings as a result of fear of legal actions."*[207] The book was subsequently published by Simon and Schuster, a US publisher.

Legal threats as a form of reputation laundering

Aside from those with in-house PR departments, businesses or wealthy individuals also employ reputation management companies who often work in tandem with law firms. For example, in 2021, Carter-Ruck described itself on its website, (in language that has since been removed) as "*the most respected media law firm in the UK means that we are well placed to influence what is published or broadcast, often working closely with the client's PR advisers."*[208]

Part of the aim of these PR exercises is to clean up a client's image and remove unfavourable information in the public domain. This can be seen as important endeavour for some, as this type of information can feed into due diligence systems at banks and other services that can flag them as a potential risky client or politically exposed person, which would make them subject to more stringent anti-money laundering checks.[209] Together with positive PR exercises, such as giving donations to charity or academic institutions, this process of cleansing negative stories from the online media landscape has become known as 'reputation laundering'. Inevitably, media and journalists become obvious targets of these reputation management services, creating a 'grey-area' between legal and quasi-legal threats.[210]

In a rare public example of this apparent type of reputation management, in May 2021, Clare Rewcastle Brown, the journalist who uncovered the Malaysia 1MDB scandal received threats of legal action on libel and GDPR grounds from the London law firm Taylor Wessing on behalf of Hamad Al Wazzan. Al Wazzan, an investment advisor, is currently on bail in Kuwait accused by the Kuwaiti authorities of brokering a deal

[203] Ibid.
[204] Janet W. Lee, WME Signs Wirecard Scandal Journalists Dan McCrum, Paul Murphy, Variety, August 2020, https://variety.com/2020/biz/news/wirecard-scandal-journalists-dan-mccrum-paul-murphy-wme-1234726877/
[205] Ellen Barry, Karen Dawisha, 68, Dies; Traced Roots of Russian Corruption, The New York Times, April 2018, https://www.nytimes.com/2018/04/17/obituaries/karen-dawisha-68-dies-traced-roots-of-russian-corruption.html
[206] E.L. London, A book too far, The Economist, April 2014, https://www.economist.com/eastern-approaches/2014/04/03/a-book-too-far
[207] Ibid.
[208] Carter-Ruck, Pre-Publication & Crisis Management, https://www.carter-ruck.com/media-law-defamation-libel-and-privacy-lawyers/pre-publication
[209] The Law Society, Politically exposed persons, December 2019, https://www.lawsociety.org.uk/en/topics/anti-money-laundering/peps
[210] John Heathershaw and Tena Prelec, Paying for a World Class Affiliation: Reputation laundering in universities, Anti-Corruption Evidence, May 2021, https://ace.globalintegrity.org/reputation-laundering-in-universities/

believed to be linked to 1MDB. Rewcastle Brown believes that Al Wazzan's objective may have been to have any references to him or his involvement in the 1MDB scandal removed entirely from the English-language media, even though his name is universally known and associated with the scandal in Kuwait as a result of Arabic-language media coverage. Rewcastle Brown received three legal letters from Taylor Wessing on behalf of Al Wazzan in relation to five articles she published on her website The Sarawak Report between May and October 2020. The letters requested the removal of all references and information, with Taylor Wessing also urging her to "*never publish the allegations, or any similar allegations, or any of our client's private and confidential information again in the future."*[211] They stated that the investigation into Al Wazzan and his release on bail is a "*private matter"* and insisted that Al Wazzan would still be able to take legal action in the English courts, even though he is currently not permitted to leave Kuwait under his bail conditions. In the letters, the lawyers also said that English language publications (third parties) had already removed references to Al Wazzan in their coverage in response to similar threats.

According to Rewcastle Brown, a writ was lodged to the London High Court at the end of May 2021, extending the one-year time limit to bring legal action against her, but was not served to her nor mentioned by the lawyers in their correspondence. Rewcastle Brown has been vocal about what she has perceived as abusive legal threats from several London law firms in the past, including in relation to her work on the 1MDB scandal. After free expression groups filed an alert to the Council of Europe's Media Freedom Platform in June 2021 there was no further attempt to pursue this case.[212] In October 2021, after the writ against her had expired, Rewcastle Brown wrote an article about the experience, stating:

> "*It is well established that, more often than not, the primary purpose of such letters is to place financial pressure on journalists and publications by forcing them to engage in expensive legal action that UHNW (Ultra High Net Worth) clients can well afford to write off as a business expense. So-called SLAPP suits rarely represent clients with a convincing case, which is largely the reason why 98% of all UK libel cases never reach the stage of judgment. The parties settle to save money, with the richest too often coming off more advantageously, whatever the rights or wrongs."*[213]

As of 2021, the alleged mastermind behind the 1MDB scandal, businessman Jho Low, is still on the run from justice in Malaysia, Singapore and the US.[214] Low has also been notably litigious. Rewcastle Brown has said that she had to self-publish her book due to legal threats from Low facilitated through London law firm Schillings.[215] The publisher Hachette held back on the UK distribution of another book about the 1MDB scandal, by former Wall Street Journalists Bradley Hope and Tom Wright, over concerns regarding legal threats.[216] According to the Guardian, Schillings, on behalf of Low, took the extraordinary step of sending threatening letters to bookshops around the world in an attempt to stop the book's distribution, demanding that ""*individual booksellers provide a commitment in writing never to sell the book, detail proposals for compensating Low for the publication of the [book's] synopsis, and provide* '*reimbursement of his legal costs*'."[217] Seemingly, these did not come to fruition and the book was eventually published in the UK in 2019.

[211] Journalist Clare Rewcastle Brown Subject to Legal Harassment from London Law Firm on behalf of Kuwaiti Investment Advisor, CoE's Safety of Journalists Platform, June 2021, https://go.coe.int/32Ow3
[212] Ibid.
[213] The Sarawak Report, How Foreign Litigants Abuse UK Lawfirms To 'Launder' Reputations, October 2021, https://www.sarawakreport.org/2021/10/how-foreign-litigants-abuse-uk-lawfirms-to-launder-reputations/
[214] Susan Coughtrie, The UK as a key nexus for protecting media freedom and preventing corruption globally, FPC, December 2020, https://fpc.org.uk/the-uk-as-a-key-nexus-for-protecting-media-freedom-and-preventing-corruption-globally/
[215] Clare Rewcastle Brown, A scandal of corruption and censorship: Uncovering the 1MDB case in Malaysia, FPC, December 2020, https://fpc.org.uk/a-scandal-of-corruption-and-censorship-uncovering-the-1mdb-case-in-malaysia/
[216] The Economist, The story behind "Billion Dollar Whale", September 2019, https://www.economist.com/books-and-arts/2019/09/19/the-story-behind-billion-dollar-whale
[217] Jim Waterson, Bookshops threatened with legal action over book about Malaysian 'playboy banker', The Guardian, September 2018, https://www.theguardian.com/world/2018/sep/14/bookshops-threatened-with-legal-action-jho-low-billion-dollar-whale

In May 2021, The Financial Times released a statement, entitled *London, libel and reputation management: The English courts attract those with deep pockets and much to lose*.[218] In the statement, FT's Editorial Board reference their experience investigating the Wirecard scandal as well as the then ongoing legal case against their former employee Catherine Belton (described in the previous chapter). However, they mainly focus their attention on broader concerns about how the UK legal system, as well as British law firms and PR companies, help the rich and powerful manage their reputations and fight their critics. It notes that "*As foreign entrepreneurs 'stature grows in the UK, reputations have become key assets to defend, not least because relationships with lenders depend on an ostensibly squeaky clean background."*[219]

Insight into how this process also affects foreign journalists was provided through the recent public inquiry into the State's responsibility in the assassination of Maltese investigative journalist Daphne Caruana Galizia.[220] Providing evidence to the inquiry in July 2021, Caruana Galizia's son, the journalist Matthew Caruana Galizia, revealed communications suggesting that the Maltese businessman Yorgen Fenech had discussed with the UK based firm ACK Law how to suppress information about him in Malta.[221] Matthew Caruana Galizia told the inquiry that, in a 2019 email conversation with his publicist, Fenech stated that lawyer Susan Aslan from ACK had identified Manuel Delia, as someone to bring a lawsuit against in the UK.[222] In comments made to Private Eye, Susan Aslan stated that "*We have never seen the emails to which you refer. At no point did I, nor anyone else in the firm, advise the suppression of legitimate journalism.*[223] Fenech, who is accused of being the mastermind behind Caruana Galizia's murder was arrested before he could carry out any such threat as alleged.[224]

Writing on his blog about this potential legal threat in July 2021, Delia commented that:

> "*It is perhaps still necessary to point out that if this plan went ahead before Yorgen Fenech was arrested and charged for murder, there could have been no way for me to defend the case in a UK court let alone live down an outstanding liability in any amount like the figures Yorgen Fenech had in mind. Apart from financial ruin and, in the opinion of Yorgen Fenech's lawyer, prison [as libel is still a criminal offence in Malta], this website and all my journalistic work since then would have likely been permanently silenced."*[225]

In 2019, Delia, together with UK journalist John Sweeny and Italian journalist Carlo Bonini, was subject to another legal threat related to their book *Murder on the Malta Express: Who Killed Daphne Caruana Galizia?*. After the co-authors put questions to then Maltese Prime Minister Joseph Muscat, legal letters were sent by his lawyers Carter-Ruck threatening legal action, which resulted in their UK publisher dropping the publication. Sweeny, a former BBC Newsnight reporter, spoke out about how such letters by law firms like Carter-Ruck have a chilling effect on democracy – "*It is one of the most expensive law firms in London. … Why wasn't a Maltese firm used? What are they hiding?"*[226] The book was subsequently published by a

[218] The Editorial Board, London, libel and reputation management, Financial Times, May 2021, https://www.ft.com/content/e37f3349-479f-42c6-85fe-11b5a29bdee0
[219] Ibid.
[220] Daphne Caruana Galizia Foundation, Public inquiry, https://www.daphne.foundation/en/justice/public-inquiry
[221] Manuel Delia, Private Eye on Yorgen Fenech's SLAPP plans, Truth be told, August 2021, https://manueldelia.com/2021/08/private-eye-on-yorgen-fenechs-slapp-plans/
[222] Manuel Delia, When Yorgen Fenech picked me as "a victim" to sue me for millions of pounds over 17 Black implications, Truth be told, July 2021, https://manueldelia.com/2021/07/when-yorgen-fenech-picked-me-as-a-victim-to-sue-me-for-millions-of-pounds-over-17-black-implications/
[223] Private Eye, issue 1554 20 August 2021- 2 September 2021, page 13, available on line here - https://manueldelia.com/2021/08/private-eye-on-yorgen-fenechs-slapp-plans/
[224] Reuters, Top businessman to face trial for Malta journalist's murder, August 2021, https://www.reuters.com/world/europe/top-businessman-face-trial-malta-journalists-murder-2021-08-18/
[225] Manuel Delia, When Yorgen Fenech picked me as "a victim" to sue me for millions of pounds over 17 Black implications, Truth be told, July 2021, https://manueldelia.com/2021/07/when-yorgen-fenech-picked-me-as-a-victim-to-sue-me-for-millions-of-pounds-over-17-black-implications/
[226] Jacob Borg, UK law firm brought in to fend off Daphne book questions, Times Malta, October 2019, https://timesofmalta.com/articles/view/uk-law-firm-brought-in-to-fend-off-daphne-book-questions.741582

local Maltese publisher Midsea before being later published in the UK by Silvertail.[227] The book went on to win the 2020 National Book Prize for literary non-fiction awarded by Malta's National Book Council.[228]

The UK as a leading source of transnational SLAPP threats

The assassination of Maltese investigative journalist Daphne Caruana Galizia in October 2017 was instrumental in bringing the issue of SLAPPs, including cross-border SLAPPs, to much greater public attention. At the time of her murder, she had 47 civil libel suits open against her. Caruana Galizia had also received threatening pre-action legal letters from UK law firms, including one initiated by London law firm Mischon de Reya, on behalf of Henley and Partners, a British company contracted to the Maltese Government to market citizenship to wealthy investors. In 2018, Caruana Galizia's sons accused Mischon de Reya of "*hounding"* their mother with legal letters, stating: "*The firm sought to cripple her financially with libel action in UK courts… Had our mother not been murdered, they would have succeeded."*[229] Her son Matthew Caruana Galizia also reported that another *"intimidating"* letter from the UK firm Schillings had arrived the morning of his mother's murder and has described London law firms as part of the "*tool kit"* of the super-rich and their enablers in politics.[230]

In November 2020, the FPC conducted a global survey of 63 investigative journalists working on financial crime and corruption in 41 countries. It found that the UK is by far the most frequent international country of origin for legal threats, almost as frequent as the EU countries and the United States combined.[231] The survey findings support growing reports of foreign freelance journalists, and news outlets without staff and offices in the UK, receiving letters from London law firms acting on behalf of the people they are investigating.[232]

Some media outlets have resorted to publishing the legal letters they have received, shining a light on this practice. The Shift, an independent Maltese media outlet setup shortly after Caruana Galizia's murder by journalist Caroline Muscat, has also gone on to receive legal letters from the UK. In December 2017, the Group Head of Public Relations at Henley & Partners wrote to The Shift stating that if they did not remove an article about the company within 24 hours, they would have "*no choice to consider appropriate next steps, including legal action."*[233] The Shift refused, publishing the letter along with their own response to it as part of their wider interest reporting. The outlet has continued to take this approach. In June 2020, they published a letter from London-based firm Atkinson Thomson Solicitors sent on behalf of Turab Musayev, an Azerbaijani-British National, in response to articles about his involvement in the Montenegro wind farm scandal.[234] The Shift have reported that they were advised by lawyers in London that mounting a defence against Musayev's threat would require €50,000 to €100,000 even if the claimant's case is weak. As of yet, it appears no further legal action has been pursued.

[227] Katie Mansfield, Silvertail signs investigation into Daphne Caruana Galizia's death, The Bookseller, November 2019, https://www.thebookseller.com/news/silvertail-signs-investigation-daphne-caruana-galizias-death-1109411
[228] Manuel Delia, Murder on the Malta Express wins the National Book Prize, Truth be told, December 2020, https://manueldelia.com/2020/12/murder-on-the-malta-express-wins-the-national-book-prize/
[229] Jonathan Ames, Law firm 'hounded ' Maltese journalist Daphne Caruana Galizia before murder, The Times, June 2018, https://www.thetimes.co.uk/article/law-firm-hounded-maltese-journalist-daphne-caruana-galizia-before-murder-62dqhl9g7
[230] Private Eye, issue 1554 20 August 2021 - 2 September 2021, page 13, available on line here - https://manueldelia.com/2021/08/private-eye-on-yorgen-fenechs-slapp-plans/
[231] Susan Coughtrie, Unsafe for Scrutiny: Examining the pressures faced by journalists uncovering financial crime and corruption around the world, FPC, November 2020, https://fpc.org.uk/publications/unsafe-for-scrutiny/
[232] Juliette Garside, English law 'abused by the powerful to threaten foreign journalists', The Guardian, November 2020, https://www.theguardian.com/law/2020/nov/02/english-law-abused-by-the-powerful-to-threaten-foreign-journalists
[233] The Shift Team, Henley and Partners threatens legal action against The Shift, The Shift, December 2017, https://theshiftnews.com/2017/12/24/henley-and-partners-threatens-legal-action-against-the-shift/
[234] Caroline Muscat, SLAPP threat from Azerbaijani – British national Turab Musayev, The Shift, July 2020, https://theshiftnews.com/2020/07/07/slapp-threat-from-azerbaijani-british-national-turab-musayev/; Caroline Muscat, Montenegro deal: dodgy agreements, suspicious transactions and curiously familiar figures, The Shift, July 2020, https://theshiftnews.com/2020/07/02/the-montenegro-deal-dodgy-agreements-suspicious-transactions-and-curiously-familiar-figures/

Malta is not the only country where these legal letters end up. In March 2017, the award winning Angolan journalist and anti-corruption campaigner Rafael Marques de Morais published an article on his blog Maka Angola entitled *A London Law Firm won't stop us exposing those who swindle Angola.*[235] Marques de Morais had received a legal letter from London-based law firm Schillings on behalf of Jean-Claude Bastos, Swiss-Angolan businessman, after the journalist wrote a series of reports regarding the activities of a firm connected to Bastos. In frank style, Marques de Morais wrote publicly about receiving the letter:

> "*Really, Schillings, in which jurisdiction do you think this alleged "defamation" occurred? Clearly not in the UK when Maka Angola publishes in Angola only. Jurisdiction aside, even if you were able to mount a defamation case in London, don't you know that the truth is an absolute defense? Sadly, no doubt based on unfounded assertions by your client, the 'pre-action protocol' letter is riddled with false and easily-disprovable assertions, right from the opening sentence."*[236]

Marques de Morais notes that Bastos likely hoped that the *"prospect of the expense and inconvenience of a potential lawsuit in a foreign land might scare the whistle-blowers in Angola into retreat."*[237] No further legal action appears to have been pursued against Marques de Morais.

In October 2020, amaBhungane, an award winning South African non-profit investigative media outlet, received a letter from London-based firm Kobre & Kim after approaching Indian businessman Murari Lal Jalan for information regarding his business dealings with the controversial Gupta family.[238] After taking legal advice, amaBhungane also decided to publish the legal letter, together with their investigation, in the public interest.[239] Speaking at the UK's first Anti-SLAPP Conference, organised by the FPC and the Justice for Journalists' Foundation in November 2021, Cherese Thakhur, amaBhungane's Advocacy Coordinator, stressed how the outlet, which has only 12 staff, has *"no ties to the UK"* including no offices, no employees working in the UK and does not *"investigate UK based stories"*.[240] Nevertheless, they have gone on to receive other legal threats since late 2020 facilitated by another UK law firm, while investigating the business interests of a local businessman and his companies in South Africa.

SLAPP letters routinely come marked 'private and confidential' and 'not-for-dissemination', which has resulted in their existence being largely hidden from view. If successful, the public will be denied the right to know, not only about the information at question, but even the fact that a legal challenge against the journalist or media outlet took place. Therefore, the approach adopted by The Shift, Maka Angola and amaBhungane to publish the letters they have received is commendable in creating awareness. Given the uncertainty inherent in UK privacy law, it is not however without risk – not least of further compounding the recipient's legal problems. It is understandable then why many, often small and cash-strapped media outlets would rather comply with the demand to change or remove content than face legal action, even if they know what they have written is true.[241] Unfortunately, this has the knock-on effect of them being less likely to report that a SLAPP has occurred, which makes it difficult to gauge an accurate scale of the problem.

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[235] Rafael Marques de Morais, A London law firm won't stop us exposing those who swindle Angola, March 2018, Maka Angola, https://www.makaangola.org/2017/03/a-london-law-firm-wont-stop-us-exposing-those-who-swindle-angola/

[236] Ibid.

[237] Ibid.

[238] Dewald van Rensburg, After state capture, Guptas and friends are flying high, amaBhungane, October 2020, https://amabhungane.org/stories/201022-after-state-capture-guptas-and-friends-are-flying-high/; Karan Mahajan, "State capture": How the Gupta brothers hijacked South Africa using bribes instead of bullets, Vanity Affair, March 2019, https://www.vanityfair.com/news/2019/03/how-the-gupta-brothers-hijacked-south-africa-corruption-bribes

[239] Letter to amaBhungane from Kobre & Kim, October 2020, https://amabhungane.org/wp-content/uploads/2020/10/FILE-FIVE-JALAN-LAWYERS-RESPONSES-TO-QUESTIONS.pdf

[240] JFJ Foundation, DAY 2: Anti-SLAPP conference, YouTube, November 2021, https://youtu.be/32vsZ_DNo0Q

[241] Susan Coughtrie, The UK as a key nexus for protecting media freedom and preventing corruption globally, FPC, December 2020, https://fpc.org.uk/the-uk-as-a-key-nexus-for-protecting-media-freedom-and-preventing-corruption-globally/

While NGOs have only shifted to documenting attempts at legal intimidation against media in a more systematic way over the past couple of years, as part of wider, growing research on SLAPPs, it is possible to find the occasional more historic example. In December 2016, the European Centre for Press and Media Freedom (ECPMF)'s Mapping Media Freedom Platform posted an alert that the British law firm Atkins Thomson had written to the Ukrainian news website Ukrainska Pravda, as well as to the British freelance journalist Maxim Tucker then based in Kiev, warning them against publishing accusations against the then Ukrainian President Petro Poroshenko put forward by the local MP Oleksandr Onishchenko.[242]

According to Ukrainska Pravda, the lawyers said that if necessary the firm would engage a lawsuit against any outlet in Europe or elsewhere who published these accusations, with the media outlet stating: *"they added that they were hired to take all measures to prevent the publication of these allegations, which they consider false."*[243] The Mapping Media Freedom alert notes that the Presidential Administration of Ukraine refused to confirm to Ukrainska Pravda whether such warnings had been made but said that Onishchenko worked for Russia and that Atkins Thomson "*defends Ukraine's interests"*. Atkins Thomson announced they represented Petro Poroshenko Bloc, its management and the Ukrainian Government. For his part, Tucker tweeted out that: "*unfortunately I cannot publish the letter as it is marked private and confidential and doing so could lead to a lawsuit they may win."*[244]

Questions over the veracity of any particular allegation aside, a bigger question these examples raise is why foreign heads of state, politicians or businessmen are hiring expensive London-based law firms to make legal threats against journalists in their own country? Why are they choosing to pursue legal action in the UK rather than through their local courts?

The Balkans Investigative Reporting Network (BIRN), which covers countries in Southern and Eastern Europe, created a guide specifically on English libel law that is mandatory reading for all its journalists.[245] Its concluding advice regarding third-country libel suits (i.e. not in the journalist's home country and not in England) is particularly telling: "*I. Know the law in your own country; II. Know the law in England; III. Assume that any third country would be just as strict on libel as England."*[246] Journalists based abroad therefore clearly remain concerned about being sued in the UK in a way that they simply do not in other countries.

This sentiment has been echoed by Alex Papachristou, Executive Director of the Cyrus R. Vance Center for International Justice, an American organisation that provides pro bono legal representation to anti-corruption and investigative journalism organisations worldwide. He has supported many journalists, including Paul Radu, in his legal case in London, and others part of OCCRP and ICIJ's global networks respond to legal threats in the UK. Speaking at the UK anti-SLAPP Conference in November 2021, Papachristou described how in the UK "*the defamation industry is hand in glove with the reputation laundering industry and the money laundering industry…. The defamation industry serves those other industries and vice versa. It is wealthy people and companies of questionable repute, who can afford and morally manage paying lawyers to bring these cases and it is a matter of political will and political pressure [to stop them]."*[247]

[242] Anonymous, Report – Violation of media freedom, Ukraine: Journalists warned against publishing accusations against Ukrainian president, Mapping Media Freedom, December 2016, https://mappingmediafreedom.ushahidi.io/posts/20640
[243] IMI, Ukrainska Pravda: Poroshenko attorneys do not want Onishchenko's allegations to be published, December 2016, https://imi.org.ua/en/news/ukrainska-pravda-said-that-poroshenko-attorneys-warned-them-from-publishing-onishchenkos-allegations-i26403
[244] Maxim Tucker, Twitter post, Twitter, December 2016, https://twitter.com/maxrtucker/status/807201381530685440; Maxim Tucker, Twitter post, Twitter, December 2016, https://twitter.com/maxrtucker/status/807201381530685440
[245] Susan Coughtrie, The UK as a key nexus for protecting media freedom and preventing corruption globally, FPC, December 2020, https://fpc.org.uk/the-uk-as-a-key-nexus-for-protecting-media-freedom-and-preventing-corruption-globally/
[246] English libel law for journalist: A brief guide, Balkan Fellowship of Journalist Excellence, http://fellowship.birn.eu.com/en/file/show/English%20libel%20law%20for%20journalists.pdf
[247] JFJ Foundation, DAY 1: Anti-SLAPP conference, YouTube, November 2021, https://www.youtube.com/watch?time_continue=23503&v=6LAXvNDnqzk&feature=emb_title

Noting the challenge of defending cases in the UK, particularly in comparison to other jurisdictions where journalists he defends face legal challenges, Papachristou added that the threat of litigation in the UK is *"a real scourge"*, with *"the only thing worse than the threat is the reality."*[248]

[248] Ibid.

