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# Taking the sting out of SLAPPs?

## A comparative analysis of anti-SLAPP statutes against a human rights framework

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# Summary

Strategic lawsuits against public participation (SLAPPs) use litigation to suppress political rights – especially public participation rights and freedoms of expression, assembly and association. The rights of journalists, human rights defenders, civil society organisations and individuals are chilled by these cases and legal threats, which convert matters of public interest into private disputes. Anti-SLAPP statutes, which use civil procedure to dispose of these cases at an early stage or provide financial remedies to SLAPP defendants, are an increasingly popular response to this problem.

One core aspect of these statutes is how they will identify SLAPPs (as opposed to ordinary legal cases) through a preliminary motion. In IHRL, three broad characteristics have been identified as guidance to identify a SLAPP: a power imbalance between the parties, a subject-matter linked to the public interest, and abusive legal tactics used by the plaintiff. This thesis compares how these characteristics are assessed under four examples of anti-SLAPP statutes and considers what the scope of these tests means for the human rights protections offered by these statutes.

The purpose sections of anti-SLAPP statutes often refer to the protection of human rights such as freedom of expression and public participation. Likewise, IHRL experts are increasingly calling for anti-SLAPP statutes to protect rights in a range of contexts ranging from anti-corruption to the protection of environmental human rights defenders. Despite the attention of human rights experts and the rights-based justifications behind these statutes, the application of these statutes in court has not been assessed for its human rights implications.

Four pieces of legislation have been selected for comparison: the Protection of Public Participation Act 2015 in Ontario (adopted in identical form in British Columbia), the 2020 amendment to New York's Civil Rights Law, the Protection of Public Participation Act 2008 in the Australian Capital Territory, and the Economic Crime and Corporate Transparency Act 2023 in the United Kingdom. The jurisdictions selected all derive from the English common law and include the tort of defamation, which is a common vehicle for SLAPPs. Because SLAPPs use the justice system, the thesis compares not only the legislative provisions but how they have been applied by courts. Leading cases and illustrative examples were identified by searching for the relevant sections of each piece of legislation. Three characteristics of a SLAPP – a power imbalance between the parties, a subject-matter linked to the public interest, and abusive legal tactics used by the plaintiff – are the points of comparison between these statutes.

This thesis finds that more attention to the characteristics of a SLAPP could improve the human rights protection under these statutes. Without attention

to all these signs of a SLAPP, statutes do not enable courts to fully appreciate the chilling effect of legal cases on human rights. The thesis concludes with three recommendations for the scope of future anti-SLAPP statutes: required consideration of the power imbalance between the parties and abusive legal tactics used by the plaintiff; a power for courts to declare a case is a SLAPP; and a broad public interest test which captures conduct as well as expression.

# Preface

I would not be half as passionate about SLAPPs without my first-hand experience as the Editor of *Critic Te Ārohi*, Aotearoa's finest student magazine. The volume of defamation threats received, even at a small student publication, was existential and eye-opening. My work as a journalist at *The Post* only cemented my view that the chilling effect of legal cases goes far beyond encouraging journalists to do their due diligence.

This thesis would not have been possible without the love of my family and friends. Thank you for the support, conversations and visits. Without you, I would not have had the confidence to take this leap into further studies.

I am immensely grateful to my supervisor, Valentin Jeutner, whose insightful feedback and guidance has helped shape this thesis. I also wish to thank Lea Wolter, Danielle Cooper, Isabella Hawkins, and Sean Gourley for their encouraging comments on the final draft.

As I conclude my time at Lund University, I have been reflecting on the enriching and inspiring opportunities this international study environment has presented. In particular, my internships with the Civil Liberties Union for Europe and the Defend-Bio Legal Clinic at the Raoul Wallenberg Institute furthered my knowledge of the practical impact of SLAPPs on civil society organisations and environmental human rights defenders, which was invaluable for my thesis.

Finally, I must acknowledge the wonderful group of friends I have found during my time in Lund. This thesis would have been a far lonelier process without our extended lunch breaks in the library. I value our friendship and look forward to seeing what you do next.

