

A SLAPP in the Face of Democracy

Professor Sharon Beder

University of Wollongong

(Author of *Global Spin* and *Power Play*)

In December 2004, Gunns, a large forestry corporation based in Tasmania, served 20 individual environmentalists and groups with writs for their campaigns against the company. Gunns' targets included Senator Bob Brown, leader of the Australian Greens, campaigners from The Wilderness Society, the Tasmanian Greens and Doctors for Forests. It claims that they have vilified the company and damaged its reputation; it is seeking more than \$6 million in damages in the Victorian Supreme Court.

Every year thousands of people, particularly in the United States, are sued for speaking out against corporations. Multi-million dollar law suits are filed against individual citizens and groups for exercising their democratic rights: circulating petitions, writing to public officials, speaking at, or even just attending public meetings, organising a boycott, or engaging in peaceful demonstrations. This trend, which began in the US in the 1970s, has spread to other countries, including Australia. Who could forget the highly publicised *McLibel* case in Britain?

The law suits have been labelled 'Strategic Lawsuits Against Public Participation', or SLAPPs, by University of Denver academics Penelope Canan and George Pring, who began their research after they noticed an increasing number of environmentalists were being named as defendants in large civil damage cases.¹ They defined a SLAPP as being a civil court action which alleges that injury has been caused by the efforts of non-government individuals or organisations to influence government action on an issue of public interest or concern.

¹ Katherine Bishop, 1991, 'New Tool of Developers and Others Quells Private Opposition to Projects', *New York Times*, 26 April 1991.

Canan and Pring found that ‘SLAPPs are filed by one side of a public, political dispute to punish or prevent opposing points of view’. Of course, people using SLAPPs in this way cannot directly sue people for exercising their democratic right to participate in the political process, so they have to find technical legal grounds on which to bring their cases. Such grounds include defamation, conspiracy, nuisance, invasion of privacy, or interference with business/economic expectancy.²

Such cases are seldom won in the courts. The charges often seem extremely flimsy and the damage claims outrageously large. Most are dismissed by the courts and most of those that are heard by the courts are won by the people being sued.³ However, companies and organisations taking this legal action are not doing so in order to win compensation. Rather, their aim is to harass, intimidate, and distract their opponents. They ‘win’ the court cases when their victims ‘are no longer able to find the financial, emotional, or mental wherewithal to sustain their defence’.⁴ They win the political battle even when they lose the court case if their victims and those associated with them stop speaking out against them.

The cost to a developer is part of the costs of doing business, but the cost of a court case could well bankrupt an individual or an environmental group. In this way the legal system serves best those who have large financial resources at their disposal, particularly corporations. Such a case takes an average of three years and even if the person being sued wins it can cost them tens of thousands of dollars in legal fees. Personal and emotional stress, disillusionment, diversion of time and energy, and even divisions within families, communities and groups can also result.

Not only does a SLAPP deter those involved from participating in political debate freely afterwards, but it also deters other citizens from speaking freely and confidently about local public issues. Research by Canan and Pring shows that people who know about SLAPPs are more cautious about speaking out publicly than those who have

² George W. Pring and Penelope Canan, *SLAPPs: Getting Sued for Speaking Out*, Temple University Press, 1996, pp. 381-5.

³ Kim Goldberg, 1992/3, ‘SLAPPs Surge North: Canadian Activists Under Attack’, *The New Catalyst* 25, Winter, p. 2; Peter Nye, 1994, ‘Surge of SLAPP Suits Chills Public Debate’, *Public Citizen*, Summer, p. 15.

⁴ Cameron Davis and David White, 1994, ‘The Unslapped: A Primer for Protecting You and Your Affiliate Against SLAPP Suits’, *elaw.public.interest*, 26 January 1994.

never heard of them.⁵ SLAPPs often do not go to trial because the objective, to scare off potential opponents, can be achieved merely by the threat of the court case.

Another effect of the SLAPP is to distract the key antagonists from the main controversy and use up their money, time, and energy in the courtroom, where the issues at hand are not discussed. Activists use the political arena to expand debate, enrol other citizens on their side, and spread the conflict. The firms and developers that utilise SLAPPs are trying to subvert and circumvent that political process ‘by enlisting judicial power against their opponents, shifting both forum and issues to the disadvantage of the other side’.⁶

SLAPPs can also shift the balance of power giving the firm filing the SLAPP suit the upper hand when they are losing in the political arena. Action tends to be taken against citizens who are successfully opposing them because those taking the action are afraid that they will not win in the public, political forum. In the courts, the wealth of the disputants and their ability to hire the best lawyers can influence the outcome. ‘Whereas in the political realm the filer is typically on the defensive, in the legal realm the filer can go on the offensive, putting the target’s actions under scrutiny’.⁷ Prolonged litigation can even achieve community compliance through delay and loss of sustained interest by the broader public.

⁵ Catherine Dold, 1992, ‘SLAPP Back!’, *Buzzworm: The Environmental Journal* IV (4), July/Aug, p. 36.

⁶ Penelope Canan and George W. Pring, 1988, ‘Strategic Lawsuits Against Public Participation’, *Social Problems*, 35

(5), p. 515; Pring & Canan, ‘SLAPPs’, p. 381.

⁷ Chris Tollefson, 1994, ‘Strategic Lawsuits Against Public Participation: Developing a Canadian Response’, *The Canadian Bar Review* 73, p. 207.