Chapter 3. Northern Ireland and Scotland: Jurisdictions of concern

England is not the only UK jurisdiction that has caused concern regarding the potential misuse of defamation, as well as other laws, to intimidate journalists and restrict media freedom. Given neither Scotland nor Northern Ireland adopted the positive changes brought about by the 2013 Defamation Act in England and Wales, there have been considerable efforts over the last decade to push for reforms.

As it happens, 2021-2 has been a particularly noteworthy period for both jurisdictions. In April 2021, the new Defamation and Malicious Publication (Scotland) Act entered into force after many years in development, in part driven by concerns of how defamation is applied online in the age of ever-present social media. In May 2021, the UK Government gave its consent to a Private Member's Bill in the Northern Ireland Assembly (NIA) to introduce defamation law reform, welcoming it as a step "*to put Northern Ireland in line with the rest of the United Kingdom".*[249] In March 2022, the Defamation Bill was passed in Stormont (as the NIA is commonly referred to) and is awaiting royal assent (as of 1st April 2022). Not all aspects put forward were adopted in either jurisdiction, but a clause within the Northern Ireland Bill for further review in two years' time has left open the opportunity to refine the law in the future.

This chapter does not aim to be an exhaustive analysis of the various legal issues in either jurisdiction, nor does it set out in detail any failings within the current reforms. Instead, it seeks to encapsulate some of the concerns that have been raised during the course of legislative efforts that highlight both the challenges for media in Scotland and Northern Ireland and the issues that could continue to make both countries susceptible for SLAPPs.

Northern Ireland: The need for long overdue defamation reform

Nine years ago, leaders of the Democratic Unionist Party (DUP) secretly vetoed the extension of the English and Welsh 2013 Defamation Act to Northern Ireland.[250] Leading lawyer and libel reform campaigner Lord Lester said at the time that he could think of no reason for Stormont to block libel reform other than that politicians wanted to be able "*to be able to sue newspapers more readily."*[251]

In May 2021, after Mike Nesbitt, a Member of the Legislative Assembly (MLA) and a former leader of the Ulster Unionist Party (UPP), appealed directly to the UK Government, consent was given for defamation law reform to be introduced in Northern Ireland. Nesbitt formally presented his Private Member's Bill at the NIA on 7th June 2021.[252] Dr Mark Hanna, a Lecturer at the School of Law at Queen's University Belfast, commented at the time: "*It is an important development, not least because it clears the procedural obstacles that had been used to block previous attempts to introduce reform in the province. The stage is now set for Northern Ireland's elected representatives to finally debate the question in the open and considered manner it deserves."*[253]

Previously a journalist himself, Nesbitt initially started his initiative to introduce reform through a Private Members Bill in 2013, persisting in the face of many challenges, including the three year hiatus of the Assembly itself. Nesbitt has stated that while not the only focus, a primary policy objective of his Bill is to

[249] Scottish Parliament, Defamation and Malicious Publication (Scotland) Bill, 2021, https://www.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/stage-3/bill-as-passed.pdf
[250] Sam McBride, Nine years after DUP secretly blocked libel reform, NIO clears way for bill to protect free speech, News Letter, May 2021, https://www.newsletter.co.uk/news/politics/nine-years-after-dup-secretly-blocked-libel-reform-nio-clears-way-for-bill-to-protect-free-speech-3243327
[251] Ibid.
[252] NIA Assembly, Defamation Bill, NIA Bill 25/17-22, 2022, http://www.niassembly.gov.uk/globalassets/documents/committees/2017-2022/finance/defamation-bill/memoranda-from-the-bill-sponsor/20210831-defamation-bill-as-introduced.pdf
[253] Dr Mark Hanna, A New Moment for Defamation Law Reform in Northern Ireland?, FPC, June 2021, https://fpc.org.uk/a-new-moment-for-defamation-law-reform-in-northern-ireland/

protect journalists conducting responsible and necessary investigations.[254] Referring to a 2016 review of Northern Ireland's libel laws, by the Northern Ireland Law Commission, Nesbitt has underscored that he concurs with its findings that "*the key imbalance was not between whether we should favour reputation over free speech or vice versa; rather, it was between those with deep pockets and those who cannot afford to defend themselves. In other words, it's not about law, but money. Plainly, that needs [to be] fixed."*[255]

There have been several indications that libel laws in Northern Ireland have been misused to limit public participation, with their impact being felt even if cases do not reach court. Research conducted by Dr Hanna has found that only 17 of 140 defamation cases issued in Northern Ireland between 2014 and 2020 resulted in a judgment, with one implication being that it's easier for media to deal with cases they face by effectively 'quietly settling'.[256]

In May 2021, openDemocracy, a global current affairs media outlet registered in London, published an article about a defamation challenge it had battled for two years in Northern Ireland. In 2018, after openDemocracy had published several articles into the political and business affairs of Jeffery Donaldson, the now leader of the DUP, he began sending legal letters and ultimately filed proceedings against the media outlet in Belfast. The case never ended up in court – instead the 'ordeal' was dragged out until the legal timeframe for the case to proceed eventually ran out in May 2020. openDemocracy's then Editor Mary Fitzgerald and Investigations Editor Peter Geoghegan, wrote at the time "*Journalists rarely like to talk publicly about the times they've been sued. Even uttering the word 'defamation' can bring back stress-filled memories of expensive lawyers' letters, threatening to take you to court unless you pay untold sums in damages. For small, non-profit media outlets like openDemocracy, the risks are even higher. Losing one court case could literally put us out of business."*[257] The article concluded that *"when it comes to press freedom, Northern Ireland is still a place apart... it's much easier to sue journalists in Northern Ireland"*.[258]

For now, until the newly passed legislation comes into effect, Northern Ireland's defamation law remains largely determined by legislation adopted in 1955 and 1996. As the 2013 Defamation Act, which somewhat lightened the burden on defendants in England and Wales, was not extended to apply in Northern Ireland, it has arguably remained an even more claimant-friendly jurisdiction. Interestingly, the disparity between the two legal systems has caused some issues in the intervening years.

In 2015, the TV channel Sky Atlantic were forced to delay the broadcast of the award winning documentary *Going Clear* in the UK and Ireland after the Church of Scientology, the subject of the film, stated its intention to sue.[259] Speaking with The Observer at the time, Gavin Millar QC of Matrix Law outlined the risk Northern Ireland as a jurisdiction posed by not being subject to the 2013 Defamation Act, commenting "*broadcasters can get sucked into litigation in Northern Ireland that they wouldn't get sucked into in Britain."*[260] For technical reasons, Sky was 'unable to differentiate its signal between regions', which meant that, as the journalist John Sweeny commented at the time, *"in its goal of preventing a broadcast of Going Clear in the UK, the church has an unlikely ally in Northern Ireland's libel laws*".[261] The documentary was

[254] Mike Nesbitt, Mike Nesbitt: Why I am trying to reform Northern Ireland's libel laws, News Letter, September 2021, https://www.newsletter.co.uk/news/opinion/mike-nesbitt-why-i-am-trying-to-reform-northern-irelands-libel-laws-3386384
[255] Ibid.
[256] NIA Assembly, Official Report: Minutes of Evidence, Committee for Finance, meeting on Wednesday, 8 December 2021, http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?&AgendaId=29643&eveID=15028
[257] Peter Geoghegan and Mary Fitzgerald, Jeffrey Donaldson sued us. Here's why we're going public, openDemocracy, May 2021, https://www.opendemocracy.net/en/opendemocracyuk/jeffrey-donaldson-sued-us-heres-why-were-going-public/
[258] Ibid.
[259] Edward Helmore, TV 'exposure' of Scientology halted by UK libel law split, The Guardian, April 2015, https://www.theguardian.com/world/2015/apr/18/scientology-tv-exposure-halted-uk-libel-law-split-going-clear
[260] Ibid.
[261] John Sweeney, Going Clear: the film Scientologists don't want you to see, The Guardian, April 2015, https://www.theguardian.com/film/2015/apr/28/going-clear-the-film-scientologists-dont-want-you-to-see

eventually screened six months later after Sky had sought further legal advice and incorporated the responses from the Church of Scientology *"where appropriate"*.[262]

The Church of Scientology had previously successfully blocked the publication or distribution of the book the film was based on, also called *Going Clear*, in the UK and Ireland in 2013 (prior to the implementation of the 2013 Defamation Act in England and Wales). American author and journalist Lawrence Wright's original publishers, Transworld, cancelled the publication in Britain and Northern Ireland following legal advice, but proceeded with sales in Europe and the US.[263] *"It's a classic example of the chill that is cast over free speech by these laws, where people choose to self-censor"*, said Robert Sharp, then head of campaigns and communications at English PEN, stated in response to Transworld's decision, *"something like religion is in the public interest. We should be allowed to scrutinise and criticise it. The cover-up of abuses by the Catholic church is a prime example of what happens when you don't."*[264] *Going Clear* was only published in the UK three years later, in 2016, after the rights were bought by the publisher Silvertail.[265]

There are also examples of wholly domestic cases of legal intimidation and SLAPPs in Northern Ireland. In 2016, journalist Ed Moloney, experienced legal threats after he asked someone, who he was investigating, to provide a comment on racketeering allegations. A lawsuit was filed against him in response. Moloney, who published the book *A Secret History of the IRA* in 2002, has spent decades reporting on Northern Ireland and knows all too well the physical dangers associated with investigating paramilitaries.[266] However, in comments made to Index on Censorship, Moloney stated his belief that Northern Ireland's libel laws were being used to pursue a vendetta against him as a result of his journalism, referring to them as "*antediluvian"* and *"so backward"*.[267] The legal action against Moloney was ultimately dropped in June 2020, but it nonetheless succeeded in wasting valuable time, money, and energy.

More recently, in September 2019, journalist Sam McBride, then with the Newsletter (now Northern Ireland Editor for Belfast Telegraph & Sunday Independent), claimed that he had been subject to legal threats by the then DUP leader Arlene Foster and four of her party colleagues in relation to his book, *Burned: The Inside Story of the Cash-for-Ash Scandal*.[268] After Foster denied her solicitors had sent a legal threat, framing the response sent to McBride's requests for comment as 'legal advice', McBride took the step of publishing the legal letter online.[269] He also published his reply to Foster's lawyers and commented: "*the one issue they took issue with was based on misunderstanding a question. The DUP solicitor replied to say his clients' position was unchanged. My publisher was not put off by the threat [and] therefore you can read the full book – but they didn't want that."*[270]

There have been various attempts since 2013 to reopen the case for libel reform. In 2014, the Northern Ireland Law Commission published a consultation paper, which noted that "*while the common law dimensions of defamation law have been essentially consistent, Northern Ireland has always tended to lag*

[262] Jasper Jackson, Scientology film *Going Clear* is Sky's most-watch documentary since 2012, The Guardian, October 2015, https://www.theguardian.com/media/2015/oct/02/scientology-film-going-clear-sky-documentary
[263] Steve Rose, Why can't we read the Scientology book *Going Clear* in the UK?, The Guardian, January 2013, https://www.theguardian.com/world/shortcuts/2013/jan/14/cant-read-scientology-book-uk
[264] Steve Rose, Why can't we read the Scientology book Going Clear in the UK?, The Guardian, January 2013, https://www.theguardian.com/world/shortcuts/2013/jan/14/cant-read-scientology-book-uk
[265] Lisa Campbell, Silvertail to publish Wright's Scientology expose, The Bookseller, March 2016, https://www.thebookseller.com/news/silvertail-publish-wrights-scientology-expos-323804
[266] Admin, The Official IRA planned the murders of journalists Ed Moloney and Vincent Browne, Village, May 2020, https://villagemagazine.ie/the-official-ira-plot-to-murder-an-irish-times-journalist/
[267] Jessica Ní Mhainín, The UK and media freedom: An urgent need to lead by example, FPC, December 2020, https://fpc.org.uk/the-uk-and-media-freedom-an-urgent-need-to-lead-by-example/
[268] Gillian Halliday, RHI: DUP threatened me with legal action, says author McBride of book about boiler scandal, Belfast Telegraph, October 2019, https://www.belfasttelegraph.co.uk/news/rhi-scandal/rhi-dup-threatened-me-with-legal-action-says-author-mcbride-of-book-about-boiler-scandal-38599506.html
[269] Sam McBride, Twitter post, Twitter, December 2019, https://twitter.com/sjamcbride/status/1204485774206554122
[270] Sam McBride, Twitter post, Twitter, December 2019, https://twitter.com/SJAMcBride/status/1204489735206506496

in the adoption of statutory reforms".[271] For example, Northern Ireland only adopted some elements of the 1996 Defamation Act in 2009, which became effective in 2010. The Commission's consultation paper also found the number of claims per capita to be relatively high in Northern Ireland, estimating them to be six times higher than comparable figures in England and Wales in 2012.[272]

Later in 2016, libel expert Dr Andrew Scott, who had been involved in producing the 2014 paper, produced a follow up report that recommended revisions equivalent to the provisions of the 2013 Defamation Act should be introduced into Northern Irish law.[273] However, Dr Scott also made further suggestions, including moving away from Section 5 of Defamation Act 2013 (which applies where an action for defamation is brought against the operator of a website in respect of a statement posted on the website), which would subsequently inform significant chunks of the Scottish reform.[274] In the five years since then, there have arguably been further developments that would suggest adopting a carbon copy of the English and Welsh law would not be sufficient.

After, Nesbitt's Private Member's Bill passed its Second Stage on 14th September 2021, it was referred to the NIA's Committee for Finance for its Committee Stage. The call for written evidence launched by the Committee generated 24 responses, including from individual journalists, lawyers, various government affiliated bodies and media representatives and press freedom groups.

In their joint written response to the call for evidence, Index on Censorship and English PEN, commented:

> *"In most defamation cases brought in NI, therefore, the merits are beside the point: the very act of filing a claim can be enough to force a publisher to settle, retract, and apologise. This indicates a fundamental lack of faith in the current system, most likely due to the insufficient public interest defence, the uncertainties inherent in a jury trial, and the lack of safeguards – such as a harm threshold – to filter out vexatious lawsuits. All contribute to a law which is all-too amenable to abuse."*

In oral evidence given to the Committee in December 2020, Jessica Ní Mhainín of Index on Censorship further illustrated the financial disparity that feed into why media might feel they have no choice but to settle:

> *"In 2020, one senior reporter in Northern Ireland told me that the amount paid out in settlements by his publication every year is about the same as his salary. He said, "It is probably on a par with what I earn every year, so to employ me as a journalist, effectively, costs double"…. Settling does not necessarily indicate an admission of wrongdoing. Settling, retracting and apologising are very often the quickest means for publishers to get rid of a case that could end up taking years and costing thousands, if not hundreds of thousands, of pounds. It is often a strategic and commercial decision."*[275]

In the December oral evidence sessions, there was a pushback from some quarters against the recommendation by media freedom groups to abolish jury trials.[276] However, parallel developments on defamation reform and SLAPPs in the Republic of Ireland may have positively influenced thinking on this issue north of the border.

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[271] Northern Ireland Law Commission, Consultation Paper: Defamation Law in Northern Ireland, 2014, http://www.nilawcommission.gov.uk/final_version_-_defamation_law_in_northern_ireland_consultation_paper_-_nilc_19__2014_.pdf
[272] Ibid, see para 2.09.
[273] Andrew Scott, Reform of defamation law in Northern Ireland, LSE Research Online, August 2016, http://eprints.lse.ac.uk/67385/1/Scott_Reform%20of%20defamation%20law_2016.pdf
[274] Legislation.gov.uk, Defamation Act 2013, https://www.legislation.gov.uk/ukpga/2013/26/section/5/enacted
[275] NIA Assembly, Official Report: Minutes of Evidence, Committee for Finance, meeting on Wednesday, December 2021, http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?&AgendaId=29643&eveID=15028
[276] Ibid.

On 1st March 2022, Ireland's Justice Minister Helen McEntee, received approval from the Cabinet to proceed with reform of Ireland's Defamation Laws.[277] In a report published by the Coalition Against SLAPPs in Europe (CASE), in March 2022, found that Ireland came *"in eighth place for the highest absolute number of SLAPPs filed, and fourth for SLAPP cases filed per capita."*[278] The new proposals, which would lead to the introduction of an anti-SLAPP mechanism, also include clearer protection for responsible public interest journalism and recommended the abolition of juries.[279] The report outlining the proposals concluded the abolition of juries would also reduce the length of hearings, lessen delays and significantly reduce the proportion of cases appealed.[280] However, to note the Republic's proposals does not include the introduction of a cap on damages in defamation cases, nor the introduction for a claimant to prove serious harm, as is the case in England and Wales.

Following this development, SLAPPs were mentioned in the final stage review of the NI Bill held on 22nd March, during which the Bill was finally passed. The main aspects that remained in the Bill were an end of the presumption to a jury trial in cases of defamation, alongside new defences of truth, honest opinion and publication on matters of public interest. Welcoming the successful passage of his Bill, Mr Nesbitt said:

> *"Unlike London and Dublin, we have no official opposition or second chamber at Stormont, meaning the role of the media is all the more important in scrutinising the work of the Executive. … My Clause 4 defence allowing publication if it is in the public interest should relieve journalists from much of the chilling effect of the current regime. That said, more work needs to be done to eradicate the modern curse of so-called SLAPPs, Strategic Lawsuits Against Public Participation, where the wealthy bring forward cases with no legal merit, purely to stall or frustrate responsible journalism…"*[281]

The bill marks a significant step forward for NI regarding defamation reform, however, not all measures put forward in Nesbitt's original bill were adopted. In particular, a clause that would have introduced a serious harm test and another that would have attempted to deal with operators of websites were vetoed out during the committee stages. Nonetheless, campaigners are hopeful that the requirement for the Bill to be reviewed in two years' time will allow for further progress in the future.

It is also important to note that cases bearing the hallmarks of SLAPPs are also understood to have been brought in Northern Ireland under privacy, data protection and anti-harassment laws. Recent cases compiled by ARTICLE 19 include a case brought by an alleged terrorist to attempt to silence reporting about alleged criminality;[282] and a right to life and privacy action brought by an alleged dissident republican to attempt to silence reporting about alleged criminality.[283] Other cases includes an action taken by alleged dissident republican terrorists to compel disclosure of Sunday Newspapers Limited sources;[284] and a case brought to the Court of Appeal on the basis of privacy and data protection rights regarding public domain information.[285]

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[277] Department of Justice, Minister McEntee receives Cabinet approval to reform Irish defamation law, Government of Ireland, March 2022, https://www.gov.ie/en/press-release/21b16-minister-mcentee-receives-cabinet-approval-to-reform-irish-defamation-law/

[278] CASE, Shutting out criticism: How SLAPPs threaten European democracy, March 2022, https://static1.squarespace.com/static/5f2901e7c623033e2122f326/t/623897f6f5eb056c82fe2681/1647876093121/CASE+report+SLAPPs+Europe.pdf

[279] Pat Leahy, Proposed changes to defamation law set to be accepted by Government, The Irish Times, March 2022, https://www.irishtimes.com/news/politics/proposed-changes-to-defamation-law-set-to-be-accepted-by-government-1.4814618

[280] Shane Phelan, Cabinet will consider long-overdue 'anti-SLAPP' defamation reform bill, Independent.ie, February 2022, https://www.independent.ie/irish-news/courts/cabinet-will-consider-long-overdue-anti-slapp-defamation-reform-bill-41364426.html

[281] News Media Association, NMA Welcomes Defamation Law Reform in Northern Ireland, March 2022, http://www.newsmediauk.org/Latest/nma-welcomes-defamation-law-reform-in-northern-ireland

[282] Fulton v Sunday Newspapers Limited [2017] NICA 45.

[283] McAuley v Sunday Newspapers Limited [2015] NIQB

[284] Duffy and Anor v Sunday Newspapers *Limited* [2017] NIQB 71

[285] Arthurs v News Group Newspapers [2017] NICA 70

Scotland: 2021 defamation reform and concerns about 'unjustified threats'

In March 2021, the Scottish Parliament voted unanimously to pass the Defamation and Malicious Publication (Scotland) Bill, becoming enforceable as an Act as of 21st April 2021. This marked the first meaningful reform to defamation law in Scotland since 1996, as only a few technical parts of the 2013 Defamation Act were adopted into Scots Law.

When bringing forth the bill in December 2019, the Scottish Government stated the objectives were to modernise and simplify the law of defamation in Scotland in order to a) strike a more appropriate balance between freedom of expression and the protection of individual reputation, and b) clarify the law and improve its accessibility.[286] Previously, defamation law in Scotland was based in common law and spread across various judgments in a 'patchwork quilt' of case law.[287]

The process of reform followed a Scottish Government Public Consultation held in spring 2019, which sought to build upon the findings of a report published by the Scottish Law Commission in December 2017.[288] A number of respondents to this consultation comprised media outlets, media lawyers and free expression groups whom particularly picked up on the issue of unjustified legal threats and the potential for legal intimidation to result in the suppression of information.[289]

The Ferret, a Scottish investigative media outlet, stated in their submission:

> "*Experience has taught us that the law of defamation can be a powerful tool in the hands of powerful people, to keep information of wrongdoing out of the public eye… The current threshold can mean that statements that embarrass or cause discomfort can be held to be the basis for an action. This is far too low, restricts freedom of speech and leads to self-censorship or prior-restraint among publishers, particularly small publishers, where the costs of defending an action can have a significant impact on business viability, even if they were to defend themselves successfully… Large corporations may use the considerable resources at their disposal to raise defamation actions, or the threat of defamation actions, to attempt to stifle legitimate public interest criticism."*[290]

Similarly, the National Union of Journalists (NUJ) in their submission stated:

> *"Unwarranted and unjustified threats of defamation have a significant effect on the reporting by media organisations, encouraging those who bring such actions to enjoy the right to stifle and oppress both fair criticism and reporting of matters of wrongdoing."*[291]

While cases against media that have reached court stage appear infrequent, that appears to hide a far more active level of legal back and forth hidden from public view. One example, in 2013, the National Collective, a cultural movement for Scottish independence during Scotland's Referendum from December 2011 to September 2014, and two of its members, were faced with libel threats after they published reports in April 2013 questioning the source of funding behind donations made to the Better Together campaign.[292] Lawyers acting on behalf of a principle Better Together funder, Ian Taylor, a multi-millionaire

[286] Scottish Parliament, Defamation and Malicious Publication (Scotland) Bill, December 2019, https://www.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/introduced/policy-memorandum-defamation-and-malicious-publication-scotland-bill.pdf
[287] Brian Pollock and Sophie Richardson, The new Scots law of defamation in 2021, lindsays, https://www.lindsays.co.uk/news-and-insights/insights/the-new-scots-law-of-defamation-in-2021
[288] Scottish Government, Defamation in Scots Law, April 2019, https://consult.gov.scot/justice/defamation-in-scots-law/
[289] Scottish Government, Published responses, https://consult.gov.scot/justice/defamation-in-scots-law/consultation/published_select_respondent
[290] Scottish Government, Response 783908485, https://consult.gov.scot/justice/defamation-in-scots-law/consultation/view_respondent?uuId=783908485
[291] Scottish Government, Response 46277069, https://consult.gov.scot/justice/defamation-in-scots-law/consultation/view_respondent?uuId=46277069
[292] National Collective, We Will Not Be Bullied, April 2013, http://www.nationalcollective.com/2013/04/18/we-will-not-be-bullied/

oil-trader, as well as the world's largest oil Trading company Vitol Group, initiated legal action against the group and two of its individual members. National Collective explained at the time "*everything in the article was based on reliable news sources and, while we do not have the resources of the mainstream press or journalistic training, the piece was put together with due care and caution.*"[293] Due to the legal pressure, they decided to take their whole website down on a temporary basis, rather than remove the individual article under question. While the mainstream national media slowly started to pick up on the story, observers noticed that the National Collective had gone offline and, rightly, speculated they were subject to legal threats. Eventually, in what the National Collective described *"a classic case of the Streisand effect"* other journalists began to investigate further "*into Vitol's history and uncovered allegations of questionable business practices"*.[294] After the threat had dissipated, ten days after originally publishing the story, National Collective wrote about their experience and raising concerns about the impact of these types of legal threats on citizen journalism:

> *"Our website has been the subject of very serious threats in an attempt to silence and stifle debate, and while the influence of big money over politics is not new, our questions remain unanswered. We are very lucky to have been able to access the advice of well qualified legal counsel Aamer Anwar, who gave time and support completely free of charge. Other citizen journalists without these support networks would likely have been silenced."*[295]

When writing in March 2021 about why defamation reform was long overdue in Scotland, Dr Andrew Tickell, Lecturer in Law at Glasgow Caledonian University, commented: "*While the legal disputes may not spill out into court, out of the public eye – in legal correspondence sent* "*without prejudice" which never receives public circulation – defamation law is felt daily by Scotland's newspapers and broadcasters, and increasingly by bloggers and social media users too."*[296]

Tickell cited the example of the former Green MSP Andy Wightman who in 2020 had to crowdfund more than £170,000 to successfully defend himself against a £750,000 defamation action brought by a company Wildcat Haven Enterprises over historic comments published on his blog in 2015.[297] Notably the comments under question had been made when Wightman was an academic, but the action was only brought years later after he had become a MSP. Wightman's public profile had allowed him to draw on the goodwill of supporters and hire the best media lawyers around, Tickell noted, but: "*most people in this country would not be able to count on that support if they found themselves in similar jeopardy... This isn't the legitimate protection of reputation. It's the abuse of power and the muscle of economic advantage."*[298]

In its response to the introduction of Bill into the Scottish Parliament in December 2019, the campaign group Scottish PEN stated its disappointment that it did not contain a provision against unjustified legal threats: "*For too long, this law has been used by powerful and wealthy entities to restrict criticism and public scrutiny. This provision would have offered a significant and practical protection for individuals and organisations, including journalists, community groups, activists, scientists, academics and social media users to ensure they can continue to realise their right to free expression and play an active role in society."*[299]

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[293] Ibid.
[294] Ibid.
[295] Ibid.
[296] Andrew Tickell, This is why reforms to Scotland's defamation law were long overdue, The National, March 2021, https://www.thenational.scot/news/19141816.reforms-scotlands-defamation-law-long-overdue/
[297] Severin Carrell, Scottish Green MSP successfully defends defamation case, The Guardian, March 2020, https://www.theguardian.com/uk-news/2020/mar/11/scottish-green-msp-wins-defamation-case
[298] Andrew Tickell, This is why reforms to Scotland's defamation law were long overdue, The National, March 2021, https://www.thenational.scot/news/19141816.reforms-scotlands-defamation-law-long-overdue/
[299] Scottish PEN, Defamation Reform: Bill introduced to Parliament, December 2019, https://scottishpen.org/defamation-bill-introduced-to-parliament/

Scottish PEN later put forward a draft amendment for an unjustified threats legal mechanism to the Justice Committee's Call for Evidence as part of its scrutiny of the proposed Bill in March 2020.[300] They stated that their proposal was informed by the language in the Intellectual Property (Unjustified Threats) Act 2017. The aim was to prevent unjustified threats of legal action by putting forward a legal mechanism that "*outlines a process that enables the bringing of counter actions by defenders, and encourages a proportionate and constructive relationship between parties, both before and during court proceedings."*[301] This was discussed by the Justice Committee, but not taken forward as they stated they *"would not want to see a process put in place which might unintentionally prevent or discourage the legitimate right of an individual to instruct a lawyer and correspond with a defender."*[302]

During a Committee hearing during the Bill's passage through the Scottish Parliament, Luke McCullough, a senior policy adviser at BBC Scotland, said that time and financial pressures on the media industry could mean journalists do not pursue stories that are in the public interest for fear of becoming the target of litigation. He told the Committee: "*You see pressures of time, pressures of money, journalists in newsrooms where they are the only journalist and if it gets just too hard, you're going to do the thing that is easy, rather than the thing that is right."*[303]

His comments were echoed by John McLellan, the Director of the Scottish Newspaper Society and former editor of the Scotsman, who endorsed the introduction of a serious harm threshold: "*It strengthens the ground on which you would say 'no, sorry, we have no case to answer' and therefore provides a strengthening of that weeding out process that we've heard before where letters arrive which are effectively a fishing exercise to see what will come back."*[304] While stating that there would be no way to stop a person or organisation who had the financial backing to continue a case, McLellan welcomed the Bill as having the potential to act as a "*more effective filter*".

The new Defamation and Malicious Publication Act introduced a serious harm threshold and contains many measures bringing it line with English and Welsh Law that were welcomed.[305] It reduced the time limit for bringing defamation cases down from three years to one year and created a single publication rule (preventing the statute of limitations re-starting each time an article is published, for example on the internet, unless it's substantially different from the original article).[306]

Diverging from English and Welsh law, the Act did introduce a statutory definition of defamation, which finds that a "*statement about a person is defamatory if it causes harm to the person's reputation (that is, if it tends to lower the person's reputation in the estimation of ordinary persons)."*[307] The Scottish Act also codifies for the first time the Derbyshire Principle, prohibiting on public authorities from bringing defamation proceedings, as well as setting out clearer definitions of what constitutes an actor, editor or publisher, which could add protections for people who share or retweet content online.[308] However, while it did not include a provision against unjustified threats of legal action, it also mirrored the English and

[300] The draft amendment was a collaboration between Scottish PEN and Doughty Street Chambers.
[301] Nik Williams, Scottish PEN submissions to the Justice Committee, https://drive.google.com/drive/folders/1qSI4IPa_Vm9WfRT5a8R-KvCo5jl3TIUu
[302] Scot Parliament, Defamation and Malicious Publication (Scotland) Bill: Stage 1 Report, October 2020, https://digitalpublications.parliament.scot/Committees/Report/J/2020/10/14/Defamation-and-Malicious-Publication--Scotland--Bill--Stage-1-Report#Court-action-to-protect-against-unjustified-threats
[303] Xander Richards, Holyrood committee hear of 'major change' proposed in new defamation bill, The National, August 2020, https://www.thenational.scot/news/18674899.holyrood-committee-hear-major-change-proposed-new-defamation-bill/
[304] Ibid.
[305] Scottish Parliament, Defamation and Malicious Publication (Scotland) Bill, 2021, https://www.parliament.scot/-/media/files/legislation/bills/current-bills/defamation-and-malicious-publication-scotland-bill/stage-3/bill-as-passed.pdf
[306] Ibid.
[307] Legislation.gov.uk, Defamation and Malicious Publication (Scotland) Act 2021, https://www.legislation.gov.uk/asp/2021/10/enacted
[308] Bevan Brittan, Defamation: Case law update, December 2010, https://www.bevanbrittan.com/insights/articles/2010/defamationcaselawupdate/. In Derbyshire, a case concerning the propriety of certain investments made by the local authority of monies in its superannuation fund, the House of Lords determined that a democratically elected governmental body (including a local authority), and indeed any public authority or organ of central or local government, should be open to uninhibited public criticism and does not therefore have the right to maintain an action for damages for defamation. To allow otherwise would have an inhibiting effect on freedom of speech.

Welsh Act's failing to not put in place limits on private companies bringing defamation actions against individuals.

In June 2021, Scottish PEN in partnership with the University of Strathclyde's School of Humanities released the findings of a study it had conducted from December 2020 with over 100 Scottish writers, editors and publishers to determine the impact of defamation law as it had stood prior to reform. The report found that the majority of participants thought that perceived or actual threats of defamation were likely to have a 'chilling effect 'on free speech in Scotland:

> "*For most study participants who had received threats of defamation action in the past (62%), only a small proportion of these requests had felt 'proportionate 'or reasonable in their requests, suggesting that many complainants pursue vanity cases to silence legitimate comment. 40% found the experience of dealing with such threats 'extremely negative 'and a further 25% found the process of engaging with potential complainants negative overall. This highlights the considerable financial and personal impact on writers dealing with such communications, and leads us to believe that more work must be done to challenge the culture of unaccountable censorship by those with the means to instil fear in writers through use of legal threats."*[309]

Scottish PEN concluded that their findings suggest "*a climate of fear and uncertainty"* and that *"self-censorship is a present risk for writers and publishers"* in Scotland.[310] Given the new Act has only been in force for a year, the full effect of its potential positive impact on the media landscape in Scotland remains to be seen.

While there have been far less known cases of cross border SLAPPs emanating from Scotland, in March 2021, the journalist and author Oliver Bullough received communication from the Scottish law firm Bannatyne Kirkwood France & Co, objecting to the inclusion of Vice-President of Angola, Bornito de Sousa, in Bullough's 2018 award winning book *Moneyland* and demanding the book be withdrawn.[311] After Bullough's lawyer replied that the complaint had no merit, he received no further communication from lawyers in the UK. Legal action was subsequently filed against Bullough and his Portuguese publisher, 20/20 Editora, by Bornito de Sousa regarding the book in Portugal, in a case that is still ongoing.[312]

[309] Scottish PEN, Report: Impact of defamation law in Scotland, June 2021, https://scottishpen.org/report-impact-of-defamation-law-in-scotland/
[310] Ibid.
[311] INDEX, A19 and ECPMF, Damages sought from British Journalist Oliver Bullough in Portugal, Safety of journalists platform, October 2021, https://fom.coe.int/alerte/detail/107136614?langue=en-GB
[312] Ibid.

Chapter 4. The impact of legal intimidation and SLAPPS

Ultimately, the main reason England, and other UK jurisdictions, remain attractive to those seeking to use legal intimidation and SLAPPs is because the financial penalty facing media defendants is so significant. The debilitating cost to the defendant is amplified further by the amount of time and energy it takes to fight back. These factors combined can also bring to bear psychological pressure, particularly if journalists are also subject to other forms of harassment, including smear campaigns, surveillance and online trolling. This chapter explores both the impact on journalists and media outlets subject to legal intimidation and SLAPPs, as well as how this affects the media's ability to carry out their role as a public watchdog. If the threat, or potential threat, of being subjected to the legal process is enough to have a chilling effect on reporting, the way articles are presented, or even the complete removal of them from the public domain, then the societal right to information is also affected. A secondary impact is therefore caused by this 'vacuum of information' on matters of public interest, creating the potential for the exposure of wrongdoing to take years to come to light – if it does at all.

The impact on individual journalists and media outlets

A common thread running through the experiences of journalists pursued through the UK libel courts, or threatened with legal action, is a fear of how devastating the financial impact will be – with the potential of losing their savings, their houses, pensions, as well as potentially their livelihoods. The cases that reached court discussed in Chapter 1, highlighted how expensive this can be, with a minimum £500,000 outlay to defend cases that reach trial. Yet as shown by the cases in Chapter 2, the costs do not start there and journalists can spend thousands of pounds in early stages of the legal back and forth, or potentially more if they feel they have no option but to settle, before seeing the inside of a courtroom.

The financial burden extends beyond the costs that can be incurred to defend a case, and any possible damages, to the possible ramifications if a journalist is unable to continue working, at least to full capacity, while a legal action against them is ongoing.[313] Scott Stedman, founder of Forensic News, currently being sued in the UK by Israeli- British businessman Walter Soriano, (see page 29), as part of his testimony to US Congress stated: *"Over the last 18 months, I have lived the increasingly-too-common life of an investigative journalist who splits his time between researching and writing articles and tending to a lawsuit."*[314]

The legal case against Paul Radu, co-founder of OCCRP, ended in a settlement favourable to the media outlet in January 2020, in which the articles under claim stayed online (see page 24). However, after a two year legal battle Radu has been clear to point out: *"Even if you win, you lose. You lose money, time, and energy you can never get back*."[315] Catherine Belton, who in 2021 faced a barrage of cases brought by four Russian oligarchs as well as the Russian state owned oil company Rosneft (see page 28), also recently remarked that she had lost almost a year of her life dealing with the legal defence of her book.[316]

The psychological impact on journalists under legal threat is usually far less discussed. Instead, it is an aspect that appears to be overlooked by outsiders who may perceive what is going on to be merely a 'due legal process'. Despite the significant impact on their finances and time, when going public in May 2021 about the legal challenge openDemocracy faced, which never came to court, the then Editor Mary Fitzgerald and Investigations Editor Peter Geoghegan, nevertheless underscored this human cost:

[313] Clare Rewcastle Brown, A scandal of corruption and censorship: Uncovering the 1MDB case in Malaysia, FPC, December 2020, https://fpc.org.uk/a-scandal-of-corruption-and-censorship-uncovering-the-1mdb-case-in-malaysia/
[314] Helsinki Commission, Helsinki Committee session on 'Countering Oligarchs, Enablers, and Lawfare', YouTube, April 2022, https://www.youtube.com/watch?v=m0YPcXB1W8I
[315] Remarks made to FPC's Project Director.
[316] Remarks made at the Frontline Club 21 February 2022.

> "*We were advised that if we went to court to defend our reporting, we risked bankrupting openDemocracy. We had staff worrying they would lose their homes. [The claimant] dragged the ordeal out over two years [which] cost us a lot. We spent months dealing with legal letters, burning through thousands of pounds and precious time that would otherwise have been spent on our journalism. The psychological toll was even higher. We wanted to defend our story, but how would it play out in a Belfast court, under laws that have been said to 'invite libel tourism'?"*[317]

The journalist Tom Burgis, who faced two libel suits in relation to his book *Kleptopia* and an article published in the FT (see page 34), gave evidence on SLAPPs to the House of Commons' Foreign Affairs Select Committee on 15th March 2022, which touched upon how the psychological effect can start early on in the legal process, in what appears to be an intentionally intimidatory fashion:

> *"The psychological pressure that these firms bring to bear is really clever. The letters—such as those from Carter-Ruck, Schillings, Mishcon de Reya, Taylor Wessing and so on – are often written in a tone of righteous indignation, where the 'journalist' has behaved appallingly and in bad faith. There is never any question of, say, having made an honest mistake. I have spent quite a long time trying to realise why so many journalists – even really courageous ones – will recoil and walk away from a story when a letter from one of these firms comes in. It is because you risk humiliation in the public square. The letters go to your editors, publishers and lawyers, and you are cast as the most monstrous, scheming and corrupt version of yourself. That is how it works, quite apart from the massive threat of costs."*[318]

Franz Wild, Finance Editor at The Bureau for Investigative Journalism provided similar testimony on how this legal intimidation is deployed to the House of Lord's Communication and Digital Select Committee on 31st March 2022. He described how *"the journalist who starts their endeavour as a public interest inquiry is immediately treated as a defendant. Their ethics are questioned, as are their integrity and their motives. Anything that is said is used against them…It is a high-wire act. You put one foot wrong and you are in big trouble."*[319] Wild provided an example of what happened when he was working a story investigating how a *"very wealthy and powerful individual"* appeared to be making transactions worth tens of millions of dollars in Africa despite being under US sanctions:

> *"As we were preparing for publication, lawyers from Carter-Ruck approached us. What ensued was a flurry of very lengthy letters. They immediately turned the tables on us, essentially, and accused us of dishonesty. They tried to identify our sources. They revealed, separately, that their client had secretly recorded me and was quoting snippets from that conversation back to me. All of this was intended to undermine the reporting. One thing they did not do, incidentally, was answer any questions of ours for quite a while."*[320]

The use of overblown language, threatening tone and outlandish demands for redress were a common theme raised by journalists and media defence lawyers spoken to as part of the research for this report. Clare Rewcastle Brown, the journalist who had been instrumental in uncovering the Malaysian 1MDB scandal (see page 22), gave evidence to the House of Lords alongside Wild. She was keen to stress how much this legal intimidation *"is actually pre-action litigation that people do not hear about":*[321]

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[317] Peter Geoghegan and Mary Fitzgerald, Jeffrey Donaldson used us. Here's why wer'e going public, openDemocracy, May 2021, https://www.opendemocracy.net/en/opendemocracyuk/jeffrey-donaldson-sued-us-heres-why-were-going-public/

[318] Foreign Affairs Committee, Oral evidence: Use of strategic lawsuits against public participation, HC 1196, House of Commons, March 2022, https://committees.parliament.uk/oralevidence/9907/pdf/

[319] Communications and Digital Committee, Uncorrected oral evidence: Lawfare and free speech, House of Lords, March 2022, https://committees.parliament.uk/oralevidence/10069/pdf/

[320] Ibid.

[321] Ibid.

> *"You will receive threatening letters where the ulterior motive is not to say, 'You shouldn't have said that'. The ulterior motive is to shut you up or blackmail you into removing often months old articles as part of a clean-up exercise by the person who has engaged the lawyers. It is very recognisable. They will accuse you of a smorgasbord of violations. It will all be about how you went about your work and it actually will not be focusing at all on something that you have said. They will be accusing you of meaning something you did not say and then dragging you into expensive to and fro. Very rarely, but on occasion it will progress. A tiny percentage of the actions of mine have progressed into a court situation."*[322]

An example of the reputation of a journalist being impugned during the legal process was visible in the lawsuit taken by ENRC against the US arm of HarperCollins, seeking the details of Burgis' contract to write the book *Kleptopia*. The US court filing system PACER has publicly accessible records, which provide details of the claims ENRC made questioning his motivations for writing the book, which Burgis has argued is an attempt to smear his reputation:

> *"It is blindingly obvious that my contract with HarperCollins is not going to contain details of my secret kickback arrangements with the enemies of some oligarchs, so the only reason to put this on the public record is to insinuate that I am corrupt. Of course, there is no evidence for this statement. I am not corrupt; I would live in a bigger house if I was. Nonetheless, these statements remain on the record. In the US system, it is very easy to obtain these documents, and that record will always say that I am a bent reporter."*[323]

The legal filings on PACER also confirmed that Burgis was subject to physical surveillance in London while meeting with a source. Burgis has said what keeps him *"up at night more than anything else*" is the fear of exposing a source as they take the *"biggest risk"*.[324]

Several journalists sued in the UK have raised concerns about how their ability to protect their sources can be affected by the legal process itself. Radu described the impact of being forced to hand over swathes of information during an 'invasive' discovery process during his court case as "*one of the most painful parts of the litigation in London".*[325] He added: *"As investigative reporters we are used to obsessively protecting our information, keeping it locked under as many layers as possible of secure communication software, encryption, and protective hardware. But if a judge orders disclosure of all your communication and source materials used in a story, these measures suddenly mean very little."*[326]

As with many costs that emerge prior to trial, the defendant has to pay up front for the costs involved in this disclosure process, which is conducted by an intermediary tech company. Radu's experience was echoed by Catherine Belton, who said in her evidence to the Foreign Affairs Select Committee: "*You have to hand over all your computers and mobile phones, which go to a third party. They are checking everything you have done, and the process is so elaborate that it essentially squeezes everything out of your publisher, and the costs are enormous*."[327] Carole Cadwalladr, who is being sued by Arron Banks (see page 19), wrote on Twitter after her trial that in her case 180,000 documents had been subject to forensic keyword searches, narrowed down to 20,000, before 4,000 were ultimately handed over to the other side. As she put it *"all because of these 23 words [under claim by Banks] and a whole stack of £££"*.[328]

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[322] Ibid.
[323] Foreign Affairs Committee, Oral evidence: Use of strategic lawsuits against public participation, HC 1196, House of Commons, March 2022, https://committees.parliament.uk/oralevidence/9907/pdf/
[324] Ibid.
[325] Paul Radu, How to Successfully Defend Yourself in Her Majesty's Libel Courts, GIJN, February 2020, https://gijn.org/2020/02/26/how-to-successfully-defend-yourself-in-her-majestys-libel-courts/
[326] Ibid.
[327] Foreign Affairs Committee, Oral evidence: Use of strategic lawsuits against public participation, HC 1196, House of Commons, March 2022, https://committees.parliament.uk/oralevidence/9907/pdf/
[328] Carole Cadwalladr, Twitter post, Twitter, January 2022, https://twitter.com/carolecadwalla/status/1484207117099798533

Cadwalladr's is one of the few, identified by media freedom and transparency organisations as a SLAPP, that has actually reached the trial stage.[329] Her status as a freelance columnist at the Observer rather than a staff reporter left her personally exposed and responsible for her own legal defence.[330] The fact she made it to trial was in part thanks to her many supporters who paid into her crowdfunding campaign. However, she also faced another challenge in the months running up to the trial, when she was forced to switch lawyers due to Banks filing another complaint against her, which also involved her original lawyer Tamsin Allen at Bindmans.[331]

Banks' has strenuously denied that he has pursued a SLAPP and his lawyer stated during the trial in January 2022 that "*to suggest it was issued in bad faith simply to stop her reporting is a complete fabrication."*[332] NGO observers have nevertheless continued to raise concerns about the impact of her being sued as an individual as well as the treatment she faced while on the stand. Cadwalladr spent three days of the five-day trial giving evidence as well as being cross-examined by Bank's lawyer. The journalist John Sweeney wrote for the Byline Times:

> *"When Carole Cadwalladr was cross-examined that afternoon by Banks' QC, William McCormick, the strategy of the plaintiff's lawyers became plain. The goal is to undermine Cadwalladr's integrity. To begin with, McCormick did well, making Cadwalladr stumble at times. McCormick has a pleasing Northern Irish accent. But for reporters in the overflow room, where we watch proceedings over a CCTV monitor, there were times that people gasped at his brutal way with words."*[333]

Rebecca Vincent, Director of International Campaigns at Reporters without Borders, who also monitored the trial, commented at the time that:

> *"This entire case is an attempt to discredit and isolate Carole as an individual, when - as she told the court - journalism is a team sport, and responsibilities are shared (between journalists/editors/ subeditors/publishers). This is part of what makes the case a SLAPP. Individual journalists should not be targeted in this way - and those who are often are unable to fight back in the way that Carole is determined to do. This is incredibly courageous - everything is on the line, including her own home. As I said earlier, no one would want to go through what Carole has been put through over the past few years, and what she's going through now in court - in her words, shame and humiliation. This is very difficult to watch."*[334]

Providing an insight about her experience after the conclusion of proceedings, Cadwalladr posted a series of remarks on Twitter:

> *"I wasn't on trial for my life. But I was. My professional reputation, my career, potentially my home. I survived because I had to. And because I was lifted & supported by so many others who understood this was about something much bigger than me. And that I couldn't do it alone."*[335]

[329] Jonathan Perfect, Index calls on Arron Banks to drop SLAPP lawsuits against Carole Cadwalladr, Index on Censorship, December 2019, https://www.indexoncensorship.org/2019/12/index-calls-on-arron-banks-to-drop-slapp-lawsuit-against-carole-cadwalladr/ ;; ARTICLE 19, United Kingdom: Support for Carole Cadwalladr as she faces SLAPP trial, January 2022, https://www.article19.org/resources/united-kingdom-support-for-carole-cadwalladr-as-she-faces-slapp-trial/

[330] Julie Posetti et al., Chapter 4 – Carole Cadwalladr: The networked gaslighting of a high-impact investigative reporter Carole, UNESCO, April 2021, https://en.unesco.org/sites/default/files/the-chilling_chapter4.pdf

[331] Carole Cadwalladr, Twitter post, Twitter, January 2022, https://twitter.com/carolecadwalla/status/1484231515483615238

[332] Charlotte Tobitt, Arron Banks suing Carole Cadwalladr for libel is free speech concern, High Court hears, PressGazette, January 2022, https://pressgazette.co.uk/carole-cadwalladr-arron-banks-libel-trial-begins/

[333] John Sweeney, Arron Banks v Carole Cadwalladr: The First Two Days, Byline Times, January 2022, https://bylinetimes.com/2022/01/17/arron-banks-versus-carole-cadwalladr-the-first-two-days/

[334] Rebecca Vincent, Twitter post, Twitter, January 2022, https://twitter.com/rebecca_vincent/status/1483796292417597443

[335] Carole Cadwalladr, Twitter post, Twitter, January 2022, https://twitter.com/carolecadwalla/status/1484818873803317249

> *"The last 2 years & [especially] the last year, last months, last weeks & last days have taken a massive toll on my physical & psychological health & every other aspect of my life. I have felt under assault. Because I have been."*[336]
>
> *"What happens next is up to the judge. The verdict won't be for weeks. But no-one who witnessed what happened in court can be in any doubt that this was about more than 23 words. The entire process was designed to punish, shame & humiliate me."*[337]