Erin Gourley

24 May 2026

# Abbreviations

| **Abbreviation** | **Definition** |
|---|---|
| SLAPPs | Strategic lawsuits against public participation |
| IHRL | International human rights law |
| UK | United Kingdom |
| USA | United States of America |
| ACT | Australian Capital Territory |
| NGO | Non-governmental organisation |
| UN | United Nations |
| OHCHR | The UN Office of the High Commissioner of Human Rights |
| Plaintiff | The individual who files the SLAPP |
| Defendant | The individual subject to the SLAPP |
| Canadian Statute | The Protection of Public Participation Act 2015 (Ontario) and Protection of Public Participation Act 2019 (British Columbia). |
| New York Statute | The anti-SLAPP provisions of New York's Civil Law Code (sections 70-a and 76-a). |
| UK Statute | The anti-SLAPP provisions of the Economic Crime and Corporate Transparency Act 2023 (sections 194 and 195). |
| ACT Statute | The Protection of Public Participation Act 2008. |
| Selected Statutes | Collectively refers to the Canadian Statute, New York Statute, UK Statute, and ACT Statute. |
| Selected Jurisdictions | Ontario and British Columbia; New York; England and Wales; and, the ACT. |

# 1 General Introduction

In December 2004, a major Australian forestry company, Gunns Ltd, filed an "unintelligible" statement of claim in the Supreme Court of Victoria, alleging 20 environmental activists had engaged in conspiracy and damaging campaigns against the company.[1] It claimed 6.3 million AUD in damages.[2] The environmental activists feared they would lose their homes as a result of the expense, and became scared to communicate with one another in case they furthered the conspiracy.

The litigation dragged on for six years, finally settling in 2010. It was not clear, even to the court, what the company's claim was, but the company was allowed to re-plead several times.[3] Eventually, the case settled out of court after the activists received substantial pro bono support from leading barristers.

The *Gunns* case is a classic example of the human rights problem that this thesis explores. Without further analysis, this case appears to be a matter of private law, or the rights that individuals are able to realise against one another in court through the litigation process.[4] But the effect of this case was more insidious – it punished 20 activists for engaging in protest against a company's actions and attempted to discourage them from opposing the company's future plans.

Over the past few decades, cases like this one have been identified with the term "**SLAPPs**" (strategic lawsuits against public participation). This term reframes these lawsuits as more than a matter of private law: they are an attempt to suppress human rights by weaponising the stressful and costly litigation process. Through litigation, plaintiffs can push matters of public interest into the private sphere.[5]

Campaigners on this issue propose anti-SLAPP statutes as a solution. Broadly, this form of legislation gives defendants a way to bring a preliminary motion asking the court to find that the case is a SLAPP. Successful defendants can usually access a remedy such as early dismissal and awards of costs, and sometimes other procedural protections such as a reversal of the burden of proof. The rationale behind these statutes is to avoid the kind of chilling effect on public participation seen in cases like *Gunns.*

Much attention has been paid to the relative effectiveness of the procedural remedies offered under these statutes. Less attention has been paid to the way in which these statutes identify SLAPPs. In asking courts to strike out certain lawsuits as SLAPPs, statutes must balance competing values: access to justice for the plaintiff and the public participation rights for the defendant. This balance makes the drafting and eventual application of anti-SLAPP statutes a difficult task.

This thesis compares four examples of anti-SLAPP statutes which are already in operation, to assess how SLAPPs are identified by courts and identify whether certain aspects of the IHRL approach to SLAPPs are missing from the legal analysis.

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[1] *Gunns Ltd v Marr* [2005] VSC 251 [25].

[2] Adam Beeson, 'The Gunns 20 Case: A Brief History' (2010) 1 National Environmental Law Review 51, 52.

[3] *Gunns Ltd v Marr* (n 1) paras 57–58.

[4] Andrew Burrows (ed), 'Introduction' *English Private Law* (Oxford University Press 2013).

[5] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, 'Sustainable Development and Freedom of Expression: Why Voice Matters' (2023) UN Doc A/HRC/53/25 para 73.

## 1.1 Outline

Chapter 2 provides an overview of three characteristics of a SLAPP: a power imbalance between plaintiff and defendant, abusive legal tactics, and a subject linked to the public interest. This chapter also outlines the empirical data on the effects of SLAPPs and reports on their effect in a range of international contexts, including the protection of environmental defenders, journalists and whistleblowers.

Chapter 3 describes the four examples of anti-SLAPP statutes to be analysed: in British Columbia and Ontario, the Australian Capital Territory, New York, and England and Wales (collectively, the "**Selected Statutes**"). It justifies the inclusion of this range of jurisdictions as a sample of enacted anti-SLAPP laws which have been in force for long enough to have observable effects.