Cadwalladr concluded by stating that she would not be shamed and humiliated.[338] However, aside from the pressure caused by the legal case itself, the case against Cadwalladr has also highlighted how there are wider pressures at play. Legal threats and SLAPP cases can feed into broader online harassment and trolling, coordinated or otherwise. Every time there has been a development in Cadwalladr's case, there is also an influx of online abuse against her. The pattern of abuse Cadwalladr faced has been documented in a case study by UNESCO, which found that *"55% of obvious abuse detected [as targeting] Cadwalladr occurs at the personal level. It was highly gendered and designed to hold her up to ridicule, humiliate, belittle and discredit*."[339] The UNESCO study concluded that *"the online violence Carole Cadwalladr experiences is a feature of the enabling environment for her offline legal harassment."* [340]

Legal threats against a journalist or media outlet also often do not come in isolation from other intentional tactics to intimidate and harass. As already mentioned, Burgis' legal case brought to light how he had been physically trailed for a meeting with a source. During the course of his five-year investigation into Wirecard, Burgis' colleague at the Financial Times, Dan McCrum, stated he was also subject to "*furious online abuse, hacking, electronic eavesdropping, physical surveillance [as well as] some of London's most expensive lawyers."*[341] He particularly noted, in an article published in September 2020 after the collapse of Wirecard, that "*observers of the Wirecard affair have tended to criticise the German establishment for the fact that this fraud ran for 20 years unchecked – poor auditing, zero regulatory oversight. And yet almost all the external professionals hired by the company to protect its reputation were based in London."*[342]

Rewcastle Brown has also outlined how she was subject to smear campaigns, online harassment and surveillance as a result of her work, on top of the many legal threats. In an article for the FPC, published in December 2020, she noted how UK law firms can operate in combination with a network of public relations consultants, corporate investigators and private protection agencies.[343] Contracts funding what Rewcastle Brown describes as "*exercises in deception"* have been worth tens of millions to public relations companies such as Bell Pottinger and FBC Media (both of which folded following exposure).[344] The International Press Institute have spoken out about how damaging online harassment and smear campaigns are to journalists' reputations as well as *"the trust journalists enjoy among their audiences and the community at large… Because trust and credibility are core aspects of successful journalism."*[345]

Rewcastle Brown, like Cadwalladr, utilised a crowdfunding campaign to raise the hundreds of thousands of pounds needed to fund her legal defence. However, this is an option that would perhaps be less successful

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[336] Carole Cadwalladr, Twitter post, Twitter, January 2022, https://twitter.com/carolecadwalla/status/1484065957974847488
[337] Carole Cadwalladr, Twitter post, Twitter, January 2022, https://twitter.com/carolecadwalla/status/1484231515483615238
[338] Carole Cadwalladr, Twitter post, Twitter, January 2022, https://twitter.com/carolecadwalla/status/1484823453261836288
[339] Julie Posetti et al., Chapter 4 – Carole Cadwalladr: The networked gaslighting of a high-impact investigative reporter Carole, UNESCO, April 2021, https://en.unesco.org/sites/default/files/the-chilling_chapter4.pdf
[340] Ibid.
[341] Dan McCrum, Wirecard and me: Dan McCrum on exposing a criminal enterprise, Financial Times, September 2020, https://www.ft.com/content/745e34a1-0ca7-432c-b062-950c20e41f03
[342] Ibid.
[343] Clare Rewcastle Brown, A scandal of corruption and censorship: Uncovering the 1MDB case in Malaysia, FPC, December 2020, https://fpc.org.uk/a-scandal-of-corruption-and-censorship-uncovering-the-1mdb-case-in-malaysia/
[344] Ed Caesar, The reputation-laundering firm that ruined its own reputation, New Yorker, July 2018, https://www.newyorker.com/magazine/2018/06/25/the-reputation-laundering-firm-that-ruined-its-own-reputation
[345] Ontheline, Risks to the reputation of journalists or news organizations, https://newsrooms-ontheline.ipi.media/measures/risks-to-the-reputation-of-journalists-or-news-organizations/

for those without the same level of public platform and recognition of their work. Rewcastle Brown still had to take out her pension in order to fund her legal case, for which she did not receive any pro bono support. It has been reported in the Byline Times that Cadwalladr is likely to have to declare bankruptcy if she loses.[346] While Stedman is currently in the process of crowdfunding in order to pay legal costs that amount to, in his words, *"more money than I've ever had in a bank account."*[347] The level to which media, but particularly individual journalists, have to put their entire financial wellbeing on the line in order to defend their reporting seems an incredibly high price to pay. Of course, they are taking this action because they believe in their report and that it is in the public interest. However, if such circumstances occurred in which there might be inaccuracies, as opposed to actual malice and false reporting, or meanings that could be open for a Judge's interpretation beyond what the journalist meant, is this a balanced approach or fair system to put journalists through in order to get to the facts of the matter?

The impact of how SLAPPs are reported, or not, in the media

Several of the journalists who spoke to the FPC and ARTICLE 19 as part of the research for this report, but not necessarily featured, described how lonely and isolating the process of being sued can be, even if they do have the support of their media outlets. This is often compounded by the fact that other journalists do not speak out in support of them, including for fear of being sued themselves. In one of the first articles to discuss the cases against Belton and HarperCollins, journalist Nick Cohen, in his opinion piece for The Observer, on 8th May 2021, wrote "*here at the Observer we have been wondering what we can safely say about the cases of assorted Russian billionaires v Catherine Belton. Something? Anything? Nothing at all?"*[348]

Belton has recognised, in her own words, *"how lucky"* she was in receiving support from the journalistic community, particularly when the lawsuits started. *"I was so buoyed by people like Nick Cohen, writing in The Observer and The Critic about the cases. These were very often journalists that I had never met, never exchanged any words with, yet there was this huge outpouring of support for the book and for me as a journalists."*[349] She continued *"Abramovich, did me, did everyone a favour when he publicly announced we were being sued, because very often these court cases go on in the dark… it's quite rare in fact that something like this will come out into the public domain."*[350]

However, Belton and her publishers at HarperCollins have acknowledged the challenges in getting the right messaging out to the media when they report on the judgments of meaning hearings and the settlements, as with those reached with Rosneft and in particular Abramovich. In response to several media reports framing Abramovich having had a 'win' against the defendants when the meaning judgment was handed down in November 2021, HarperCollins felt it necessary to release the following statement in order to correct the public perception:[351]

> *"Mr Abramovich has not won his claim against HarperCollins and Catherine Belton. The judge found, in relation to the majority of Mr. Abramovich's complaints, that he had exaggerated the*

[346] Manasa Narayanan and Daisy Steinhardt, On trial: Freedom of the Press, Byline Times, February 2022, https://bylinetimes.com/2022/02/14/on-trial-freedom-of-the-press/

[347] Helsinki Commission, Helsinki Committee session on 'Countering Oligarchs, Enablers, and Lawfare', YouTube, April 2022, https://www.youtube.com/watch?v=m0YPcXB1W8I

[348] Nick Cohen, 'Are our courts a playground for bullies? Just ask Catherine Belton', The Observer, May 2021, https://www.theguardian.com/commentisfree/2021/may/08/are-our-courts-a-playground-for-bullies-just-ask-catherine-belton

[349] Comments made at Frontline Club on 21st February 2022.

[350] Ibid.

[351] Jess Glass and Jonathan Coles, Roman Abramovich wins court fight over claims Putin 'ordered him to buy Chelsea', Mirror, November 2021, https://www.mirror.co.uk/news/uk-news/breaking-roman-abramovich-wins-court-25534556; Jess Glass, Roman Abramovich wins first round in libel case over Putin's People book claims, Evening Standard, November 2021, https://www.standard.co.uk/news/uk/roman-abramovich-vladimir-putin-justice-kgb-high-court-b968017.html; Luke Harding, Roman Abramovich wins first round of libel battle over Putin's People book, The Guardian, November 2021, https://www.theguardian.com/world/2021/nov/24/roman-abramovich-wins-first-round-of-libel-battle-over-putins-people-book

> *meaning of the words he complained about and rejected one complaint in its entirety. Today's preliminary judgment only decides what ordinary readers would understand the relevant passages in the book to mean."*[352]

This statement was not universally picked up in media reports, with Arabella Pike, Publishing Director at HarperCollins, describing how there were a number of *"disobliging"* articles in the tabloid press that *"utterly distorted"* what had happened in court.[353] Pike acknowledged that they were perhaps not adequately prepared for the challenge of informing journalists *"up against a deadline to get 800 words up on to a website, within half an hour, [how] to deal with an 80 page, very complex legal judgment."*[354] How a case is reported is important, because otherwise it can play into a spinning exercise by the claimant, which further undermines the journalists' credibility, even if as in Belton's case, the changes were very minor and the main thrust of the claims under question remained in the book.

The cases against Belton and Burgis have attracted much more attention than those that have gone before them. There is quite a stark contrast to the case against Radu and OCCRP only two years ago which received almost no media coverage in the UK. While Cadwalladr's case eventually reached trial in January 2022, it was covered to a certain extent; there was nevertheless criticism that it was insufficient and too late. Peter Jukes, Editor of the Byline Times, who has previously collaborated with Cadwalladr to report on Banks, commented:

> *"The silence of most British journalists over this case, let alone the US journalists who purchased so much of their reporting on Cadwalladr's work, is almost as striking as the volume of evidence she has provided. Who will stand up for journalism? Or will journalists hang alone?"*[355]

Meanwhile, former Editor of openDemocracy, Mary Fitzgerald despaired in the run up to Cadwalladr's trial about vitriol directed towards Cadwalladr on the one hand, and the lack of solidarity amongst the wider journalistic community on the other:

> *"With the exception of The Guardian, most coverage of her case has been disparaging. Douglas Murray has argued in The Spectator that Cadwalladr should return her Orwell Prize, even though the reporting that won her that award is not being disputed in court. Guido Fawkes has taken an obsessive interest in Cadwalladr's alleged 'conspiracy theories'; former BBC and GB News frontman Andrew Neil has previously disparaged her as a "mad cat woman". Among the many large outlets that followed her reporting for years, including The Sunday Times, the Financial Times, the BBC and Channel 4, there has largely been silence about her case."*[356]

More proactive education on how legal intimidation and SLAPPs work is clearly needed to support the wider journalistic community's understanding, not only on how to report their own potential cases safely, but also how to report on those experienced by other journalists and media outlets. This is important not only for providing solidarity, but also to ensure that those who wish to evade scrutiny by misusing the legal system will not evade the spotlight completely.

However, challenges remain for even those who are writing about their own cases. Peter Geoghegan, now Editor at openDemocracy, revealed in November 2021, that after the outlet had published the article in May 2021 about having faced a lawsuit from Jeffery Donaldson, their insurance went up threefold *"just for*

[352] PA News Agency, Roman Abramovich wins first round in libel case over Putin's People book claims, The Argus, November 2021, https://www.theargus.co.uk/news/national/19738300.roman-abramovich-wins-first-round-libel-case-putins-people-book-claims/
[353] Comments made at Frontline Club on 21st February 2022.
[354] Ibid.
[355] Peter Jukes, Twitter post, Twitter, January 2022, https://twitter.com/peterjukes/status/1483229688189313024?lang=en-GB
[356] Mary Fitzgerald, Arron Banks vs Carole Cadwalladr shows how badly UK is failing press freedom, openDemocracy, January 2022, https://www.opendemocracy.net/en/opendemocracyuk/arron-banks-vs-carole-cadwalladr-shows-how-weak-uk-press-freedom-is/

talking about this issue."[357] amaBhungane, the South African investigative media outlet, found that when in April 2021 they tried to write about their experience of a SLAPP case and offered the UK law firm involved a right to reply, it led to the original threats against them, first issued in November 2020, being reignited.[358] This secondary threat, regarding a previous SLAPP threat, had the desired chilling effect and amaBhungane decided not to proceed with telling the story publicly until November 2021, after the statute of limitations on the original story had expired.

The impact on media freedom

In his review of defamation law in Northern Ireland, published in 2014, Dr Andrew Scott cited a seminal study that produced significant evidence that defamation law has a 'chilling effect' on all branches of the media. Conducted in the mid-1990s, this study, led by Prof Eric Barendt (now Emeritus Professor of Media Law at LSE) outlined a two-part classification of impact – 'direct' and 'structural'.[359] The 'direct' impact is *"when material is specifically changed as a result of legal considerations, of which the 'if in doubt, take it out' philosophy 'exemplified by most magazine editors and publishers' is part and described as 'conscious inhibition' or 'self-censorship'."*[360]

The 'structural' impact refers to a *"deeper, subtler way in which libel inhibits media publication,"* preventing the creation of media content about certain individuals or topics from the outset as to do would be known to invite legal challenges. In effect, *"nothing is edited to lessen libel risk because nothing is written in the first place."*[361]

One recent example of this structural impact is given by the author journalist and author Oliver Bullough, in comments to the New York Times shortly after the recent Russian invasion into Ukraine: *"In the last couple weeks I've had a dozen editors ask me to write about Roman Abramovich, and I've had to reply that I have never looked at him because it's never occurred to me that I'd get anything published about him… You become quite good at navigating the rules. It's a very effective form of censorship."*[362]

"This is why the campaign against SLAPPs is so important to us as a family," Daphne's son Matthew Caruana Galizia said at the UK anti-SLAPP Conference in November 2021.[363] He noted that journalists that tried to continue Caruana Galizia's investigations, as well investigate her murder itself were met with more legal threats. Matthew Caruana Galizia gave the example of how articles published into the misuse by criminal groups made up of high level politicians of a now defunct private bank in Malta, Pilatus Bank, to launder money started to disappear of the internet, with editors he spoke to afraid of potential legal action.[364] If legal threats are successful, it has the potential to create a complete vacuum of information about whatever the journalist was writing about in the first place and potentially the fact a legal challenge ever took place as well.

Journalists who have caved in the face of legal action rarely go on the public record. However, in October 2018, the Maltese blogger Manuel Delia wrote about his *"shame"* over retracting a story in the face of possible legal threats from the UK in an article entitled *Satabank: And how I let them bully me into*

[357] JFJ Foundation, DAY 1: Anti-SLAPP conference, YouTube, November 2021, https://www.youtube.com/watch?v=6LAXvNDnqzk
[358] JFJ Foundation, DAY 2: Anti-SLAPP conference, YouTube, November 2021, https://www.youtube.com/watch?v=32vsZ_DNo0Q
[359] Northern Ireland Law Commission, Consultation Paper: Defamation Law in Northern Ireland, NILC 19 (2014),. November 2014, http://www.nilawcommission.gov.uk/final_version_-_defamation_law_in_northern_ireland_consultation_paper_-_nilc_19__2014_.pdf
[360] Judith Townend, Chapter 7: Freedom of Expression and the Chilling Effect, Routledge Companion to Media and Human Rights, March 2017, http://sro.sussex.ac.uk/id/eprint/67678/1/Chapter%207%20Townend-chilling%20effects-accepted%20version-1-3-17.pdf
[361] Ibid.
[362] New York Times, Do Russian Oligarchs Have a Secret Weapon in London's Libel Lawyers?, published on 29th March 2022, https://www.nytimes.com/2022/03/29/business/oligarchs-london-putin-russia.html, in which he was quoted saying.
[363] JFJ Foundation, DAY 2: Anti-SLAPP conference, YouTube, November 2021, https://www.youtube.com/watch?v=32vsZ_DNo0Q&t=18367s
[364] Ibid.

silence.[365] Delia described how the lawyer of a businessman he had been investigating had written to him to take seriously his client's intention to proceed with legal action in the UK. Delia wrote "*His words to me were:* "*Don't be stupid. These people won't inconvenience you or cost you a big fine. You will have no choice but to jump off Dingli Cliffs.*"[366]

Writing his article after Maltese authorities had frozen the accounts of Satabank, Delia stated:

> "*I chose the easy way out. Satabank was not the most important issue I was working on and having to defend the issue alone in the UK, without a realistic prospect of continuing working on the website even if I did find anyone willing to pay for the legal costs for my defence, I decided to bow to the SLAPP threat I was faced with…. I buckled under their pressure and in doing so I effectively helped them to continue with what they were up to until reality and better journalists at the Times of Malta caught up with them.*"[367]

It is highly concerning that journalists are being put into what is in effect Hobson's choice-esque situations – publish the information and face financial ruin or withdraw the story and feel that they are effectively complicit in covering up wrongdoing.

Journalists, and especially investigative journalists, want to get the facts correct, for the principle itself and the nature of their work, but also to ensure they do not expose themselves to legal risk. Gill Philips, Director of Legal Services at The Guardian has described her job is a 'daily risk assessment'. Speaking to the House of Lord Committee, in March 2022, she explained that:

> *"You are looking at what the output is against the risk of being sued, the costs of that and what the evidence is… There is a very good defence in the Defamation Act 2013, which Parliament brought in, of public interest, but that has become turned around and is used against the journalist, who has to show all their workings. It has become an enormously expensive exercise. That has also somehow moved from being a very good thing to being just deployed against journalists all the time…"*[368]

Even for book publishers, who carry out extensive pre-publication legal reviews, the question of risk is a complicated one. Thomas Jarvis, Legal Director at HarperCollins, the publisher behind Belton and Burgis' books that formed the basis of their SLAPPs cases has spoken about the challenge of publishing the same material, in which *"the risk is the same in front of you on the pages,"* in different jurisdictions:

> "*It is a common situation where the US publication will contain allegations that are not in the UK edition, because you have had to reduce your risk in that publication in a way that you would not in the US. It creates a sort of perversity. There is a tension with writers, because you have something that is being published in the pages of the US edition and it is not appearing here. People will ask, "Why is that? It doesn't make sense. Is that an editorial issue or a legal issue?"*[369]

While the letters from Carter-Ruck did not stop The Sunday Times from publishing its stories in April 2018 about the former MP Charlie Elphicke (see page 23), they noted that it appeared to put a chill on other media from following suit. Gabriel Pogrund, when writing about The Sunday Times' experience after Elphicke dropped the case, stated that: *"the mere knowledge that Elphicke was using the [Carter-Ruck] to sue scared off other media from repeating the claims. The BBC's Andrew Marr Show did not even show the*

[365] Manuel Delia, Satabank: And how I let them bully me into silence, Truth be told, October 2018, https://manueldelia.com/2018/10/satabank-and-how-i-let-them-bully-me-into-silence/
[366] Ibid.
[367] Ibid.
[368] Communications and Digital Committee, Uncorrected oral evidence: Lawfare and free speech, House of Lords, March 2022, https://committees.parliament.uk/oralevidence/10070/pdf/
[369] Ibid.

Sunday Times front page, as is tradition, for fear they would be sued. The story never entered public discourse."[370]

Moreover, showing the wider ripple effect of legal action, the victim 'Jane' stated that she felt that: *"because of the claimant's actions in pursuing The Sunday Times after publication, he has been able to punish and torture me, effectively forcing me to prove that I'm a victim of rape and sexual assault without any repercussions. I do not wish to keep reliving this and hope that my involvement with this man will soon be over."*[371]

The impact on access to information and redress of wrongdoing in society

The right to defend oneself against spurious claims that may cause harm to individual reputations is not under question. The legitimacy of legal threats should be more thoroughly questioned, however, especially when they originate from those subject to investigations regarding their involvement in corruption. Particularly as this can impact society's right to information and the potential redress of wrongdoing.
As already discussed, the imbalance of power between those who have the funds to pursue legal action, and journalists and media outlets who have limited resources to defend themselves is considerable. As the journalist Oliver Bullough has described, this can also feed into an unfortunate feedback loop: "*journalists struggle to make accusations of wrong-doing against wealthy litigious people if those people haven't been convicted of a crime; while police officers don't know anything wrong is happening, because journalists can't write about it, so those people don't get convicted of a crime."* [372]

One example is that of fraudster Raheem Brennerman, a multimillionaire businessman who tried in 2014 to quash a Sunday Times investigation into his dealings surrounding a property development in Belgravia, for which the Royal Bank of Scotland (RBS) had lent him £146.5m.[373] In an article published in April 2013, The Sunday Times stated that Brennerman controlled a possible sham offshore trust linked with the Belgravia development, in which charities including Cancer Research UK and the National Trust were unknowingly named as the beneficiaries.[374] The paper stated that: *"Naming a charity as the main beneficiary of a trust reduces the requirements for identity and anti-money-laundering checks and they can be removed from trust documents shortly before any funds are distributed without the charity knowing anything about it."*[375] According to the newspaper, Brennerman hired some of the best lawyers in London, including the legal firm Carter-Ruck and the barrister Desmond Browne QC, to defend his reputation.[376] While Brennerman's case was eventually struck out, after he failed to make a payment for security of costs, the case lasted more than 18 months and the newspaper never recouped its almost half a million pounds in legal costs.[377] It was not until four years later that Brennerman was eventually convicted in US federal court in New York for *"operating a wide-ranging scheme to fraudulently obtain tens of millions of dollars in bank financing"* and sentenced to 12 years in prison.[378]

[370] Gabriel Pogrund, Charlie Elphicke: the predator MP and his protection racket, The Times, March 2022, https://www.thetimes.co.uk/article/charlie-elphicke-the-predator-mp-and-his-protection-racket-3kb30pl6w
[371] Ibid.
[372] Oliver Bullough, Moneyland: Why Thieves & Crooks Now Rule The World & How to Take It Back.
[373] Jon Ungoed-Thomas and Duncan Campbell, Fraudster Raheem Brennerman faces 90 years in jail, The Times, December 2017, https://www.thetimes.co.uk/article/fraudster-raheem-brennerman-faces-90-years-in-jail-x7glhj9hh
[374] Jon Ungoed-Thomas, Duncan Campbell and Craig Shaw, Red Cross and Greenpeace sucked into tax black hole, The Times, April 2013, https://www.thetimes.co.uk/article/red-cross-and-greenpeace-sucked-into-tax-black-hole-85cl7cqcjxb
[375] Ibid.
[376] Jon Ungoed-Thomas and Duncan Campbell, Fraudster Raheem Brennerman faces 90 years in jail, The Times, December 2017, https://www.thetimes.co.uk/article/fraudster-raheem-brennerman-faces-90-years-in-jail-x7glhj9hh
[377] Ibid.
[378] U.S. Attorney's Office, Southern District of New York, Chairman and CEO of Sham Oil and Gas company sentenced to 12 years in prison for international fraud scheme, United States Department of Justice, November 2018, https://www.justice.gov/usao-sdny/pr/chairman-and-ceo-sham-oil-and-gas-company-sentenced-12-years-prison-international-fraud

Another example is that of cyclist Lance Armstrong who sued The Sunday Times and two journalists over a 2004 article that raised questions regarding his performance, which resulted in a settlement of £300,000.[379] After Armstrong finally admitted he was a drug cheat in 2013, The Sunday Times and journalists managed to reclaim the costs of the settlement but by which point it was almost a decade later.[380] There are parallels with the cases of sexual predators Jimmy Saville and Harvey Weinstein, both of whom readily utilised the threat of legal action, and demonstrate how it can take years to hold the rich and powerful to account.[381]

Even after the #MeToo movement, The Telegraph reported in 2018 that it had been the subject to an injunction obtained by a leading businessman to prevent the newspaper revealing alleged sexual harassment and racial abuse of staff. The Telegraph stated that they had spent the previous eight months investigating allegations of bullying, intimidation and sexual harassment made against the businessman, but because many of the victims had signed NDAs the court had found in the businessman's favour.[382] The paper was able to report that the accused man was being represented by Schillings, had hired a team of at least seven lawyers, and spent close to £500,000 in legal fees to persuade the Court of Appeal to grant an injunction.[383] Shortly afterwards Lord Hain, a former Labour cabinet minister, named the businessman as Phillip Green, then owner of the retail chain Topshop. Hain stated he had been contacted by someone *"intimately involved in the case*" and felt a *"duty"* to reveal the name using parliamentary privilege.[384]

Meanwhile, the impact of recent global journalistic investigations – such as The Panama Papers and Paradise Papers, published by organisations including OCCRP, the ICIJ and others – have led to high profile resignations, changes to financial regulation, arrests and indictments against criminal figures, as well as the recovery of several billions in fines and seizure of illicit funds.[385] This demonstrates the importance of investigative journalism, yet governments and official bodies who rely on their findings to investigate wrongdoing often overlook its value. Governments and official bodies have been slow to recognise, if they have at all, the serious challenge legal threats journalists can face personally – not to mention the broader implications for media freedom and the safety of journalists.