Chapters 4, 5 and 6 compare how the courts applying the Selected Statues have engaged with each of the SLAPP characteristics.

## 1.2 Objectives and research questions

The primary objective of this thesis is to evaluate different approaches to identifying a SLAPP in terms of protecting human rights. To achieve this, the thesis poses and answers four research questions and three sub-questions:

i. What are the characteristics of SLAPPs that make them a human rights concern?
ii. How do the Selected Statutes characterise SLAPPS?
iii. How are the Selected Statutes applied in court in relation to each SLAPP characteristic? This sub-question breaks down the following for each SLAPP characteristic:
    a. How do the Selected Statutes assess the *power imbalance between the parties*?
    b. How do the Selected Statutes assess whether the *defendant's conduct relates to a matter of public interest*?
    c. How do the Selected Statutes assess *abusive legal tactics used by the plaintiff*?
iv. What lessons does this analysis have for future attempts to protect human rights through anti-SLAPP statutes?

## 1.3 Method

This thesis uses comparative legal analysis.[6] Under this method, a set of legal systems are chosen for comparison – i.e. the identification of similarities and differences between them – on a particular point. Comparative legal research typically goes through the process of preparation, description, comparison, followed

[6] Marieke Oderkerk, 'Methods of Comparative Legal Research: How to Set Up and Carry Out a Comparative Legal Research Project' *Uncovering European Private Law: A Student Handbook* (Open Book Publishers 2025).

by explanation and evaluation, but the exact method used will depend on the goals of the research.[7]

The normative goal of this research is to evaluate the strengths and weaknesses of different approaches to identifying a SLAPP, in terms of the human rights protections offered. The legislative and judicial responses to anti-SLAPP laws in the selected jurisdictions will be described, then compared and evaluated on their alignment with the characteristics of a SLAPP.

This thesis begins with an account of a common legal problem – the issue of SLAPPs – in four common law jurisdictions, before comparing each jurisdiction's alignment with characteristics of a SLAPP in IHRL guidance. Examples of legislation which fulfil the same function in different legal systems have been identified for comparison. It will conclude with an identification of the strengths and weaknesses of the different approaches, and an assessment of where there is room for better human rights protection.

The legal systems identified have been selected because they experience high levels of SLAPPs and in particular, because they are common law systems based on the English tradition with the tort of defamation. Given the legal nature of the problem with SLAPPs, it is important to assess the application of anti-SLAPP statutes in court, rather than comparing the legislation on paper. To ensure comparability, the scope of the anti-SLAPP laws is compared rather than the procedural protections, which differ between legal systems. The cases chosen for analysis are at appellate levels where such guidance is available, but first-instance judgments are also used to illustrate specific fact patterns and to draw insights, given that the statutes' influence on the day-to-day operations of courts is the core part of their operations.

## 1.4 Scope and limitations

The main limitation of this thesis is the selection of jurisdictions. There are several anti-SLAPP statutes that could have been included. Due to time constraints, it was not possible to analyse a broader range of statutes and their application in court. The Selected Statutes were chosen to represent a range of responses to addressing the issue. Furthermore, the decision was made to include only one state from the US due to the wealth of academic writing on comparisons between state anti-SLAPP laws in this context.

The thesis does not outline other torts and procedural protections which could deal with SLAPPs, such as striking out claims for abuse of process.[8] There is potential that the common law could evolve to deal with SLAPPs, but at present these do not present a solution to the human rights issues that SLAPPs pose.

The deadline for the transposition of the EU Anti-SLAPP Directive into national law, 7 May 2026, passed while I wrote this thesis. The directive is mentioned in the introductory chapters, but the recent developments in Ireland and Malta to transpose the directive into common law systems have not been analysed due to time constraints.

Finally, this paper focuses on the legal tests for identifying SLAPPs as opposed to the procedural safeguards provided by anti-SLAPP legislation – while

[7] ibid 314.

[8] Mark Hanna, 'SLAPPs: What Are They? And How Should Defamation Law Be Reformed to Address Them?' (2024) 16 Journal of Media Law 118, 136.

acknowledging that the calibration of these safeguards is an important part of the protection for defendants. This choice was made in order to limit the scope of the comparison and focus on an under-explored aspect of anti-SLAPP statutes.