When OCCRP published the Azerbaijan Laundromat in 2017, it found that between 2012 and 2014, $2.9 billion had been laundered through a complex scheme involving four shell companies registered in the UK. These funds were then used by members of Azerbaijan's political elite to *"pay off European politicians, buy luxury goods, launder money, and otherwise benefit themselves"*.[386] This scheme was in use at a time when there was a severe crackdown on civil society and independent media inside Azerbaijan, including the arrest and imprisonment of Radu's colleague Khadija Ismayilova. In February 2020, the European Court of Human Rights ruled that there was no *"reasonable suspicion"* that Ismayilova committed the crimes she was accused of; rather, her imprisonment was an attempt to silence her journalism.[387] *"If someone wants to hurt you, they will go to the jurisdiction where they can hurt you the most,"* OCCRP co-founder Drew Sullivan recently commented to the authors of this report.[388] While Ismayilova could be silenced by

[379] Richard Sandomir, Armstrong is suing accuser, New York Times, June 2004, https://www.nytimes.com/2004/06/16/sports/cycling-armstrong-is-suing-accuser.html
[380] BBC Sport, Lance Armstrong 'agrees Sunday Times settlement', August 2013, https://www.bbc.com/sport/cycling/23830777
[381] Charlie Holt, How abusive lawsuits block accountability – and what we can do to fight back, FPC, February 2021, https://fpc.org.uk/how-abusive-lawsuits-block-accountability-and-what-we-can-do-to-fight-back/
[382] Claire Newell, The British #MeToo scandal which cannot be revealed, The Telegraph, October 2018, https://www.telegraph.co.uk/news/2018/10/23/british-metoo-scandal-cannot-revealed/
[383] Ibid.
[384] Claire Newell, Hayley Dixon, Callum Adams, Sophie Barnes and Ben Rumsby, Sir Philip Green named in Parliament as businessman at centre of Britain's #MeToo, The Telegraph, October 2018, https://www.telegraph.co.uk/news/2018/10/25/sir-philip-green-named-parliament-businessman-centre-britains/
[385] OCCRP, Impact to Date, Updated February 2022, https://www.occrp.org/en/impact-to-date; ICIJ, ICIJ Story, https://www.icij.org/about/icijs-story/ ; Douglas Dalby and Amy Wilson-Chapman, Panama Papers helps recover more than 1.2 billion around the world, ICIJ, April 2019, https://www.icij.org/investigations/panama-papers/panama-papers-helps-recover-more-than-1-2-billion-around-the-world
[386] OCCRP, The Azerbaijani Laundromat, September 2017, https://www.occrp.org/en/azerbaijanilaundromat/
[387] ARTICLE 19, Azerbaijan: ECHR ruling confirms government failing to protect journalists from abuse, January 2019, https://www.article19.org/resources/azerbaijan-echr-ruling-confirms-government-failing-to-protect-journalists-from-abuse/
[388] Comments made to FPC's Project Director Susan Coughtrie.

imprisonment at home in Baku, for Radu, and OCCRP as an outlet, the UK's libel laws appeared to provide the best option.

Sullivan added: *"Organized crime figures and dodgy London lawyers are a match made in hell. The lawyers actively promote legal attacks on vulnerable media to their clients who are dangerous people whose lives are steeped in the usage of fear, intimidation and threats. London courts gleefully take these cases on as if they are legitimate deliberative issues. They are not. We usually win in the end but at a cost. It's a farce. When our Azerbaijani reporters are writing about Azerbaijani citizens doing bad deeds in Azerbaijan, our UK lawyers are recommending nonsensical public interest phrases be added to protect us from UK lawsuits. It's a farce."*[389]

OCCRP's original investigation, together with information that had been sealed in the Javanshir Feyziyev settlement, were later utilised in a National Crime Agency (NCA) investigation into £15 million of allegedly corruption funds held by the UK based wife, son and nephew of Feyziyev.[390] In a civil proceeding, held in November 2021, a lawyer for the NCA presented a detailed analysis to bolster the agency's argument that the money had flowed through the Azerbaijani Laundromat. In January 2022, a UK court approved the NCA's seizure of £5.6m from members of Feyziyev's family.[391] In July 2021, the NCA had also seized £4 million from an Azerbaijani couple, Izzat Khanim and Suleyman Javadov, after they accepted that the money came into the UK unlawfully via the Azerbaijani laundromat.[392]

In response to the evidence given on the issue of SLAPPs to the House of Lords Communications and Digital Committee, Baron Lipsey, commented, that much of what he had heard was very *"familiar"* to what he had experienced when he was in charge of responding to libel cases as deputy editor of the Times, 30 years ago. While acknowledging several changes have happened since, he concluded that one of the key factors making this *"a very imminent problem"* today, is that *"newspapers are a lot poorer than they were, and so less able to invest in their journalists' protection, and there are more rich crooks who are prepared to go to any lengths to clear their reputation."*[393]

As the cases highlighted in this report have demonstrated, even from an early stage the inequality of arms present between those threatening legal action and journalists trying to defend themselves is often significant. Reform is needed urgently, not only for the protection of journalists and media freedom, but to ensure those involved in wrongdoing cannot utilise UK laws – or even the threat of utilising them – to evade being held to account simply because they are rich enough to do so.

[389] Comments made to FPC's Project Director Susan Coughtrie.
390 Miranda Patrucic and Ilya Lozovsky, UK Aims to Seize £15 Million From Family of Azeri Politician, OCCRP, November 2021, https://www.occrp.org/en/daily/15402-uk-aims-to-seize-15-million-from-family-of-azeri-politician
391 Steve Swann and Dominic Casciani, Court approves £5.6m seizure over money laundering, BBC News, January 2022, https://www.bbc.co.uk/news/uk-60203664
[392] Martin Bentham, 'Laundromat' couple hand over £4m after Evening Standard win, Evening Standard, July 2021, https://www.standard.co.uk/news/uk/laundromat-couple-izzat-khanim-javadova-suleyman-javadov-4m-pounds-evening-standard-win-b944136.html
[393] Communications and Digital Committee, Uncorrected oral evidence: Lawfare and free speech, House of Lords, March 2022, https://committees.parliament.uk/oralevidence/10070/pdf/

Chapter 5. Potential steps to mitigate SLAPPs in the UK context

On 17th March 2022, UK Deputy Prime Minister Dominic Raab announced a consultation on legislative proposals to address SLAPPs together with *"a call for evidence that asks for views on how to make these reforms as targeted and effective as possible"*.[394] The announcement marked the most notable step towards the realisation of anti-SLAPP measures being adopted in the UK to date. While timing of the consultation's launch was seen as part of the Government's wider response to Russia's invasion into Ukraine in late February, there has been rapidly growing political interest to address SLAPPs. Several Members of Parliament (MPs) have spoken out on the issue in recent months, with a cross-party effort by the MPs David Davis and Liam Byrne resulting in a backbench debate on 'Lawfare and the UK Court System' in January 2022.[395]

This chapter looks at the principles that should underpin potential solutions to mitigate SLAPPs, pinpoints areas of concern relating to legislation in England and Wales, as well as briefly examining anti-SLAPP initiatives in other jurisdictions. While anti-SLAPP laws have been introduced at a state or regional level in the US, Canada and Australia, there is so far no dedicated law against SLAPPs at any level in Europe.[396] CASE has been campaigning for a EU Anti-SLAPP Directive, which would have no applicability in the UK, as well as for a recommendation at the Council of Europe (CoE), of which the UK remains a member.[397]

As it stands, there is therefore both a need for the UK to introduce its own legislative measures to tackle SLAPPs and an opportunity for the UK to lead the way in Europe to adopt measures at a national level that would safeguard free speech against the threat of abusive lawsuits and legal intimidation. Given that the UK is a leading international source of transnational legal threats, as already highlighted in the FPC's research, which was also cited in the background document to the Government's call for evidence, anti-SLAPP measures would have an impact both domestically and abroad. While much of the focus of anti-SLAPP measures has been on legislative change, there is also an argument for stronger regulatory oversight of law firms, which, wittingly or unwittingly, facilitate legal intimidation and SLAPPs on behalf of their clients.

Main principles and approaches

Encouragingly the UK Government's consultation document reflects a number of the recommendations and the main areas of concern put forward by the UK Anti-SLAPP Coalition.[398] In July 2021, 22 members of the UK Anti-SLAPP Coalition released a policy paper *On Countering Legal Intimidation and SLAPP in the UK*, which sets out the following overarching principles to be applied in the creation of anti-SLAPP measures, in line with similar initiatives taken elsewhere:[399]

- **SLAPPs are disposed of and dealt with expeditiously in court:** SLAPPs take advantage of the litigation *process* to harass and intimidate their targets. The shorter the process, the less potential there is for

[394] UK Parliament, The Lord Chancellor and Secretary of State for Justice (Dominic Raab) contribution to Strategic Lawsuits Against Public Participation debate, Volume 710: debated on Thursday 17 March 2022, Hansard Parliament, https://hansard.parliament.uk//commons/2022-03-17/debates/294F53A7-AD78-4ACC-B4B6-FC556CBA93B1/StrategicLawsuitsAgainstPublicParticipation#contribution-597376B2-51B6-4E97-990D-FBCF6DE35095

[395] UK Parliament, Mr David Davis contribution to Lawfare and UK Court System debate, Volume 707: debated on Thursday 20 January 2022, Hansard Parliament, https://hansard.parliament.uk/Commons/2022-01-20/debates/4F7649B7-2085-4B51-9E8C-32992CFF7726/LawfareAndUKCourtSystem?highlight=strategic%20lawsuits%20against%20public%20participation#contribution-61B08842-CF97-4224-BFE0-29C311B22728

[396] Jeremy Goldman, Freedom of Speech Gets a Big Boost With New York's Passage of Widely Expanded Anti-SLAPP Law, Lexology, November 2020, https://www.lexology.com/library/detail.aspx?g=de4a0093-e3e9-4172-b0a2-b3eac0741b99; Ryan Patrick Jones, B.C. legislature unanimously passes anti-SLAPP legislation, CVC, March 2019, https://www.cbc.ca/news/canada/british-columbia/legislature-passes-anti-slapp-1.5049927

[397] CASE, The need for an EU Anti-SLAPP Directive, https://www.the-case.eu/campaign-list/the-need-for-an-eu-anti-slapp-directive

[398] Ministry of Justice, Strategic Lawsuits Against Public Participation – A Call for Evidence, March 2022, https://consult.justice.gov.uk/digital-communications/strategic-lawsuits-against-public-participation/supporting_documents/slappscallforevidenceweb.pdf

[399] UK Anti-SLAPP Coalition, A Policy Paper: Countering legal intimidation and SLAPPs in the UK, July 2021, https://fpc.org.uk/wp-content/uploads/2021/07/Policy-Paper-Countering-legal-intimidation-and-SLAPPs-in-the-UK.pdf

abuse. The importance of disposing of a SLAPP quickly is particularly acute prior to the costly disclosure process, which provides the greatest opportunity for legal harassment.

- **Costs for SLAPP *targets* are kept to an absolute minimum:** an award of costs post-SLAPP is an important measure, but not sufficient in this regard. Costs need to be minimised throughout the litigation process to avoid the financial threat of prolonged litigation.
- **Costs for SLAPP *litigants* are sufficient to deter SLAPPs:** these must be made automatically available so as not to represent a further burden for those already exhausted by the litigation process. Can take the form of punitive or exemplary damages or other sanctions.
- **Laws implicating speech are narrowly drafted and circumscribed:** that is to say, they must be tightly worded enough to prevent their application being stretched to cover legitimate acts of public participation.
- **The use of SLAPPs or legal intimidation is delegitimised as a means of responding to criticism:** this principle requires a process of delegitimisation, involving an expansion of industry standards, engagement with stakeholders on the incoming standards and finally clear enforcement if the use of SLAPPs or legal intimidation is used in contradiction to these standards.

The policy paper outlined four different approaches that, taken together, would address the principles outlined above and should be encompassed in any efforts to counter legal intimidation and SLAPPs in the UK:

1. The introduction of an Anti-SLAPP Law to strengthen procedural protection;
2. A legal review and reform of relevant laws to reduce opportunities for abuse;
3. The tightening of regulatory and ethical standards covering industries facilitating SLAPPs or issuing baseless legal threats; and
4. The expansion of admissibility of legal aid or otherwise providing funding for defendants acting in the public interest.

The provision of legal aid or other sources of funding is important to enable SLAPP defendants to fight cases. Charlie Holt, a lawyer with English PEN and Greenpeace International with experience of working on anti-SLAPP initiatives both in the US and Europe explains that the provision of legal aid would recognise the fact that, regardless of the outcome of the lawsuit, SLAPPs operate through the litigation process:

> *"Even if costs are awarded on a full indemnity basis to a winning defendant, and even if that defendant is sure of victory from the beginning of the trial (which can be still challenging given the various ambiguities in the English and Welsh laws utilised for the purposes of SLAPP), a defendant who lacks the resources to fight a case through to trial will still think twice about pursuing a defence. Many will end up quietly retracting and apologising, as the cost burden required to continue a case becomes too great to bear."*[400]

Therefore, providing financial support to public watchdogs from the beginning of proceedings empowers those targeted by SLAPPs to fight back and prove their case in court. In the UK, the easiest way of doing this would be to expand the eligibility for legal aid; with a targeted fix being to expand the type of cases qualifying for legal aid under Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LAPSO).[401] This would provide a means by which any defendant being sued for acts of public participation, regardless of the law utilised against them, would have access to legal aid.

In November 2022, proposals for potential reform were launched at the first ever UK anti-SLAPP conference by Holt, who is a co-chair of the UK Anti-SLAPP Coalition. Developed with support from media

[400] Comments made to FPC's Project Director

[401] Legislation.gov.uk, Legal Aid, Sentencing and Punishment of Offenders Act 2012, October 2012, https://www.legislation.gov.uk/ukpga/2012/10/contents/enacted

law experts, who participated in two roundtables held in September and October 2022, these proposals set out what could be done by amending current judicial guidance and Civil Procedure Rules (CPR) to push back against SLAPPs, but ultimately pointed to a need for a UK Anti-SLAPP Law to bring about the level of procedural change necessary to fully address the problem.[402] These draft reforms are attached in full as an appendix to this report (page 84).

Calls for a UK Anti-SLAPP Law gathered notable political backing in a backbench Parliamentary debate on 'Lawfare and the UK Court System', held on 20th January 2022. Sponsored by the MPs David Davis and Liam Byrne the debate had cross-party support from more than 30 MPs.[403] As well as highlighting individual cases, many of which are featured in this report, almost all those who spoke during the debate called for urgent action to address this issue. Bob Neil, Chair of Parliament's Justice Select Committee, stated that a UK Anti-SLAPP Law is *"worthy of consideration… because it could involve an early strike-out mechanism that would speed up the means of dealing with cases without any substantive merit that have clearly been brought for the purposes of intimidation through a war of attrition*."[404]

While the exact formulation of an Anti-SLAPP Law is being considered, there has already been interest in both chambers of the Parliament to put forward Private Members Bills to address SLAPPs. On 18th March, Lord Thomas of Gresford, a former judge, presented his Strategic Litigation Against Public Participation (Freedom of Expression) Bill, for which he had drawn on the law in place in Ontario, Canada.[405]

Addressing issues within UK legislation

2013 Defamation Act

While 2013 reforms introduced a serious harm threshold, a public interest defence, a single publication rule and tightened up jurisdictional checks, in other respects the law remains burdensome and procedurally complex, leading to cases lasting years before resolution.[406] Although a defendant can in theory use several legal mechanisms to have a claim that is clearly without merit dismissed early, in practice, a defendant will have spent tens of thousands on lawyers' fees just to get to that point and so this is not a real deterrent. A motion to strike need to be introduced at a much earlier stage and with a higher threshold protections for publications in the public interest.

Application of Section 9 of the Defamation Act

One of the main impetuses for the Defamation Act 2013 was the recognised need to curb the so called 'libel tourism' which was seen to stifle reporting. Ken Clarke, who was the Justice Secretary when the initial Defamation Bill was introduced to Parliament, recognised the danger posed by libel tourism as the bill for the now Defamation Act was being passed and expressed concerns about the use of *"threatened proceedings by wealthy foreigners"*, even though many of the cases may not end up in the British courts.[407] This is also set out in the accompanying explanatory notes to the Defamation Act 2013, which expressly states that the purpose of the Defamation Act 2013 is to prevent libel tourism.[408]

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[402] Judicial guidance should be used to help assist judges in the interpretation of existing measures, whether procedural protections under civil procedural rules or statutory mechanisms that exist to address SLAPPs. 'Practice directions' give practical advice to judges on how to interpret the CPR – while this is unique to England and Wales, the principles could apply to all UK jurisdictions.

[403] UK Parliament, Lawfare and UK Court System, Volume 707: debated on Thursday 20 January 2022, Hansard, https://hansard.parliament.uk/commons/2022-01-20/debates/4F7649B7-2085-4B51-9E8C-32992CFF7726/LawfareAndUKCourtSystem

[404] UK Parliament, Sir Robert Neill contribution to Lawfare and UK Court System debate, Volume 707: debated on Thursday 20 January 2022, Hansard Parliament, https://hansard.parliament.uk/Commons/2022-01-20/debates/4F7649B7-2085-4B51-9E8C-32992CFF7726/LawfareAndUKCourtSystem#contribution-963D0363-DA44-467F-A58C-EDD6687D1D83

[405] UK Parliament, Strategic Litigation Against Public Participation (Freedom of Expression) Bill [HL], Volume 820: debated on Friday 18 March 2022, Hansard, https://hansard.parliament.uk/lords/2022-03-18/debates/0FA3F130-8A2D-4E14-9608-825ABEB61967/StrategicLitigationAgainstPublicParticipation(FreedomOfExpression)Bill(HL)

[406] Nik Williams, Laurens Hueting and Paulina Milewska, The increasing rise, and impact, of SLAPPs: Strategic Lawsuits Against Public Participation, Foreign Policy Centre, December 2020, https://fpc.org.uk/the-increasing-rise-and-impact-of-slapps-strategic-lawsuits-against-public-participation/

[407] House of Commons debate Tuesday 12 June 2012, Parliament.uk, https://publications.parliament.uk/pa/cm201213/cmhansrd/cm120612/debtext/120612-0001.htm#12061240000667

[408] Legislation.gov.uk, Defamation Act 2013, https://www.legislation.gov.uk/ukpga/2013/26/notes/division/5/9

As a consequence, Section 9(2) of the Defamation Act states that:

> *A court does not have jurisdiction to hear and determine an action to which this section applies unless the court is satisfied that, of all the places in which the statement complained of has been published,* ***England and Wales is clearly the most appropriate place*** *in which to bring an action in respect of the statement.*

It is clear that the legislation has set a higher bar for defendants that are not domiciled in the UK or a contracting State to the Lugano Convention.[409] A case that supports this and has had benefit of judicial interpretation has been the case of Ahuja v Poltika.[410] The judge in the case referred to the issue of libel tourism, and ultimately decided that England and Wales is not the most appropriate place to conduct the libel action. The case focused on the extent to which the article had been published in the UK, since the claimant had argued that he had a global reputation because it had been viewed in the UK.

The dissemination of content on the internet, combined with arguments over global reputations, can facilitate claimant's cases coming within the purview of Section 9 of Defamation Act. To prevent the Section being vulnerable to misuse, it is vital that, as demonstrated in cases such as Wright v Ver, the consideration of whether England and Wales is the most appropriate jurisdiction is highly fact specific and evidence based.[411] This approach will maintain the purpose of Section 9 of the Act, which is to curb libel tourism.

Additionally, when judges are assessing jurisdictional arguments there is little, if any, focus on whether the claimant's choice of jurisdiction may be being used as a possible basis for aggressive litigation or threats of litigation, to prevent discussion of matters of public interest that may constitute a SLAPP. This may be the reason why there is still concern as to whether the courts of England and Wales are still hosting claims that appear to have tenuous links to the UK.[412] In order to guard against abuse, understanding how Section 9 can be abused as a potential form of SLAPP should form an integral part of the assessment.

Serious Harm and Public Interest

Section 1 of the Defamation Act 2013 introduced the threshold of 'serious harm'. In relation to the case of corporate claimants, they must be able to prove that the publication resulted in serious financial loss. The evidential burden for a corporate claimant under Section 1(2) – requiring evidence of financial or anticipated financial loss – has provided some way of limiting such claims, particularly for big companies.[413] Implementing a higher threshold for corporate claimants is a welcome development in combatting SLAPP actions in particular.

The public interest defence in Section 4 of the Defamation Act 2013 was welcomed at the time as a long overdue effort to strengthen the protection accorded to those writing in the public interest. It has been emphasised that Section 4 is also available to others outside traditional journalists, provided they have acted responsibly in trying to get the information.[414] This will usually involve approaching the subject of allegations for a comment and response and the conduct of a defendant will be assessed in line with whether they were acting responsibly. However, while Section 4 provides greater clarity than the old *Reynolds* defence ever did, there is still some ambiguity in relation to the definition of 'reasonable belief' that creates uncertainty in the law. This has limited the scope of its application. This was discussed in the case of Lachaux where the public interest defence failed on the second limb, that of 'reasonable belief' in

[409] S9(1) Defamation Act 2013 .For information on the Lugano Convention see: https://ukandeu.ac.uk/the-facts/what-is-the-lugano-convention/
[410] [2015] EWHC 3380 (QB)
[411] [2019] EWHC 2094 (QB)
[412] UK Anti-SLAPP Coalition, A Policy Paper: Countering legal intimidation and SLAPPs in the UK, July 2021, https://fpc.org.uk/wp-content/uploads/2021/07/Policy-Paper-Countering-legal-intimidation-and-SLAPPs-in-the-UK.pdf
[413] Guy Vassal-Adams, Corporate Claimants in Libel: Part 2, The Defamation Act 2013 and its Impact, Matrix Chambers, November 2020, https://www.matrixlaw.co.uk/resource/corporate-claimants-in-libel-part-2-the-defamation-act-2013-and-its-impact-by-guy-vassall-adams-qc/
[414] Doyle v Smith [2018] EWHC 2935

the public interest.[415] The test is subjective but it appears that many of the old *Reynolds* criteria will remain relevant in determining what constitutes 'reasonable'. Whilst this may be achievable for more seasoned journalists and bigger organisations that are sufficiently resourced, without a good in-house lawyer it can be difficult to know if all the steps needed to have a 'reasonable belief' have been effectively followed. This creates the basis for claimants to effectively do a deep dive into everything the journalist did and make accusations of 'bad faith' reporting, which can give the journalist running a public interest defence the effect of being on trial. A further challenge is maintaining the confidentiality of sources and the worry that there may be a risk of surveillance in some more sensitive investigations.

Another issue with the application of 'reasonable belief' was identified in the case of Javanshir Feyziyev and The Journalism Development Network, Azerbaijan and Paul Radu.[416] This case highlighted the shortcomings for publishers not involved in the editorial decisions but who were still found responsible for publication. In such circumstances, the availability of Section 4 of the Defamation Act 2013 was limited because the defendants would struggle to demonstrate a 'reasonable belief that publication was in the public interest'.[417] Vigilance is needed to ensure that the public interest defence is applied in a practical way that does not undermine it by applying standards that are too difficult to overcome. Justice Warby highlighted that the public interest defence should be applied in a *"bespoke"* way that takes into account the individual defendant and their role, etc.[418] This is vital if it is to be an operable and robust defence against claims targeting acts of public participation. It can also be duly applied to the spectrum of defendants, whether professional journalists or citizen bloggers.

Since responsible journalism, rightly, features so heavily in whether public interest defence can and should succeed, it is crucial that the right of reply process should not be used by the recipient as a means to obtain an injunction to prevent publication or as a stalking ground for litigation. Any attempt by potential SLAPP claimants to abuse the process of right to reply should be heavily reprimanded through costs and other measures, such as identifying any action as a potential SLAPP in open court. The current media protocol stipulates that litigants in person be provided and comply with the protocol.[419] They also set out, that the claimant should notify 'as soon as possible' the intention to take legal action. Before allowing claims to be issued and proceed, the letter of claim should confirm that requests for information and matters such as right to reply have been responded to and engaged with in a reasonable and meaningful manner and in good faith. A new pre-action protocol dealing with claims targeting acts of public participation may need to be developed. Where 'good faith' engagement is not achieved a specific costs penalty should be referred to in the pre-action protocol, which will severely limit the damages, where available.

Privacy, Breach of Confidence and Misuse of Private Information

Potential misuse and abuse of Privacy laws

The question in all of these potential causes of action is whether the right to freedom of expression in Article 10 of the Human Rights Act 1998, codifying the right to freedom of expression into UK law, can override Article 8, the right to privacy. The assessment of competing convention rights, established in the case of Re S, means that no right has precedence against the other and whenever both Article 8 rights and Article 10 rights are engaged and in conflict, an *"intense focus on the comparative importance of the specific rights being claimed is necessary"*.[420] The issue for SLAPPs is the manner in which privacy actions can be abused to stifle legitimate free expression. Developments in privacy law have demonstrated that it is being used more than the law of defamation, and this is in part due to the relative ease in establishing a

[415] 5RB, Judgment in Lachaux, July 2021, https://www.5rb.com/news/lachaux-v-independent-print-limited-evening-standard-limited/
[416] [2019] EWHC 957 (QB)
[417] Ibid para 41
[418] [2016] EWHC 1853 (QB) para 246
[419] Civil Procedure Protocol. This protocol must be followed by all claimants and potential defendants when instigating a claim and engaging in litigation. Ministry of Justice, Pre-action Protocol for Media and Communications Claims, October 2019, https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def
[420] Per Lord Steyn, Re S [2004] UKHL47 paragraph 17

claim of privacy when compared to libel, which has a threshold of claims that pass the 'serious harm' test.[421]

Article 8 claims are wide in scope and have been referred to as the "*most elastic"* of rights.[422] This is key since, once an individual or subject matter engages Article 8, it is then open to whether Article 10 can override such interest, for example by stating that there are matters of public interest, which outweigh those rights. In line with the approach taken to Article 10 by the European Court of Human Rights, domestic law in England and Wales, has also highlighted that there must be distinctions drawn between personal life and those activities conducted in public life.[423] However, at the same time, key developments in privacy law have caused consternation for the media and those reporting on issues such as corruption and individuals subject to criminal or other types of investigation.[424] The upshot of many of these cases has been that in a climate of uncertainty around the balance of rights individuals invariably have leant on the right to privacy when they are being investigated or are suspected of involvement and prior to charge or when they are arrested.[425] However, privacy rights should not automatically override the public interest and the public's right to information. The latest decision in the Supreme Court in the case of Bloomberg v ZXC has amplified concerns on the potential ramifications for investigative journalism and matters of public interest.[426]

This case demonstrates the lack of clarity around the appropriate balance that must be kept in mind when finding in favour of Article 8 rights. This is especially so when, as in the aforementioned case, a significant part of the balancing exercise with regards to Article 8 rights (as they also pertain to the right to reputation) is the effect of publication on that right to reputation. Furthermore, public interest arguments were also extended to the public interest in maintaining confidentiality.[427] Whilst such an approach may be suitable in certain cases, it does serve to highlight the multiple factors that are coming within the purview of Article 8 and seemingly raises the question of whether factors giving rise to Article 8 are taking precedence over Article 10 rights, notwithstanding that neither is said to take precedence.

Whilst Article 8 does include an inherent right to reputation, publications of public interest should not be prevented for notional reputational reasons, especially where the reporting is factually accurate and tenets of responsible journalism have been followed. This becomes problematic in the respect of applications for injunctions, where privacy, as well as public interest, is instructive in deciding whether an injunction will be granted.[428] In applications for injunctions, which appear to bear the hallmarks of a SLAPP claim, it is important to ensure against abuse through rigorous consideration of Article 10 and the public interest, as required by Section 12(3) of the Human Rights Act. The fullness of Article 10, which includes the right to **receive** and **access** information, must constantly feature when faced with SLAPPs. Furthermore, reputational rights of those in receipt of SLAPPs ought to be considered as part of the balancing exercise. This approach was taken in the case of Sheikh Mohammed Bin Rashid al Makhtoum v HRH Princess Haya, where it was noted that publication was necessary in order to meet the Article 8 rights of the Princess and her children, in order to counter false and defamatory narratives that had been made.[429]

[421] Geoffrey Robertson, Free speech is being chilled by a misguided push for 'privacy', The Telegraph, March 2022, https://www.telegraph.co.uk/opinion/2022/03/14/free-speech-chilled-misguided-push-privacy/
[422] Per Lord Sumption in Association of Police officers v ACPO
[423] Yeo v Times Newspapers Limited para 137, see: https://www.judiciary.uk/wp-content/uploads/2015/11/yeo_v_tnl_-2015_ewhc_3375_qb_251115.pdf
[424] Richards v BBC [2018] EWHC 1837 (Ch)
[425] Panopticon Blog, ZXC v Bloomberg: privacy expectations and criminal investigations, May 2020, https://panopticonblog.com/2020/05/15/zxc-v-bloomberg-privacy-expectations-about-criminal-investigations/
[426] [2022] UKSC 5 see: https://www.supremecourt.uk/cases/docs/uksc-2020-0122-judgment.pdf; Pia Sarma, Privacy for suspects is a Supreme Court decision too far, The Times, February 2022, https://www.thetimes.co.uk/article/privacy-for-suspects-is-a-supreme-court-decision-too-far-2jqcffwb0
[427] Bloomberg v ZXC [2020] EWCA Civ 611, para 113
[428] See section 12(4) of the Human Rights Act 1998
[429] [2020] EWHC 122 para 74

Data Protection

As set out earlier in this report, data protection rights are increasingly being referred to in legal claims. They have featured in a number of landmark cases, including Richards v BBC, Campbell v MGN, and Weller & Ors v Associated Newspapers Limited. Similar to the balancing exercise undertaken in privacy claims set out above, Article 85 of the GDPR stipulate that data protection rights must be balanced against freedom of expression.

On the face of it, Section 32 of the Data Protection Act 1998 (commonly known as the 'journalistic exemption'), provides solid defences for anyone processing data for the purposes of journalism and with a view to publication. It is also clear from the guidance produced by the Information Commissioners Office (which at the time of writing is currently undergoing a consultation) that public interest and freedom of expression is a crucial component of the exemption. However, whilst journalism is construed widely, it did not extend to Google as a search engine, which could not meet the 'view to publication' standard.[430] This is a concern from an access to information perspective, where there is no recourse to the journalistic exemption and with claimants able to request for material to be removed from search engines and archives the ramifications for public knowledge and engagement on issues can be severely curtailed.[431]

SLAPPs and concerns about access to justice

A key argument often invoked in discussions about further legal reform in the UK, particularly to libel laws, is the importance of access to justice for those who have had their reputation allegedly defamed. During the last campaign for libel reform, a decade ago, one law professor raised a cautionary concern that: *"the current commentary on the law, particularly in England, has been remarkably one-sided and in some respects dangerously over-simplified. A number of causes célèbres have been exploited – on occasion with little concern for the underpinning facts – in order to secure superficial political impact*."[432] These are perhaps similar arguments that might face current efforts for reform of the UK legal system.
Certainly, harm to a person's reputation can be devastating and there have been examples in recent years of how wrong media outlets can get. Arguably, one of the most famous cases in recent history is that of retired schoolteacher Chris Jefferies who was falsely accused of the murder of his tenant Joanna Yeates in 2010. Eight British newspapers issued public apologies to Mr Jefferies after he sued them for libel, for which he also received substantial damages.[433] In a statement to the Leveson Inquiry, held between 2011-12, the culture, practices and ethics of the British media, Mr Jefferies said: *"The national media shamelessly vilified me… The UK press set about what can only be described as a witch hunt. It was clear that the tabloid press had decided that I was guilty of Miss Yeates's murder and seemed determined to persuade the public of my guilt."*[434]

The Leveson Inquiry was set up in response to the News of the World hacking scandal, in which journalists, working for the paper as well as others operated by Rupert Murdoch, were found to have been hacking into the phones of famous people as well as others who were the victims of crime, including the murdered school girl Mily Dowler. This completely unjustified invasion of privacy was a criminal act and several figures involved faced criminal prosecution and conviction, including former News of the World editor Andy

[430] ICO, Data protection and journalism: a guide for the media: Draft consultation, January 2014, https://ico.org.uk/media/about-the-ico/consultations/2045/data-protection-and-journalism-a-guide-for-the-media-draft.pdf; 5RB, (1) NT1 & (2) NT2 v Google LLC, April 2018, https://www.5rb.com/case/1-nt1-2-nt2-v-google-llc/
[431] See Data protection in media litigation by Jennifer Agate and Owen O'Rorke, Communications Law Vol. 21, No2, 2016 p47
[432] Then Professor of Law at the University of East Anglia, now Professor of Law and Head of the Law School at the University of Leeds. Alastair Mullis, Opinion: "Some comments on proposals for reform of laws governing freedom of expression and the media in Europe", Inforrm, June 2010, https://inforrm.org/2010/06/28/opinion-some-comments-on-proposals-for-reform-of-laws-governing-freedom-of-expression-and-the-media-in-europe-alastair-mullis/
[433] Alina Polianskaya, Christopher Jefferies: What happened to the man falsely vilified over Joanna Yeates' death played by Jason Watkins in ITV drama, I News, August 2020, https://inews.co.uk/culture/television/christopher-jefferes-now-joanna-yeates-murder-what-happened-jason-watkins-lost-honour-itv-581069
[434] Ibid.

Coulson.[435] The affair had the effect of eroding significant public trust in the media. However, it is important to remember that it was thanks to dogged investigative journalism by Nick Davies and his colleagues at The Guardian that the full depth of the horrors of the hacking scandal were exposed. This was despite significant pressure from Murdoch and his business empire. Davies, in a 2021 discussion of the scandal, described how Murdoch *"rained down legal letters"* on the police, in a tactic that led to him successfully avoiding being interviewed.[436] Murdoch's lawyers reportedly wrote a letter of complaint to Scotland Yard shortly after a The Guardian story stated he was wanted for questioning appeared.[437] In response, the Met's Directorate of Professional Standards (DPS) began a 'scoping exercise' to try to find out if there was a leak from Scotland Yard, and approached Davis to try to find out his sources.[438] The complicity of the police in the hacking scandal has been well documented, and the intervention of Davies and his colleagues were instrumental for the process of redress to take place.[439]

So where does that leave the question of access to justice? The right to individuals to protect their reputation is not under question. But while legal representation, and the right to defend yourself against spurious claims, is an important feature of democratic societies, the misuse of legal systems in an attempt to shut down public interest reporting must also be seen as undemocratic.[440]

The need to strengthen regulatory oversight

Steps should be taken to tighten industry and ethical standards in relation to abusive legal threats and SLAPPs, both with regards to law firms and reputation management companies, the latter of which is a largely under regulated industry.[441] More care should be taken by companies when on-boarding clients, ensuring in particular that the source of income being used to pay for the services is fully vetted.

Those in the legal profession have to balance competing obligations – including responsibilities to the court, the public interest and ensuring access to justice – as well as financial demands. However, In England and Wales, until recently neither the Solicitors Regulatory Authority (SRA) nor the Bar Council's Codes of Conduct have provisions explicitly relating to SLAPPs. The same is true of the Law Societies of Scotland and Northern Ireland.

On 4th March 2022, the SRA published their guidance on 'Conduct in Disputes', which marks the first time the SRA has explicitly recognised the issue of SLAPPs.[442] This updated guidance was also cited in the Government's consultation document and Raab in his announcement said the Government would be *"looking at the regulatory regime"*. This sets a good foundation for further regulatory initiatives, including the potential for a standalone anti-SLAPP warning notice, similar to one on Non-Disclosure Agreements (NDAs) which was published by the SRA in 2018 in light of the #MeToo movement. Warning notices are both an educational and regulatory tool, informing lawyers of their obligations and the standards to be expected in the way they engage in their communication on behalf of their client, as a framework by which to assess potential violations when reported to the SRA.

[435] Lisa O'Carroll, Andy Coulson jailed for 18 months for conspiracy to hack phones, The Guardian, July 2014, https://www.theguardian.com/uk-news/2014/jul/04/andy-coulson-jailed-phone-hacking
[436] Nick Davies, Rupert Murdoch: Scotland Yard want interview about crime at his UK papers, The Guardian, June 2014, https://www.theguardian.com/uk-news/2014/jun/24/scotland-yard-want-interview-rupert-murdoch-phone-hacking
[437] Dominic Ponsford, A year on from hacking trial verdict, has Rupert Murdoch avoided predicted police questioning?, PressGazette, June 2015, https://pressgazette.co.uk/year-hacking-trial-verdict-has-rupert-murdoch-avoided-predicted-police-questioning/
[438] Ibid.
[439] Daniel Morgan, Revealed: How The Metropolitan Police Covered-Up For Rupert Murdoch's News International, Bellingcat, June 2015, https://www.bellingcat.com/news/uk-and-europe/2015/06/22/revealed-how-the-metropolitan-police-covered-up-for-rupert-murdochs-news-international/
[440] Susan Coughtrie, Unsafe for Scrutiny: Examining the pressures faced by journalists uncovering financial crime and corruption around the world, FPC, November 2020, https://fpc.org.uk/publications/unsafe-for-scrutiny/
[441] Office of the Registrar of Consultant Lobbyists, see: https://registrarofconsultantlobbyists.org.uk/
[442] Solicitors Regulation Authority, Guidance: Conduct in disputes, March 2022, https://www.sra.org.uk/solicitors/guidance/conduct-disputes/

Without sufficient guidance and effective enforcement there is nothing stopping lawyers from knowingly pursuing lawsuits filed with the improper purpose of silencing criticism. This can result in the protection of, and impunity for, powerful corrupt individuals with deep pockets. Therefore, all Codes of Conduct relevant for the legal sector across the UK should be updated with information and guidance on identifying SLAPPs circulated and publicised, potentially through training or workshops, to members of the profession.

Lawyers acting on behalf of SLAPP litigants are also understood to often engage private intelligence firms, many of whom are well known for using deceptive tactics and intrusive surveillance designed to be highly intimidating. PR firms are also often engaged to smear the reputations of and spread misinformation about counterparties. Unlike many European countries, and US states, Britain has no statutory regulation of private investigators or PR firms, even after the 2011 tabloid phone hacking affair. Such firms are bound by privacy and other laws and legal procedures, but even those are sometimes looser in civil cases brought by private parties.[443] Lawyers have been able to benefit from these gaps in the law by using private investigation and PR firms to obtain evidence and tactical advantages such as paying witnesses for evidence in private-party civil proceedings.[444]

Anti-SLAPP initiatives in other jurisdictions

The UK is behind the curve when it comes to addressing the issue of SLAPPs. Anti-SLAPP legislation already exists in a few countries, though mostly at a state level – e.g. in some parts of the United States, Australia and Canada.[445] Meanwhile work is actively underway in the Europe Union to develop a solution that could be applied across the region. Below is a short overview of initiatives in these other jurisdictions.

United States

SLAPPs were first identified as a public threat to free expression in the United States during the 1980s and the original acronym 'SLAPP' was coined by two US law professors.[446] Generally speaking the First Amendment of the US Constitution has been recognised as providing a stronger defence against challenges to freedom of expression than exists in most other countries. However, with an increase in cases taken against those speaking out in the public interest, US state legislatures started to look at introducing specific anti-SLAPP measures. Today, 32 states have anti-SLAPP statutes, which generally allow defendants to file for early dismissal and recover attorney's fees and costs, however they do vary considerably in their content and design.[447] Some only cover a limited area of interest or provide a narrow definition whereby the plaintiff can only be a 'public applicant or permittee'.[448] As a result, these statutes have been criticised for curtailing the definition of SLAPP in a way that excludes their use in cases involving media defendants, for example.[449] Other US states, such as California, allow defendants to file a so-called 'SLAPPback' lawsuit, suing the filer of a SLAPP to recover sometimes considerable damages for abuse of the legal process.[450] There have been several attempts to push anti-SLAPP Bills through Congress, including as recently as 2020. While these have failed, campaigners continue to push for anti-SLAPP measures to be taken forward through the federal level in the US.

[443] Franz Wild, Isobel Koshiw , Jane Bradley , Andrew Higgins, TBIJ, The power of money: how autocrats use London to strike foes worldwide, 18 June 2021, https://www.thebureauinvestigates.com/stories/2021-06-18/the-power-of-money-how-autocrats-use-london-to-strike-foes-worldwide

[444] Paying a witness would breach England's rules governing public prosecutions however.

[445] Similar laws now exist in the Canadian provinces of British Columbia and Quebec, as well as one Australian territory.

[446] George W. Pring, SLAPPs: Strategic Lawsuits against Public Participation, Pace Environmental Law Review, Volume 7 Issue 1 Fall 1989 Article 11, September 1989, https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1535&context=pelr

[447] Jared Schroeder, SLAPP Fight: How Journalists Are Pushing Back on Nuisance Lawsuits, GIJN, September 2021, https://gijn.org/2021/09/14/slapp-fight/

[448] Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, The Use of SLAPPs to Silence Journalists, NGOs and Civil Society, Study requested by the JURI committee, European Parliament, June 2021, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf

[449] Ibid; L Wright-Pegs, 'The Media SLAPP Back: An Analysis of California's Anti-SLAPP Statute and the Media Defendant' (2019) UCLA Entertainment Law Review 323, 332-339

[450] Reporters Committee for Freedom of the Press, California, https://www.rcfp.org/anti-slapp-guide/california/

Canada

Three provinces in Canada have adopted anti-SLAPP measures: Quebec, Ontario and British Columbia. In 2009 Quebec amended its Code of Civil Procedure to create an anti-SLAPP mechanism. While it was the first attempt of its kind in Canada, it has since been argued to *"less effective because it focuses on the motives for bringing a lawsuit*".[451]

A more praised approach was taken by legislators in Ontario, who adopted in 2015 the Protection of Public Participation Act, which allows for cases to be dismissed at a much earlier stage on a widely defined public interest grounds. Under the law, lawsuits targeting expression on a matter of public interest will only be allowed to proceed if *"two things are proven: first, there is some evidence that the claim will succeed; and second, the harm in dismissing the case outweighs the harm in letting it proceed."*[452] Importantly, if the case fails at this early stage, the claimant is fully responsible for the legal fees of the defendant, making the prospect of bringing vexatious or weak cases much less attractive. In 2019, British Columbia followed Ontario with its own Protection of Public Participation Act, which has a similar mechanism for early dismissal if the case impinges the defendant's right to public participation.[453]

Australia

In 2008, the Australia Central Territory (ACT) enacted the Protection of Public Participation Act, the only law recognised as a specific anti-SLAPP initiative in Australia. As it is not a national law, its applicability is narrow, and it has also been criticised for being not being sufficiently effective. It places a 'heavy' focus on the concept of 'improper purpose' of the plaintiff's suit, which is defined as cases *"aiming to discourage public participation, to divert the defendant's resources, and to punish the defendant's public participation"*.[454] The authors of a 2021 study on SLAPP legislation, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee, found that *"the high threshold posed by this narrow definition fails to recognise the fact that the main problem with SLAPPs is that the litigation process itself, regardless of the outcome, constitutes a threat to public participation."*[455]

However, there have been amendments to existing defamation laws, which appear to potentially reduce the success of some SLAPP cases getting off the ground, when filed by corporations. Amendments to the Defamation Act 1974 in New South Wales (NSW) in the early 2000s removed the right of most corporations to sue for defamation, effectively limiting it to companies with fewer than ten full time or equivalent employees and not-for-profit enterprises.[456] The NSW reform was later adopted nationally in the 2005 Defamation Act (that uniformed defamation laws across Australia) that came into effect on 1st January 2006.[457] Unlike the UK, this means that very few corporations can bring actions for defamation in Australia. Companies that want to protect their reputations have to resort to less plaintiff friendly causes of action, like injurious falsehood (the equivalent of malicious falsehood in the UK). In July 2021, Australia also

[451] CanLII, Code of Civil Procedure, CQLR c C-25.01, October 2021, https://www.canlii.org/en/qc/laws/stat/cqlr-c-c-25.01/latest/cqlr-c-c-25.01.html; Hilary Young, Anti-SLAPP laws help keep frivolous lawsuits out of the courts, but not every province has them, The Conversation, June 2021, https://theconversation.com/anti-slapp-laws-help-keep-frivolous-lawsuits-out-of-the-courts-but-not-every-province-has-them-162579#:~:text=Had%20they%20pursued%20it%2C%20the,perhaps%20intended%20to%20stifle%20criticism

[452] Ibid.

[453] CanLII, 1704604 Ontario Ltd. V. Pointes Protection Association, 2020 SCC 22 (CanLII), September 2020, https://www.canlii.org/en/ca/scc/doc/2020/2020scc22/2020scc22.html?autocompleteStr=pointes%20protection&autocompletePos=2; Ryan Patrick Jones, B.C. Legislature unanimously passes anti-SLAPP legislation, CBC, March 2019, https://www.cbc.ca/news/canada/british-columbia/legislature-passes-anti-slapp-1.5049927

[454] Protection of Public Participation Act 2008, section 6(a)-(c).

[455] Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, The Use of SLAPPs to Silence Journalists, NGOs and Civil Society, Study requested by the JURI committee, European Parliament, June 2021, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf; They cited G Ogle, 'Anti-SLAPP reform in Australia' (2010) 19(1) Review of European Community & International Environmental Law 35.

[456] New South Wales Consolidated Acts, DEFAMATION ACT 2005 – SECT 9 Certain corporations do not have cause of action for defamation, http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/repealed_act/da197499/s8a.html

[457] New South Wales Consolidated Acts, DEFAMATION ACT 2005 – SECT 10A Serious harm element of cause of action for defamation, http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/da200599/s9.html

introduced a serious harm threshold for defamation, mirroring that in the Defamation Act 2013 (UK).[458] As with the UK law, it is foreseen that this will further restrict the rights of corporations to sue for defamation because it requires a publication to have caused or be likely to cause serious financial harm.

Council of Europe

Several texts adopted at the CoE, explicitly refer to the problem of SLAPPs, and other forms of legal intimidation, including the Committee of Ministers 2018 Recommendation on the roles and responsibilities of internet intermediaries and the 2012 Declaration on the desirability of international standards dealing with forum shopping in respect of defamation, to ensure freedom of expression. In October 2020, CoE Human Rights Commissioner Dunja Mijatović outlined a threefold approach she argues is needed as part of a comprehensive response to effectively counter SLAPPs, including:[459]

- Preventing the filing of SLAPPs by allowing the early dismissal of such suits;
- Introducing measures to punish abuse, particularly by reversing the costs of proceedings; and
- Minimising the consequences of SLAPPs by giving practical support to those who are sued.

Mijatović noted that the European Court of Human Rights has already stressed that States are required to create a favourable environment for participation in public debate by all, enabling everyone to express their opinions and ideas without fear.

In 2021, CASE launched a campaign for a recommendation at the Council of Europe noting that *"apart from the indirect legal standards provided by the ECtHR and brief references in existing policy documents and calls by its Commissioner for Human Rights, the Council of Europe lacks a coherent set of guidelines on how national law and practice should prevent SLAPPs".*[460]

In January 2022, the Parliamentary Under-Secretary of State for Justice, James Cartlidge, used the occasion of the debate on Lawfare and the UK Court System to announce that the UK will be a member of the Council of Europe's inaugural working group on SLAPPs.[461] The working group is comprised of experts in law and media policy who will begin working this year on an anti-SLAPP draft recommendation for member states due in December 2023.