# 2 What is a SLAPP and why is it a human rights issue?

Strategic lawsuits against public participation (SLAPPs) are legal cases which aim to suppress the exercise of political rights. The term SLAPP was first coined in the United States in 1988 by Penelope Canan and George W Pring, social science researchers for the University of Denver.[9] They analysed 100 cases where plaintiffs sued defendants in retaliation for their exercise of political rights, noting that there were likely flow-on effects on democratic rights which should be further explored. Their definition of SLAPP was "attempts to use civil tort action to stifle political expression".[10]

The archetypal SLAPP is the "McLibel" case, the longest-running trial in English legal history, which started in 1994 and lasted until 1997. There, two Greenpeace activists were found to have defamed McDonald's with a pamphlet criticising the environmental practices of the fast food company.[11] Later, the United Kingdom government was found to have breached the European Convention of Human Rights for the inadequate provision of legal aid to the defendants along with the breach of freedom of expression.[12]

In the years since Canan and Pring coined the term, SLAPPs have been recognised in law and policy as a serious issue with a chilling effect on human rights. The first example of anti-SLAPP legislation which sought to protect defendants in such cases through legal procedure was enacted in Washington State in 1989.[13] Today in the United States, 40 states and the District of Columbia have anti-SLAPP legislation on the books, while in Canada three provinces have enacted such legislation.[14] There are current campaigns for comprehensive anti-SLAPP statutes in Australia and the United Kingdom, while the Coalition Against SLAPPs in Europe has seen success with the EU Anti-SLAPP Directive.[15]

Much has been written about the relative strengths of different examples of anti-SLAPP legislation by campaigners. Within the United States, the Institute for Free Speech grades anti-SLAPP laws annually on the procedural protections offered alongside the scope of the laws.[16] A global ranking on similar criteria has been carried out by Canada's Centre for Free Expression.[17] The scope of the expression protected is a consideration in these assessments, but the test for identification of SLAPPs is not considered.[18]

This thesis addresses the question of identifying a SLAPP. It argues that the core challenge of addressing this policy problem in law lies in finding a test which can

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[9] Penelope Canan and George W Pring, 'Strategic Lawsuits against Public Participation' [1988] 35 Social Problems 5 506.

[10] ibid 506.

[11] *McDonald's Corporation v Steel & Morris* [1997] EWHC 366 (QB).

[12] *Steel and Morris v The United Kingdom* App no 68416/01 (ECtHR, 15 February 2005).

[13] Revised Code of Washington 4.24.510.

[14] Institute for Free Speech, 'Anti-SLAPP Statutes: 2025 Report Card' (2025).

[15] EU Anti-SLAPP Directive (2024/1069); Human Rights Law Centre, 'Stop the SLAPP: Protecting Freedom of Expression in Australia' (2024); UK Anti-SLAPP Coalition, 'Why Do We Need a UK Anti-SLAPP Law Now?' (2024).

[16] Institute for Free Speech (n 14).

[17] Evan Brander and James L Turk, 'Global Anti-SLAPP Ratings: Assessing the Strength of Anti-SLAPP Laws' (Centre for Free Expression).

[18] Institute for Free Speech (n 14) 11.

distinguish legitimate legal cases from those brought for the purpose of suppressing political rights. In implementing such laws, courts must grapple with the difficult question of balancing the right to a fair trial with freedom of expression. This chapter outlines an IHRL approach for the identification of SLAPPs and describes how SLAPPs are a problem for human rights.

## 2.1 Characteristics of a SLAPP

No specific instrument has been introduced to deal with or define SLAPPs at the international level. SLAPPs are difficult to define because they are an abuse of process which can take many forms.[19] The UN Office of the High Commissioner of Human Rights' (the **"OHCHR"**) framing of the concept has been influential in recent campaigns on the issue, such as the Australian Human Rights Law Centre's "Stop the SLAPP" campaign, the Platform to Protect Whistleblowers in Africa, and the International Labour Organisation's campaign on the safety of journalists.[20] It has also been cited in recent policy work on anti-SLAPP legislation in Ireland.[21]

This definition describes SLAPPs as "lawsuits or threats of legal action which use abusive litigation tactics with the aim or effect of suppressing public participation and critical reporting on public interest matters".[22] It then identifies three characteristics indicating that a case may be a SLAPP – a power imbalance, a subject linked to public participation rights, and abuse of legal tactics by the plaintiff.[23] These characteristics are a useful frame for the analysis in this thesis because they broadly capture the essence of a SLAPP without being overly prescriptive. They also align with the more detailed set of ten indicators set out by the Council of Europe in its 2024 recommendation on SLAPPs.[24]

### 2.1.1 Power imbalance: *'SLAPPs exploit imbalances in financial, political or societal power'*

The first characteristic from the OHCHR looks at the relative positions of the plaintiff and the defendant to assess whether the plaintiff is exploiting a disparity in their positions. Statistics in Europe show that SLAPP plaintiffs are often politicians or businesses, while defendants are either in the media industry, activists or civil

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[19] Article 19, 'Un-SLAPPed: Towards a Comprehensive Reform of Laws and Practices Curbing Public Participation and Freedom of Expression' (2026) Legal Briefing 7.