European Union

SLAPPs are often cross-border, meaning that human rights defenders resident in one jurisdiction may be threatened with a lawsuit or have legal action filed against them in another. This is done in an effort to further bleed human rights defenders of time and money, by forcing them to familiarise themselves with a foreign legal system, look for a lawyer in another country, and pay for any travel and translation costs. This is the case for UK journalist and anti-corruption expert Oliver Bullough, who is currently being sued in Portugal in relation to his book, *Moneyland*. Bullough has never set foot in Portugal, yet the Vice President of Angola has successfully filed a lawsuit seeking more than half a million euro against him there.[462]

According to a study commissioned by the European Commission, SLAPPs are *"increasingly used across EU member states, in an environment that is getting more and more hostile towards journalists, human rights*

[458] Defamation Act 2005 - Section 10A Serious harm element of cause of action for defamation - http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/da200599/s10a.html

[459] Dunja Mijatović, Time to take action against SLAPPs, 27 October 2020, https://www.coe.int/en/web/commissioner/-/time-to-takeaction-against-slapps

[460] CASE, The need for a Council of Europe Recommendation on SLAPPs, https://www.the-case.eu/campaign-list/the-need-for-a-council-of-europe-recommendation-on-slapps

[461] UK Parliament, James Cartlidge contribution to Lawfare and UK Court System debate, Volume 707: debated on Thursday 20 January 2022, Hansard Parliament, https://hansard.parliament.uk/Commons/2022-01-20/debates/4F7649B7-2085-4B51-9E8C-32992CFF7726/LawfareAndUKCourtSystem#contribution-21FD8E36-269B-4827-8351-11DF8A3A9BD2

[462] Index on Censorship,"Index on Censorship condemns lawsuit against journalist and author Oliver Bullough ,September 2021, https://www.indexoncensorship.org/2021/09/index-on-censorship-condemns-lawsuit-against-journalist-and-author-oliver-bullough/

defenders and various NGOs."[463] A broad coalition of civil society organisations have been advocating for the EU to undertake a number of complementary steps, including through the adoption of an EU Directive on SLAPPs. On 1st December 2020, over 60 organisations from across Europe endorsed a Model EU Anti-SLAPP Directive.[464] The European Commission committed to *"take action to protect journalists and civil society against strategic lawsuits against public participation"* in its 2021 work programme.[465] The European Commission proposals are expected to be announced in late April 2022.

[463] Petra Bárd, Judit Bayer, Ngo Chun Luk and Lina Vosyliute, SLAPP in the EU context, European Commission, May 2020 https://ec.europa.eu/info/sites/info/files/ad-hoc-literature-review-analysis-key-elements-slapp_en.pdf; Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies, The Use of SLAPPs to Silence Journalists, NGOs and Civil Society, Study requested by the JURI committee, European Parliament, June 2021, https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694782/IPOL_STU(2021)694782_EN.pdf

[464] Protecting Public Watchdogs Across The EU: A Proposal For An EU Anti-SLAPP Law, December 2020, https://dq4n3btxmr8c9.cloudfront.net/files/zkecf9/Anti_SLAPP_Model_Directive.pdf

[465] Secretariat-General of European Commission, 2021 Commission work programme – key documents, European Commission, October 2020, https://ec.europa.eu/info/publications/2021-commission-work-programme-key-documents_en

Conclusion

When research started for this report in early 2021, there was little public discourse around SLAPPs in the UK. While SLAPPs have been gaining wider recognition as an issue in several jurisdictions around the world, the acronym was unfamiliar to many in the UK, including to journalists and media lawyers themselves. This is partly due to the fact, by its very nature, it's been a largely hidden problem to date. Unless media come forward to discuss the legal threats they receive, it will not reach the public consciousness. After all, it's difficult to prove the absence of something – whether it is the information being left out of stories for fear of legal threats or the investigations that are not being published at all.

Recent cases that have reached the High Court over the last year, recognised as SLAPPs by media freedom and anti-corruption groups, such as those brought against the investigative journalists Catherine Belton, Tom Burgis and Carole Cadwalladr, significantly raised the public profile of this issue. However, without a doubt, the subject of SLAPPs and calls to address the improper use of UK laws to silence journalists have been brought into sharper focus by the recent Russian invasion into Ukraine. Concerns regarding Russian oligarchs utilising the UK legal system to prevent scrutiny of their business dealings and to launder their reputations have effectively spring boarded the term SLAPPs into the national discourse. It is important this moment is not lost to address this issue, which reaches beyond just Russians and kleptocracy.

When Jeremy Hunt, then foreign secretary, opened a conference launching the Global Media Freedom Coalition in London in 2019, he stated that, "*The strongest safeguard against the dark side of power is accountability and scrutiny… Real accountability comes from the risk of exposure by a media that cannot be controlled or suborned.*"[466] Hunt was referring largely to the situation in less than democratic countries, like Russia and Azerbaijan. But it is increasingly important to understand the effect foreign influence, exerted through legal threats initiated in the UK by the political and business elites from here or overseas, can have on journalists 'abilities to ask questions and to report transparently about matters of public interest.

Even examining it through purely a domestic lens, the legal system across the UK as it stands is unfairly stacked in the favour of those who have money to pursue incredibly costly legal action and those who do not. A more equitable system is needed in order to ensure that legal action can be pursued against media in a way that will not potentially financially cripple them but will address a genuine concern and ensure remedy for those who have been defamed. At the same time, those who wish to utilise the legal system as a tool to hide their wrongdoing cannot take advantage to bully journalists and media into submission.

The continuation of crime and corruption, which has been the subject of many of the cases presented in this report, has a real cost to societies and the people living in them. The recent Russian invasion into Ukraine has underscored that point, woefully too late. If journalists are hampered by legal threats and SLAPPs that drain their financial, human and psychological resources, it is crucial to ask ourselves what will be the ultimate impact on our right to know about the nefarious influences affecting our society? And without the information about wrongdoing being brought to light, how will it be stopped?

[466] FCO and the RT Hon Jeremy Hunt MP, Media freedom and journalists under threat: Foreign Secretary's speech, Gov.uk, July 2019, https://www.gov.uk/government/speeches/media-freedom-and-journalists-under-threat-foreign-secretarys-speech

Appendices

UK Anti-SLAPP Coalition – A Policy Paper: Countering legal intimidation and SLAPPs in the UK

A growing body of evidence has identified abusive legal threats and strategic lawsuits against public participation (SLAPPs) as a key emerging issue of concern for freedom of expression and the right to information in the UK. The impact goes beyond those directly subject to these legal tactics, posing a wider challenge to society and the principle of public participation.

Summary

SLAPPs are abusive lawsuits pursued with the purpose of shutting down acts of public participation. These legal actions are directed against individuals and organisations - including journalists, media outlets, whistleblowers, activists, academics and NGOs - that speak out on matters of public interest. SLAPPS have been gaining wider recognition as an issue in several jurisdictions. However, there is also a significant concern regarding the 'hidden problem' of UK law firms sending threatening legal communication prior to any official filings, which can have a similar effect to SLAPPs. These legal threats are particularly effective when emanating from the UK, which is seen as a more plaintiff-friendly jurisdiction and where mounting a defence is a particularly costly and lengthy process.

The aim of this policy paper is threefold:

1. To provide an overview of the problem in the UK context;
2. To identify the key principles for mitigating the threat of legal intimidation and SLAPPs; and
3. To form a starting point for legislative and regulatory initiatives to address this issue in the UK.

As an immediate step, a formal Parliamentary inquiry into legal intimidation and SLAPPs is needed to a) examine this issue in the UK, including the impact it is having on those subject to these tactics as well as more broadly on public debate and discussion; and b) explore the legislative and regulatory proposals needed to counter it, including a potential UK Anti-SLAPP Law.

About the UK Anti-SLAPP Coalition

The UK Anti-SLAPP Coalition is an informal working group established in January 2021, co-chaired by the Foreign Policy Centre, Index on Censorship and English PEN. It comprises a number of freedom of expression, whistleblowing, anti-corruption and transparency organisations, as well as media lawyers, researchers and academics who are researching, monitoring and highlighting cases of legal intimidation and SLAPPs, as well as seeking to develop remedies for mitigation and redress.

Background to the issue of legal intimidation and SLAPPs in the UK

Common hallmarks

From the many cases members of the UK anti-SLAPP coalition have studied and worked on, we can identify a number of common hallmarks or qualities:

- The lawsuit or legal threats are generally based on defamation law, though an increasing number of lawsuits invoke other laws concerning privacy, data protection, and harassment.
- There is an imbalance of power and wealth between the plaintiff and defendant.
- The plaintiff engages in procedural manoeuvers or exploits resource-intensive procedures such as disclosure to drive up costs.
- The lawsuit often targets individuals instead of/as well as the organisation they work for.
- The plaintiffs often have a history of legal intimidation and use many of the same law firms to facilitate their SLAPPs.
- The plaintiff may claim to pursue a disproportionately large amount of compensation from the defendant if they refuse to comply with the plaintiff's demands.
- Legal threats are increasingly being issued in response to 'right to reply' requests and result in journalists being drawn into a protracted quasi-legal communication process prior to publication.

Broader context

Legal intimidation and SLAPPs do not happen in isolation, but come in tandem with other forms of harassment and must be seen also in the context in which they are financed and pursued:

- Subjects of legal intimidation and SLAPPs have also raised concerns regarding online trolling, smear campaigns as well as on-and-offline surveillance.[467]
- Cases of legal intimidation and SLAPPs in the UK are frequently linked with investigations into financial crime and corruption. Law enforcement bodies, such as the Serious Fraud Office, have also been subject to lawfare tactics that share similar characteristics.[468] How legal intimidation and SLAPPS are financed must also be examined as part of a wider cause for concern. Investigations into transnational financial crime and corruption are rarely published without the mention of funds being used to pay for property, education or indeed legal and reputation services in the UK.[469]
- Reputation management appears to be a common driving force behind legal intimidation and SLAPPs taken against media, with reputations seen as assets to be defended against criticism or enquiry, with media pressured to remove 'uncomfortable' information from the public domain.[470]
- Even well-funded media organisations or NGOs are not immune from the "chilling effect" of legal intimidation - watering down reports or stories, avoiding pursuing litigious individuals/organisations, and generally holding back on contentious speech in order to avoid draining their funds. This is particularly true in light of the growing journalism-funding crisis, with declining revenues.[471]

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[467] The Editorial Board of the Financial Times, London, libel and reputation management: The English courts attract those with deep pockets and much to lose, May 2021, https://www.ft.com/content/e37f3349-479f-42c6-85fe-11b5a29bdee0; The Foreign Policy Centre (FPC), Unsafe for Scrutiny: How the misuse of the UK's financial and legal systems to facilitate corruption undermines the freedom and safety of investigative journalists around the world, December 2020, https://fpc.org.uk/publications/unsafe-for-scrutiny-12-2020-publication/. The FPC's contribution to the working group is based on the findings of the Unsafe for Scrutiny research programme and any views expressed are those of Project Director Susan Coughtrie.

[468] Index on Censorship, Index and 21 other organisations condemn lawsuits brought by ENRC against public watchdogs, June 2021, https://www.indexoncensorship.org/2021/06/lawsuits-brought-by-enrc-against-uk-serious-fraud-office-and-dechert-llp/; RAID, ENRC's egregious attempts to curtail freedom of expression jeopardise anti-corruption efforts, June 2021, https://www.raid-uk.org/blog/enrcs-egregious-attempts-curtail-freedom-expression-jeopardise-anti-corruption-efforts

[469] Ben Cowdock and Rachel Teka Davis, How UK anti-corruption groups work with journalists to push for change, FPC, December 2020, https://fpc.org.uk/how-uk-anti-corruption-groups-work-with-journalists-to-push-for-change/

[470] The Editorial Board of the Financial Times, London, libel and reputation management: The English courts attract those with deep pockets and much to lose, May 2021, https://www.ft.com/content/e37f3349-479f-42c6-85fe-11b5a29bdee0 ; Susan Coughtrie, The UK as a key nexus for protecting media freedom and preventing corruption globally, FPC, December 2020. https://fpc.org.uk/the-uk-as-a-key-nexus-for-protecting-media-freedom-and-preventing-corruption-globally/

[471] Rob Sharp, Solutions to the journalism funding crisis: what are they?, LSE, April 2020, https://blogs.lse.ac.uk/polis/2020/04/21/solutions-to-the-journalism-funding-crisis-what-are-they/

- This is taking place against a backdrop of other worrying trends for media freedom in the UK, regarding attempts to restrict freedom of information and challenges to public scrutiny. The UK is ranked 33rd out of 180 countries in Reporters Without Borders' 2021 World Press Freedom Index.[472]

Supporting evidence

Usually cases of legal intimidation and SLAPPs do not get publically reported until after the legal threat has dissipated, if at all. Recently, however, there has been an increasing effort to research and document cases:

- A report from the Foreign Policy Centre (FPC) published in November 2020, which surveyed 63 investigative journalists in 41 countries working to uncover financial crime and corruption, found:[473]
    - 73% of all respondents stated they had received legal threats as a result of information they had published, with more than half saying it had made them more cautious as a result.
    - Of the 71% of respondents who reported experiencing threats, legal threats were identified as having the most impact on their ability to continue working (48%), more so than psychosocial (22%), or physical and digital threats (each 12%).
    - Crucially, the UK was found to be by far the most frequent international country of origin for legal threats after the journalists' home countries. It was almost as frequent a source of these legal threats (31%), as all EU countries (24%) and the United States (11%) combined.
- Eight years after the passage of the Defamation Act 2013, UK courts continue to attract authoritarian governments and other international plaintiffs: recent examples include the lawsuits filed by Russian billionaires against Catherine Belton;[474] the lawsuit filed by Swedish businessman Svante Kumlin against the Swedish publication Realtid, their journalists, and editor;[475] the lawsuits filed by allies of the Malaysian Prime Minister against Clare Rewcastle Brown;[476] and the lawsuit filed against OCCRP and its co-founder Paul Radu by an Azerbaijani politician.[477]
- Cases do not even have to reach court to create a detrimental impact. In May 2020, journalists at openDemocracy described the effects of legal action pursued against them by Jeffery Donaldson, the now Democratic Unionist Party leader, stating "Those two years cost us a lot. We spent months dealing with legal letters, burning through thousands of pounds and precious time that would otherwise have been spent on our journalism. The psychological toll was even higher." The case eventually became time expired.[478]
- So concerning are the threats of potential legal action that it has led to instances of self-censorship – such as the delayed publication of Billion Dollar Whale or the blocked UK publication of Karen Dawisha's Putin's Kleptocracy, believed to be the tip of the iceberg.[479]
- The abusive potential of UK existing laws beyond its borders is also of concern. Indeed, the Balkans Investigative Reporting Network (BIRN), which covers countries in Southern and Eastern Europe, created a guide specifically on English libel law that is mandatory reading for all its journalists. One of the last sections is particularly telling: "For now, our advice regarding third-country libel suits (i.e. not in

[472] Reporters without Borders, United Kingdom - https://rsf.org/en/united-kingdom; 2021 World Press Freedom Index - https://rsf.org/en/ranking
[473] Susan Coughtrie and Poppy Ogier, Unsafe for Scrutiny: Examining the pressures faced by journalists uncovering financial pressure and corruption around the world, November 2020, https://fpc.org.uk/wp-content/uploads/2020/11/Unsafe-for-Scrutiny-November-2020.pdf.
[474] Nick Cohen, Are our courts a playground for bullies? Just ask Catherine Belton, The Guardian, May 2021, https://www.theguardian.com/commentisfree/2021/may/08/are-our-courts-a-playground-for-bullies-just-ask-catherine-belton
[475] Index on Censorship, SLAPP Lawsuit against Swedish Magazine Realtid Filed in London, December 2020, https://www.indexoncensorship.org/2020/12/slapp-lawsuit-against-swedish-magazine-realtid-filed-in-london/
[476] Clare Rewcastle Brown, A scandal of corruption and censorship: Uncovering the 1MDB case in Malaysia, FPC, December 2020, https://fpc.org.uk/a-scandal-of-corruption-and-censorship-uncovering-the-1mdb-case-in-malaysia/
[477] Paul Radu, How to Successfully Defend Yourself in Her Majesty's Libel Courts, GIJN, February 2020, https://gijn.org/2020/02/26/how-to-successfully-defend-yourself-in-her-majestys-libel-courts/
[478] Peter Geoghegan and Mary Fitzgerald, Jeffrey Donaldson sued us. Here's why we're going public, openDemocracy, May 2021, https://www.opendemocracy.net/en/opendemocracyuk/jeffrey-donaldson-sued-us-heres-why-were-going-public/
[479] The Economist, The Story Behind Billion Dollar Whale', September 2019, https://www.economist.com/books-and-arts/2019/09/19/the-story-behind-billion-dollar-whale; Jim Waterson, Bookshops threatened with legal action over book about Malaysian 'playboy banker', The Guardian, September 2018, https://www.theguardian.com/world/2018/sep/14/bookshops-threatened-with-legal-action-jho-low-billion-dollar-whale; Ellen Barry, Karen Dawisha, 68, Dies; Traced Roots of Russian Corruption, The New York Times, April 2018, https://www.nytimes.com/2018/04/17/obituaries/karen-dawisha-68-dies-traced-roots-of-russian-corruption.html

your country and not in England) is straightforward: I. Know the law in your own country; II. Know the law in England; III. Assume that any third country would be just as strict on libel as England."[480]

- On a European level, a number of groups have documented a rise in SLAPPs across the continent, with the Coalition Against SLAPPs (CASE) in Europe working to collect research on the issue.[481]

Principles for mitigating the threat of legal intimidation

Given the aforementioned problems, any effort to address legal intimidation and SLAPPs should seek to apply the following principles:

1. SLAPPs are disposed of and dealt with expeditiously in court: SLAPPs take advantage of the litigation process to harass and intimidate their targets. The shorter the process, the less potential there is for abuse. The importance of disposing of a SLAPP quickly is particularly acute prior to the costly disclosure process, which provides the greatest opportunity for legal harassment.
2. Costs for SLAPP Targets are kept to an absolute minimum: an award of costs post-SLAPP is an important measure, but not sufficient in this regard. Costs need to be minimised throughout the litigation process to avoid the financial threat of prolonged litigation.
3. Costs for SLAPP Litigants are sufficient to deter SLAPPs: these must be made automatically available so as not to represent a further burden for those already exhausted by the litigation process. Can take the form of punitive or exemplary damages or other sanctions.
4. Laws implicating speech are narrowly drafted and circumscribed: that is to say, they must be tightly worded enough to prevent their application being stretched to cover legitimate acts of public participation.
5. The use of SLAPPs or legal intimidation is delegitimised as a means of responding to criticism: this principle requires a process of delegitimisation, involving an expansion of industry standards, engagement with stakeholders on the incoming standards and finally clear enforcement if the use of SLAPPs or legal intimidation is used in contradiction to these standards.

Approaches to countering legal intimidation and SLAPPs in the UK

There are four different approaches that, taken together, would address the principles outlined above and should be encompassed in any efforts to counter legal intimidation and SLAPPs in the UK:

1. **The introduction of an Anti-SLAPP law to strengthen procedural protection.**
2. **Legal review and reform of relevant laws to reduce opportunities for abuse.**
3. **Tighten regulatory and ethical standards covering industries facilitating SLAPPs or issuing baseless legal threats.**
4. **Expanding admissibility of legal aid or otherwise providing funding for defendants acting in the public interest.**

These are explored briefly in turn in the accompanying explanatory note, set out as a starting point for addressing this issue, with the intention for further examination and development, including hopefully as part of an official inquiry.[482] To note, initiatives to examine and address the issue of SLAPPs are already underway elsewhere. The 2021 Annual Report of the Council of Europe Platform explicitly identifies the UK as the "foremost country of origin" of SLAPPs, and warns that the practice "threatens to bring the UK and

[480] English libel law for journalist: A brief Guide, Balkan Fellowship of Journalist Excellence, http://fellowship.birn.eu.com/en/file/show/English%20libel%20law%20for%20journalists.pdf
[481] For more about the work of the Coalition against SLAPPS in Europe (CASE) - https://www.the-case.eu/
[482] Explanatory Note: Approaches to Countering Legal Intimidation and SLAPPS in the UK - https://fpc.org.uk/wp-content/uploads/2021/07/Explanatory-Note-Approaches-to-Countering-Legal-Intimidation-and-SLAPPS-in-the-UK.pdf

its legal profession into disrepute in the eyes of the world."[483] Council of Europe Commissioner for Human Rights Dunja Mijatović has called on Council of Europe member states, which includes the UK, to take action saying that it is "high time" to tackle SLAPPs.[484] The European Commission has already committed to taking action against SLAPPs: in 2021 it set up an expert group on SLAPP and it is due to present an anti-SLAPP initiative later this year.[485] Commissioner Věra Jourová has repeatedly voiced her support for EU anti-SLAPP legislation.[486]

Supported by

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21. Transparency International – UK
22. Whistleblowing International Network (WIN)

[483] Partner Organisations to the Council of Europe Platform, 'Wanted! Real Action for Media Freedom in Europe', May 2021, https://rm.coe.int/final-version-annual-report-2021-en-wanted-real-action-for-media-freed/1680a2440e

[484] Dunja Mijatovic, 'Time to take action against SLAPPs', Council of Europe, October 2020, https://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/time-to-take-action-against-slapps?

[485] European Commission, 'Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Democracy Action Plan', December 2020, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&qid=1607079662423

[486] Jessica Ni Mhainin, 'Fighting Back against the Menace of SLAPPs', Index on Censorship Magazine, April 2021, https://journals.sagepub.com/doi/full/10.1177/03064220211012279

UK Anti-SLAPP Working Group: Proposals for Procedural Reform

Judicial Guidance, Civil Procedural Reform, and a UK Anti-SLAPP Law

PRACTICE DIRECTIONS/JUDICIAL GUIDANCE

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

- Security for Costs/Caution for Expenses: CPR 25.12 provides for limited circumstances in which security for costs can be issued. In a few instances, however, security for costs has been imposed on claimants as a sanction for misconduct, even where the test under 25.12 was not met.[487] In other cases, such as the lawsuit filed by Charles Taylor against the author of The Mask of Anarchy, security for costs has apparently been used as a means of testing the seriousness of a claim (in that case successfully, since the SLAPP was dismissed after Taylor was ordered to pay security for costs).[488] There has not as yet been any practice direction issued dealing with security for costs, and given the ad hoc way courts have responded to issues such as proportionality guidance should be issued on when security for costs could be used as an interim sanction, or as a means to test the seriousness of a claim.
- Motion to Strike: CPR 3.4 allows courts to strike out a claim not only if it discloses no reasonable grounds for bringing a claim, but also where the statement represents an "abuse of the court's process". A Practice Direction for such motions already exists, which explains that an abuse of process includes claims that are "vexatious, scurrilous or obviously ill-founded". There is no established legal definition for vexatious (or indeed scurrilous), but in *Attorney General v Barker* Lord Bingham set out characteristics of 'vexatious conduct', including that 'whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process by the court, meaning by that *a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process'* [emphasis added]. One simple but potentially effective way to strengthen the use of 3.4 in relation to SLAPPs would be to incorporate Bingham's criteria into the existing Practice Direction, thereby making clear that "vexatious" here includes SLAPPs.

RECOMMENDATIONS

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

OUTSTANDING QUESTIONS

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

CPR REFORM

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

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

[488] Stephen Ellis, *Face to face with England's libel laws,* available at https://journals.openedition.org/socio/568?lang=en

the principles underpinning these recommendations should be understood as applying across the UK:

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

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

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

RECOMMENDATIONS

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

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

ANTI-SLAPP LAW

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

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

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

    (1) In this act "public participation" means any communication or conduct aimed at influencing public opinion or otherwise engaging on a matter of public interest.
    (2) For the purposes of subsection (1) "matter of public interest" means any issue of political or societal significance.
- **Filter Mechanism:** a new means for summary disposal of claims should be instituted similar to Section 8 of the Defamation Act 1996, requiring a higher threshold to be met for claims targeting public participation. An example of what this could look like can be found below:
    1. ***Summary disposal of claims targeting public participation***

    (1) The court may dispose summarily of the plaintiff's claim where:
    (a) The claim targets an act of public participation; and
    (b) It appears to the court that the claim has no likely prospect of success and there is no reason why it should be tried; or
    (c) The court otherwise considers it to be in the interests of justice for the claim not to proceed to trial

    (2) In considering whether the claim should not proceed under (c) the court shall have regard to–
    (a) Any unreasonable failures to comply with the Pre-Action Protocol for Claims Targeting Public Participation
    (b) The disproportionate, excessive or unreasonable nature of the claim, or part of it, including but not limited to the quantum of damages claimed by the claimant;
    (c) The scope of the claim, including whether the objective of the claim is a measure of prior restraint;
    (d) The nature and seriousness of the harm likely to be or have been suffered by the claimant;
    (e) The litigation tactics deployed by the claimant, including but not limited to the choice of jurisdiction and the use of dilatory strategies;
    (f) The foreseeable costs of proceedings;
    (g) The existence of multiple claims asserted by the claimant against the same defendant in relation to similar matters;
    (h) The imbalance of power between the claimant and the defendant;

(i) The financing of litigation by third parties;
(j) Whether the defendant suffered from any forms of intimidation, harassment or threats on the part of the claimant before or during proceedings;
(k) The actual or potential chilling effect on public participation on the concerned matter of public interest

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

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

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

- **Civil Restraint Orders:** courts should be empowered to issue a civil restraint order (CRO) against SLAPP litigants. This could potentially be achieved by amending Section 42 of the Senior Courts Act to enable such orders to be imposed, without the need for application from the Attorney General, against those who have pursued multiple (i.e. 2 or more) SLAPP cases. This would enable repeat offenders to be included in the MOJ's registry of vexatious litigants - providing an important deterrent against those routinely relying on the use of SLAPPs.[489]

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

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

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

Summary of the main provisions of the Defamation Act 2013

The below summary of the Defamation Act is drawn from Thomson Reuters' Practical Law, reproduced with the permission of the publishers.[490] For further information visit www.practicallaw.com. To note, that sources of defamation law in England and Wales include not only the Defamation Act 2013 but other legislation (most notably, the Defamation Acts 1996 and 1952) and case law."
The following is a summary of its key provisions, with particular focus on the provisions that will be relevant to ISPs and publishing on the internet.