[20] International Labour Organization and International Labour Organization. Sectoral Policies Department, 'Decent Work and the Safety of Journalists' ([1st ed.], ILO 2026) 7 <https://doi.org/10.54394/00033954> accessed 5 May 2026; Human Rights Law Centre, 'Stop the SLAPP: Protecting Freedom of Expression in Australia' (2024) 9; The Platform to Protect Whistleblowers in Africa, 'The Investigative Journalism and Whistleblower Protection Nexus:The African Experience' (2025) Policy Brief 16.

[21] Michelle Lynch, 'Strategic Litigation Against Public Participation (SLAPP)' (House of the Oireachtas 2025) Library and Research Service Note 1.

[22] Office of the High Commissioner of Human Rights, 'The Impact of SLAPPs on Human Rights and How to Respond' (UN 2023) Briefer 1.

[23] ibid 2.

[24] Council of Europe, 'Recommendation of the Committee of Ministers to Member States on Countering the Use of Strategic Lawsuits against Public Participation (SLAPPs)' (2024) CM/Rec(2024)2 8.

society organisations.[25] The power imbalance involved in SLAPP cases amplifies the effect of legal cases and threats, particularly when combined with requests for excessive damages. The Council of Europe's recommendation highlights that these asymmetries in power or privilege have a detrimental effect on public participation, when used to bring legal threats and cases.[26]

### 2.1.2 Subject linked to public participation: *'SLAPPs are used to silence or suppress speech or action on matters affecting the public and in which the public might legitimately take an interest'*

The second characteristic from the OHCHR is a factual inquiry to determine whether the defendant is exercising public participation rights (a group of rights including freedom of expression, freedom of association, freedom of assembly, or participation rights) on a matter of public interest.

Both public participation and public interest are interpreted expansively in guidance on the issue. The Council of Europe defines public participation as "everyone's democratic right to participate in public debate and public affairs, online and offline, without fear or discrimination," while public interest covers "all matters which affect the public and in which the public may legitimately take an interest, especially those matters concerning important social issues or affecting the well-being of individuals or the life of the community or the environment".[27]

For example, in the context of environmental defenders, SLAPPs are often brought against those who report on harm and violations of environmental law by corporations (journalists and environmental NGOs) and individual defenders who bring litigation or participate in protests against corporate activities.[28]

### 2.1.3 Abusive legal tactics: *'SLAPPs turn proceedings into punishment with a view to intimidating and ultimately silencing'*

The third characteristic from the OHCHR is normally inferred from the conduct of the case, the weakness of the case, or an improper purpose on the part of the plaintiff. There are several factors that indicate the plaintiff is exercising abusive legal tactics, including the following: exorbitant damages sought,[29] issuing multiple proceedings,

[25] Coalition Against SLAPPs in Europe (CASE) and Daphne Caruana Galizia Foundation, '2025 Report on SLAPPs in Europe: Democracy in the Dock' (2024) 20.

[26] Council of Europe (n 24) 1.

[27] ibid 4a and b.

[28] Special Rapporteur on environmental defenders, Michel Forst, 'Report on Key Trends and Threats Regarding Environmental Defenders' UN Doc ECE/MP.PP/2025/20 para 56.

[29] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan, 'Reinforcing Media Freedom and the Safety of Journalists in the Digital Age' (2022) UN Doc A/HRC/50/29 para 67.

frequently amending pleadings, excessive disclosure requests, frivolous or vexatious claims,[30] and claims which are retaliatory or abusive.[31]

The Business and Human Rights Resource Centre also lists considerations including: tactics which drag out the case, baseless arguments, targeting individuals rather than organisations, and a history of legal intimidation by the plaintiff.[32] At the regional level, the EU Anti-SLAPP Directive focuses heavily on this aspect, with excessive damages, multiple proceedings, harassment or threats, and bad faith procedural tactics all indicators of this characteristic.[33] The Council of Europe Recommendation adds consideration of whether the plaintiff has accompanied their legal action with a public relations campaign designed to discredit the defendant(s).[34]

## 2.2 The effect of SLAPPs on human rights

The problem of SLAPPs is difficult to quantify, because legal threats and the prospective cost of mounting a defence can intimidate defendants into settling or apologising before claims are tested in court. The International Press Institute's 2026 report on environmental journalism in Africa noted that in places where SLAPPs were particularly common, journalists tended to self-censor or not investigate at all to avoid costly legal battles.[35]

SLAPPs can be effective without a case ever reaching court – a legal letter threatening a claim can lead to self-censorship, because removing an offending social media post, publishing an apology or retraction, or stopping engagement with the plaintiff is significantly cheaper than litigation.[36] Mark Hanna notes that the cost of litigation means the problem is furtive by nature – it can emerge in "the mere threat of proceedings, through a phone call by a claimant's lawyer, or a whisper in the ear of the defendant".[37] Statistics on legal threats by nature rely on self-reporting by those affected – for example, the Foreign Policy Centre's report surveyed journalists working on Organised Crime and Corruption Reporting Project investigations. It found that legal threats were the most impactful on the journalists' ability to keep working, more than harassment, physical and digital threats.[38]

In terms of claims actually filed, the most recent data on SLAPPs comes from the Coalition Against SLAPPs in Europe (CASE). This report analysed trends in 1303 SLAPPs filed between 2010 and 2024 – however, the report authors note that, due to the issues discussed above caused by threats of legal action, this data may only be

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[30] Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan (n 5) para 105.

[31] Open-ended Intergovernmental Working Group on the Prevention of Corruption, 'International Study on Best Practices and Challenges in the Protection of Reporting Persons' (2025) UN Doc CAC/COSP/WG.4/2025/CRP.1 paras 101–105.

[32] Business & Human Rights Resource Center, 'SLAPPed but Not Silenced: Defending Human Rights in the Face of Legal Risks' (2021) 29.

[33] EU Anti-SLAPP Directive art 4(3).

[34] Council of Europe (n 24) para 8(g).

[35] Jordan Higgins and Dr Marystella Simiyu, 'SLAPPs against Environmental and Climate Journalists in Africa: A Perfect Storm for Harassment' (International Press Institute Africa Programme 2026) 26.

[36] UK Anti-SLAPP Coalition (n 15) 6.

[37] Hanna (n 8) 121.

[38] Susan Coughtrie and Poppy Ogier, 'Unsafe for Scrutiny: Examining the Pressures Faced by Journalists Uncovering Financial Crime and Corruption around the World' (*The Foreign Policy Centre*, 2020) 23.

the "tip of the iceberg".[39] The most common defendants were in the media industry: journalists, media outlets or editors. The next most common targets were activists followed by NGOs. The plaintiffs bringing the cases were businesses in 41% of cases and politicians in 29% of cases.[40] Other than these statistics on the identity of the parties, the report also noted that defamation claims made up the vast majority of SLAPPs, but other areas of law, including data protection, competition law and business torts were increasingly used by plaintiffs.[41]

Despite the difficulty with quantifying the problem, SLAPPs are acknowledged as a "growing trend" by special procedures of the UN Human Rights Council.[42] They have been identified as a concern in contexts including freedoms of association and assembly,[43] the protection of journalists[44] and environmental defenders,[45] whistleblowers and anti-corruption,[46] and the independence of justice systems.[47]

The silencing that results from SLAPPs is one of the core human rights concerns that they raise. The stress and anxiety associated with being the subject of a lawsuit, coupled with the serious potential impacts of a SLAPP in terms of financial consequences, create a "powerful chilling effect".[48] [49] [50] For the subjects of SLAPPs, the lawsuits create a climate where they are "punished, intimidated or deterred from engaging in human rights-promoting activities in the future".[51]

While a SLAPP may have a direct effect on the expression of a journalist or activist, the looming threat of legal action in relation to the issue also has a "ripple effect" of stopping the public from accessing information about the subjects of SLAPPs.[52] In jurisdictions where there have been high-profile SLAPPs against environmental defenders, the effects include widespread self-censorship, environmental organisations needing to get publications reviewed by lawyers, activists not speaking

[39] Coalition Against SLAPPs in Europe (CASE) and Daphne Caruana Galizia Foundation (n 25) 14.