Section 1: requirement to show serious harm
This section introduces a requirement that a statement must have caused (or be likely to cause) serious harm to the claimant's reputation for it to be defamatory in order to discourage trivial claims. This is seen as a higher threshold than "substantial harm" which was the government's original proposal when the Bill was first published as a draft in its 2011 consultation paper.

Section 1(2), which was introduced at a very late stage in the Parliamentary process, requires a business (defined as a "body that trades for profit") to show that the statement has caused or is likely to cause it "serious financial loss" in order for it to meet the "serious harm" requirement.

Section 2: statutory defence of truth
This new defence will replace the common law defence of justification. It applies if the defendant can show that the imputation conveyed by the statement complained of is substantially true.

Section 3: statutory defence of honest opinion
This new defence will replace the common law defence of fair comment. A defendant will have to meet the following three conditions to establish the defence of honest opinion:

- The statement complained of must be an expression of opinion and not an assertion of fact.
- The statement complained of must indicate the basis of the opinion.
- The opinion must be one that an honest person could have held on the basis of a fact which existed at the time the statement was published or a privileged statement published before the statement complained of.

This provision broadly reflects the current defence of fair comment while simplifying and clarifying certain elements, but does not include the requirement for the opinion to be on a matter of public interest.

Section 4: statutory defence of publication on matter of public interest
This section introduces a new defence for those who are publishing material which they reasonably believe is in the public interest. It replaces the common law defence known as the Reynolds defence, which it is intended to reflect.

The original wording in the Bill referred to "responsible" publication and set out a non-exhaustive list of matters to which the court could have regard to in determining whether a defendant acted responsibly in publishing the statement. Section 4(2) now provides that the court should have regard to all the circumstances of the case. Section 4(4) provides that in its determination the court must make such allowance for editorial judgement as it considers appropriate.

[490] PLC IPIT & Communications, Defamation Act 2013: summary of main provisions, Thomson Reuters Practical Law, May 2013, https://uk.practicallaw.thomsonreuters.com/8-526-7636?transitionType=Default&contextData=(sc.Default)&firstPage=true

Section 5: operators of websites
Section 5 provides that where an action is brought against the operator of a website in respect of a statement posted on the website, it will be a defence for the operator to show that it was not the operator who posted the statement on the website.

The defence is, however, subject to a number of caveats; section 5(3) provides that it will be defeated where the claimant shows all of the following:

- It was not possible for the claimant to identify the person who posted the statement.
- The claimant gave the operator a notice of complaint in relation to the statement.
- The operator failed to respond to the notice of complaint in accordance with any provision contained in regulations.

Section 5(4) (which was a later amendment) adds some clarification to the requirement to identifying the suspected defendant, stating that it is only possible to "identify" a person if the claimant has sufficient information to bring proceedings against him.

Further provisions concerning this defence are to be set out in regulations, which are to be made by statutory instrument. Subsection (5) provides details in general terms of other provisions that maybe included in the regulations, including the action to be taken by a website operator in response to a notice of complaint and the time limit for taking such action.

Section 5(6) sets out certain specific information which must be included in a notice of complaint. The notice must specify the complainant's name, set out the statement concerned, where on the website it was posted and explain why it is defamatory of the complainant. Regulations may specify what other information would need to be included in a notice of complaint.

Section 5(11) (which was also added later) provides that the defence will be defeated if the claimant shows that the website operator has acted with malice in relation to the posting of the statement concerned.

Finally, section 5(12) (which was again added later) provides that the defence is not defeated by reason only of the fact that the operator of the website moderates the statements posted on it by others.

Section 6: peer-reviewed statements
This section provides protection for scientists and academics publishing in peer-reviewed journals. The publication of a statement in such a journal is privileged, provided certain conditions are met.

Section 7: absolute and qualified privilege
This section updates and extends the circumstances in which the defences of absolute and qualified privilege are available.

Section 8: single publication rule
Until now, every publication of defamatory material has given rise to a separate cause of action which is subject to its own limitation period (the "multiple publication rule"). This has been of particular concern in relation to online material as each "hit" on a webpage creates a new publication, potentially giving rise to a separate cause of action, should it contain defamatory material.

Section 8 introduces a single publication rule. This means that a claimant will be prevented from bringing an action in relation to publication of the same material by the same publisher after the expiry of a one-year limitation period from the date of the first publication of that material to the public, or a section of the public. However, the claimant would still be allowed to bring a new claim if the original material was republished by a new publisher or if the manner of publication was otherwise materially different from the first publication. The court's discretion under the Limitation Act 1980 to extend the time period is retained.

Section 9: libel tourism
This section aims to address the issue of "libel tourism" (a term which is used to apply where cases with a tenuous link to England and Wales are brought in that jurisdiction). It applies when a defamation action is brought against a person who is not domiciled in the UK, an EU member state or a state which is a party to the Lugano Convention (section 9(1)).

The section provides that a court does not have jurisdiction to hear and determine such actions unless it is satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement. This means that in cases where a statement has been published in England and Wales and also abroad, the court will be required to consider the overall global picture to consider where it would be most appropriate for a claim to be heard. It is intended that this will overcome the problem of courts readily accepting jurisdiction simply because a claimant frames their claim so as to focus on damage which has occurred in the jurisdiction only. It is anticipated that the Civil Procedure Rule Committee will be asked to consider including in the Civil Procedure Rules relevant factors for the court's consideration.

Section 10: action against secondary publishers
This section offers greater protection to secondary publishers, such as booksellers, by taking away the court's jurisdiction to hear an action for defamation brought against them except where it is not reasonably practicable for the claimant to bring the action against the author, editor or publisher.

Section 11: trial by jury
This section removes the presumption in favour of a jury trial in defamation cases.

Section 12: publication of judgment
This section gives the court the power to order a summary of its judgment to be published in defamation proceedings generally (in contrast to the provision in section 8 of the Defamation Act 1996 concerning the summary disposal of claims).

The parties are to agree the wording of any summary and the time, manner, form and place of its publication. If they cannot agree, the court will give directions.

Section 13: removal of statement
This section was introduced during the Bill's passage through Parliament. It provides that a court that has given judgment for the claimant in an action for defamation can order:

- The operator of a website on which the defamatory statement is posted to remove the statement. This provision is designed to give claimants a remedy in situations where the website operator has a defence under section 5 of the Act because it did not post the statement on its website itself.
- Any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement. This subsection was added after the above following concerns that without such a provision, the effect of section 10 of the Act might be that an action could not be brought against a secondary publisher who refuses to remove material from circulation in these circumstances.

Section 15: meaning of "publish" and "statement"
This section sets out definitions of the terms "publish", "publication" and "statement" for the purposes of the Act. Broad definitions are used to ensure that the provisions of the Act cover a range of publications in any medium, reflecting the current law.

ARTICLE 19 - Applicable international standards

The protection of the right to freedom of expression
The right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights (UDHR), and given legal force through Article 19 of the International Covenant on Civil and Political Rights (ICCPR).[491] At the European level, Article 10 of the European Convention on Human Rights (European Convention) protects the right to freedom of expression in similar terms to Article 19 of the ICCPR.[492]

The scope of the right to freedom of expression is broad. Article 19 of the ICCPR and Article 10 of the European Convention require States to guarantee to all people the freedom to seek, receive or impart information or ideas of any kind, regardless of frontiers, through any media of a person's choice; this also includes the Internet and digital media.[493] General Comment No. 34 of the UN Human Rights Committee (HR Committee), the treaty body of independent experts monitoring States' compliance with the ICCPR, explicitly recognises that Article 19 of the ICCPR protects all forms of expression and the means of their dissemination, including all forms of electronic and Internet-based modes of expression.[494]

The HR Committee also recognises that the right to freedom of expression includes, *inter alia*, political discourse, commentary on one's own and on public affairs, journalism, and expression that may be regarded as deeply offensive.[495] Similarly, the European Court on Human Rights (European Court) has repeatedly stated that the protection of Article 10 "*is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.*"[496]

International and regional human rights standards highlight the role that journalists and media play in a democratic society and the functions they serve for the exercise of freedom of expression and information. Importance of the media for democracy and society has been repeatedly recognised by international and regional human rights bodies. For instance, the HR Committee states that:

> *'A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other [rights guaranteed by the ICCPR]. It constitutes one of the cornerstones of a democratic society. The [ICCPR] embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. The public also has a corresponding right to receive media output.'*[497]

The HR Committee also recognises that the ICCPR places particularly high value upon uninhibited expression whose content involves political discourse, particularly in circumstances of public debate

[491] Although as the UN General Assembly resolution, the UDHR is not strictly binding on states, many of its provisions are regarded as having acquired legal force as customary international law; see Filartiga v Pena-Irala, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2nd circuit); International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, UN Doc. A/6316.
[492] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 September 1950.
[493] Human Rights Committee (HR Committee), General Comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, September 2011, https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf. See also HRC, Resolution: The promotion, protection and enjoyment of human rights on the Internet, A/HRC/20/L.13, June 2012, https://ap.ohchr.org/documents/E/HRC/d_res_dec/A_HRC_20_L13.doc
[494] Ibid., para 12.
[495] Ibid, para 11.
[496] European Court of Human Rights (European Court), Handyside v United Kingdom, App. No. 5493/72 (1976), para 49.
[497] General Comment No. 34, op.cit., para 13.

concerning public figures in the political domain and public institutions.[498] Similarly, the European Court has underscored the "public watchdog" function of the media as well as that of non-governmental organisation (NGOs).[499] Further, the European Court has consistently held that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.[500] The European Court has emphasised that

> *'Freedom of the press… affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders…freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the [European Convention]'.*[501]

Moreover, international and regional standards emphasise that journalism encompasses different forms, practices and activities performed by a wide range of actors whose protection is determined by the functions they serve in a democratic society rather than on formal regimes of or procedures for recognition. The HR Committee recognises that journalism is not limited to "professional full-time reporters and analysts" but also covers "bloggers and others who engage in forms of self-publication in print, on the internet or elsewhere."[502]

Limitations on the right to freedom of expression

Under international and European human rights law, the right to freedom of expression is not an absolute right, but rather one which can be legitimately restricted by the State provided certain conditions are met. Such conditions comprise a three-part test against which any proposed restriction on freedom of expression must be scrutinised:

1. **The restriction must be provided by law:** This means that it must have a basis in law, which is publicly available and accessible, and formulated with sufficient precision to enable citizens to regulate their conduct accordingly;[503] and assurance of legality on limitations to Article 19 of the ICCPR should comprise the oversight of independent and impartial judicial authorities;
2. **The restriction must pursue a legitimate aim:** Legitimate aims are those exhaustively enumerated in Article 10, paragraph 2 of the European Convention and Article 19, paragraph 3 of the ICCPR;[504] respect of the rights or reputations of others; the protection of national security, of public order (*ordre public*), or of public health or morals; and
3. **The restriction must be necessary in a democratic society:** This requirement encapsulates the dual principles of necessity and proportionality. It demands an assessment of, first, whether the proposed limitation satisfies a "pressing social need".[505] Secondly, it must be established whether the measures at issue are the least restrictive to achieve the aim. States are required to demonstrate in a specific and individualised fashion the precise nature of the threat establishing a direct and immediate connection between the expression and the threat.[506]

Assessing the necessity and proportionality of a restrictive measure requires a careful consideration of the particular facts of the case. The assessment should always take as a starting point that it is incumbent upon

[498] Ibid, para 38.
[499] European Court, Lingens v Austria, App. no. 9815/82 (1986), para 41; European Court, Steel Morrris v United Kingdom, App. No. 68416/01, (2005), para 95; Társaság a Szabadságjogokért v Hungary, App. No. 37374/05 (2009), para 27; Vides Aizsardzības Klubs v Latvia, App. No. 57829/00 (2004), para 42; Youth Justice Initiative for Human Rights v Serbia, App. No. 48135/06 (2013).
[500] European Court, Thoma v Luxemburgo, App. No. 38432/97, 26 June 2001, paras 45 & 46.
[501] European Court, Lingens v Austria, op. cit., para 42.
[502] General Comment No. 34, op. cit., para 44.
[503] European Court, The Sunday Times v UK, App. No. 6538/74 (1979), para 49.
[504] European Court of Human Rights, European Convention on Human Rights, Council of Europe, https://www.echr.coe.int/documents/convention_eng.pdf; https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights
[505] European Court, The Observer & Guardian v the UK, App. No. 13585/88 (1991), para 59.
[506] Ibid., para 22.

the State to justify any restriction on freedom of expression, including freedom of the press.[507] As a party to the ICCPR and the European Convention, States must subject any interference to freedom of expression and information in general - and freedom of the press in particular- to the strict requirements of the three-part test. This means that the three-part test applies to all branches of government (executive, legislative and judicial), and other public or governmental authorities at national, regional or local level.[508]

Legal protection of the media

States have the obligation to respect and ensure the right to freedom of opinion and expression for all, including for journalists and the media.[509] In General Comment No. 31, the HR Committee stated that States also have a positive duty to protect against any undue limitation or restriction on freedom of expression from both State agents and private parties.[510] In practice, this means that States must guarantee a broad protection of the right to freedom of expression in the national legal system and should also undertake all necessary measures to give effect to the right and protect its exercise from undue restrictions. States must adopt legislative, judicial, administrative or special measures geared towards safeguarding the exercise of freedom of expression in line with international and regional human rights standards.[511]

The positive obligation is central to addressing situations when legal actions are brought solely to harass or subdue an adversary and prevent an exercise of fundamental rights and the right to freedom of expression. This applies to SLAPPs.[512]

Although there is no uniform definition of SLAPPs and different concepts are used in laws and advocacy, the impact of SLAPPs on freedom of expression and human rights has been widely recognised. For instance:

- The UN Special Rapporteur on the right to freedom of peaceful assembly and of association, and the UN Special Rapporteur on extrajudicial, summary or arbitrary execution have raised concerns over the use of SLAPPs against assembly organisers. This concerned, in particular, instances where business entities seek injunctions and civil remedies against protesters on the basis of trespass or defamation laws. The mandate holders established that States have the obligation to ensure due process and to protect assembly organisers from civil actions that lack merit.[513]

- In the General Comment No. 24, the UN Committee on Economic, Social and Cultural Rights established that "actions [instituted] by corporations to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation's reputation, should not be abused to create a chilling effect on the legitimate exercise of such remedies."[514]

[507] European Court, Lingens v Austria, op. cit., para 41.
[508] HR Committee, General Comment No. 31, March 2004, CCPR/C/21/Rev.1/Add. 1326, May 2004, para 4, http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d/PPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO+fud3cPVrcM9YR0iW6Txaxgp3f9kUFpWoq/hW/TpKi2tPhZsbEJw/GeZRASjdFuuJQRnbJEaUhby31WiQPl2mLFDe6ZSwMMvmQGVHA==
[509] Article 2 of the ICCPR read in conjunction with Article 19. Article 1 of the European Convention read in conjunction with Article 10.
[510] General Comment No. 31, op.cit., paras 6 &8.
[511] Idem. See also European Court's interpretation in Hokkanen v Finland, (1994) and López-Ostra v Spain, (1994) where it interprets the positive obligation of State parties in similar terms as the UN Human Rights Committee.
[512] UN Special Rapporteur on the Right to Freedom of Association and Assembly, Info Note on SLAPPs and Freedom of Association and Assembly, https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPPsFoAA.docx
[513] Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association & the Special Rapporteur on extrajudicial, summary or arbitrary execution on the proper management of assemblies, UN Doc.A/HRC/31/66, February 2016, para 84.
[514] UN Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of Business Activities, E/C.12/GC/24, August 2017, https://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1a0Szab0oXTdImnsJZZVQcIMOuuG4TpS9jwlhCJcXiuZ1yrkMD/Sj8YF+SXo4mYx7Y/3L3zvM2zSUbw6ujlnCawQrJx3hlK8Odka6DUwG3Y

- The UN Working Group on Business and Human Rights recommended States enact anti-SLAPP legislation to ensure that human rights defenders are not subjected to civil liability for their activities. [515]

- The Resolution on Safety of Journalists, adopted by the Human Rights Council (HRC) at its 46th session, recognised SLAPPs against the media as an attempt to silence journalists and media workers and as a means used by business entities and individuals to exercise pressure on journalists and stop them from critical and/or investigative reporting.[516]

International freedom of expression standards establish that States' positive obligation to protect the right to freedom of expression from undue interferences entails the creation of an enabling legal environment for journalists and the media to operate freely and without undue interferences; to proactively take all necessary measures – in law, procedure and practice; to eliminate the obstacles and interferences to exercising the right to freedom of expression in relation to matters of public interest; and to adopt legislation or any special measures to protect journalism from further interferences undermining their social function.[517] Hence, States should address the chilling effect of abusive litigation and provide effective remedies against abusive claimants that resort to the judicial system to intimidate or silence journalists and the media in retaliation for their work on matters of public concern.[518]

Due process and procedural protection against SLAPPs

The problem of SLAPPs also engages the protection of the right to a fair trial/due process, and access to court, protected under Articles 14 and 16 of the ICCPR and Article 6 of the European Convention. In civil proceedings, the right to fair trial applies to both the claimant and the defendant involved in any civil dispute at domestic level. Both claimants and defendants must be able to argue their case with the requisite of effectiveness and with respect for procedural safeguards.[519]

An important aspect of the right to fair trial is the principle of procedural fairness and 'equality of arms', which requires that neither party is put in a disadvantageous position compared to the other party. The principle of 'equality of arms' means that in the various stages of the legal process, the parties must stand in an equal position and enjoy the same reasonable opportunity to present their case.[520] Therefore, procedural safeguards may be necessary (i) to counterbalance any procedural unfairness indirectly caused by existing protections to everyone's right to a fair trial; and (ii) to protect individuals 'opinions and public debate on matters of public concern from civil claims that lack merit.[521] In these cases, courts should strike a fair and proper balance between the public interest allowing adversarial and meritorious lawsuits to proceed and the public interest in protecting expression on matters of public concern.[522]

In addition, the European Court has stated that the provision of legal aid or the simplification of applicable procedures may constitute a means to guarantee the right to a fair trial in general, and ensure equality of arms in particular.[523] Legal aid schemes however should be limited to those cases where it is necessary for a

[515] UN Working Group on Business and Human Rights, Guidance on National Actions Plans on Business and Human Rights, 2016, p. 31, https://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf
[516] HRC, Resolution 45/18 on the Safety of Journalists, A/HRC/45/L.42/Rev.1, 1 October 2020, p.3, https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/HRC/45/L.42/Rev.1&Lang=E
[517] HRC, Resolution 33/2 on Safety of Journalists, A/HRC/RES/33/2, 2017, point 5, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/226/24/PDF/G1622624.pdf?OpenElement; European Court, Dink v Turkey, App. No. 2668/08, 6102/08, 30079/08 (2010), para 27 or Castells v Spain, App. No. 11798/85 (1992), para 43.
[518] See General Comment No. 24, and UN Special Rapporteur on the right to freedom of peaceful assembly, op. cit.
[519] See European Court, H. v Belgium, App. No. 8950/80 (1987), para 53.
[520] See European Court, Ocalan v Turkey, App. No. 46221/99 (2005), para 140;Mammadov v Azerbaijan, App. No. 60802/09 (2017), para 19; or Steel and Morris, App. No. 68416/01, May 2005, De Haes and Gijsels v Belgium, App. No. 7/1996/626/809 (1997).
[521] Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, op. cit.
[522] See European Court, Brandstetter v Austria, App. No. 11170/84; 12876/87; 13468/87 (1991); and Thorgeir Thorgeirson v Iceland, App. No. 13778/88 (1992).
[523] See European Court, Steel and Morris, op.cit., paras 59-61; Airey v Ireland, App. No. 6289/73 (1979), para 26.

fair hearing and indispensable for effective access to court.[524] Hence, legal aid may be required for journalists who are both UK citizens and foreign nationals when the rights to freedom of expression and proper defence of journalists and the media are at stake as a result of unequal conditions to comply with legal and procedural conditions before a trial. The European Court has established that the necessity of legal aid '*must be determined on the basis of the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant's capacity to represent him or herself effectively*'.[525]

In Steel and Morris v the United Kingdom, the European Court found that the denial of legal aid to applicants acting as defendants to protect their right to freedom of expression in a defamation case brought by a global corporation deprived them of the opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms.[526] The European Court regarded various factors to reach to a conclusion of potential unfairness, including but not limited to the length of the proceeding, the financial consequences for the applicants of failing to comply with the civil judge requirements, the amount of claimed damages compared to the applicant's incomes, along with the scale and complexity of the proceedings.[527]

In the context of SLAPPs brought under defamation legislation (or protection of reputation or privacy), States should adopt safeguards against potential abusive claims and ensure that only viable and well-founded reputational damage claims are brought. Defendants should have an effective remedy available against plaintiffs bringing clearly unsubstantiated cases with a view of exerting a chilling effect on debates of public concern. Such an effective remedy can either take the form of specific SLAPPs legislation or result from general procedural rules. In either case, courts should have the power, at the requests of the defendant or on their own motion, to dismiss defamation or reputational related claims that target a contribution to a debate of public concern and are frivolous, clearly unsubstantiated or otherwise clearly lacking any chance of success.[528]

[524] Steel and Morris, Ibid.
[525] Ibid. para 61.
[526] Ibid., paras 63 & 71.
[527] Ibid., paras 63-71
[528] Defining Defamation, op.cit., Principle 6. The particular remedy will vary between jurisdictions, but possible options include the right to bring a case for abuse of civil process and/or the availability of a procedural mechanism to strike out the claim early on in the proceedings unless the plaintiff or claimant can show some probability of success. Anti-SLAPP laws traditionally provide a mechanism that allows the defendant, after service of the complaint, to file a motion to strike out or dismiss the complaint as targeting speech directly related to and arising from a matter of public concern. The burden of proof is upon the defendant to convince the court that the speech in question is directly related to and arising from a matter of ongoing public concern, and to set forth the legal justifications for publication. In the event that the court agrees that the speech is directly related to, and arising from, a matter of ongoing public concern, the claim is deemed to be a SLAPP case and the following substantive and procedural rules apply: a) All collateral litigation, including discovery and/or disclosure demands, is immediately frozen; b) The burden of proof is upon the plaintiff or claimant to show with convincing clarity from the four corners of the complaint alone that they would prevail in a libel trial; and c) In the event that the plaintiff or claimant fails to show the above, the court can award appropriate legal fees and costs to the prevailing defendant. In countries where no specific legislation has been adopted, malicious prosecutions may be dealt with by general rules of procedure that allow the courts to condemn the plaintiff or claimant for abusive proceedings, if the judge finds that: (i) the proceedings are clearly unsubstantiated; or (ii) are otherwise lacking any reasonable prospect of success.