[40] ibid 22.

[41] ibid 30.

[42] Special Rapporteur on environmental defenders, Michel Forst, 'Report on Regional Consultations with Environmental Defenders' (2025) UN Doc ECE/MP.PP/2025/19 paras 85–90.

[43] Special Rapporteur on the rights to freedom of peaceful assembly and association, 'Info Note: SLAPPs and FoAA Rights' (2017).

[44] Secretary-General, 'Safety of Journalists and the Issue of Impunity' (2025) UN Doc A/80/345 paras 7–8.

[45] Special Rapporteur on environmental defenders, Michel Forst (n 28) para 53.

[46] Open-ended Intergovernmental Working Group on the Prevention of Corruption, 'International Study on Best Practices and Challenges in the Protection of Reporting Persons' (2025) UN Doc CAC/COSP/WG.4/2025/CRP.1 paras 100–105.

[47] Special Rapporteur on the Independence of judges and lawyers, Margaret Satterthwaite, 'Justice Is Not for Sale: The Improper Influence of Economic Actors on the Judiciary' (2024) UN Doc A/79/362 paras 44–45.

[48] ibid 67.

[49] Special Rapporteur on the situation of human rights defenders, Michel Forst, 'Situation of Human Rights Defenders' (2017) UN Doc A/72/170 para 43.

[50] Secretary-General (n 44) para 16.

[51] Special Rapporteur on the Independence of judges and lawyers, Margaret Satterthwaite (n 47) para 45.

[52] Laura Lee Prather, 'SLAPP Suits: An Encroachment on Human Rights of a Global Proportion and What Can Be Done about It.' (2023) 22 Northwestern Journal of Human Rights 49, 55.

out, and the public becoming more reluctant to engage with environmental causes over concerns about retaliation.[53]

These lawsuits can also add to existing strain on the courts. The Special Rapporteur on independent justice has observed that where unaddressed, these lawsuits waste judicial resources and erode public faith in the integrity of the judicial system.[54] Furthermore, they can deter rights-holders from seeking remedies or engaging with other grievance mechanisms because they fear retaliation.[55]

As a response to the rising recognition of this problem, human rights organisations and Special Rapporteurs are increasingly recommending that states should enact anti-SLAPP legislation to address the issue. Two resolutions from the Human Rights Council[56] and various Special Rapporteurs have recommended that states adopt anti-SLAPP legislation in the context of the safety of journalists.

## 2.3 SLAPPs are unjustified limitations on human rights

The European Court of Human Rights, the Inter-American Court of Human Rights and the Constitutional Court of South Africa have all recognised the chilling effect of SLAPPs as an unlawful limitation on human rights.[57]

The human rights affected by SLAPPs are civil and political rights – most commonly freedom of expression, freedom of assembly, and the right to public participation.[58] All of these rights can be restricted, but the restrictions must not be aimed at discouraging the exercise of the rights, which is the purpose of a SLAPP.[59] Further, restrictions on these rights must be provided by law, pursue a legitimate aim, and meet the tests of necessity and proportionality.[60] While the rights and reputations of others are listed as a justification for restrictions on expression, these restrictions must pass the same tests.[61]

As private law claims, whether SLAPPs are provided by law and pursue a legitimate aim will depend on the particular case brought by the plaintiff and whether it is legally valid. However, the tests of necessity and proportionality demonstrate why even SLAPPs which do pursue a legitimate aim are an issue for human rights.

[53] Special Rapporteur on environmental defenders, Michel Forst (n 42) paras 91–93.

[54] Special Rapporteur on the Independence of judges and lawyers, Margaret Satterthwaite (n 47) para 44.

[55] UN High Commissioner for Human Rights, 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse through Non-State- Based Grievance Mechanisms: Explanatory Notes' (2020) UN Doc A/HRC/44/32/Add.1 para 18.

[56] UN Human Rights Council, 'Resolution 59/15: The Safety of Journalists' (2025) UN Doc A/HRC/RES/59/15.

[57] *OOO Memo v Russia* [2022] ECtHR Application No 2840/10; *Palacio Urrutia v Ecuador* [2021] Case No 13015, Inter-American Court of Human Rights (24 November 2021) (Inter-American Court of Human Rights); *Mineral Sands Resources Propriety Limited and Another v Christine Reddell and Others* [2022] Constitutional Court of South Africa Case No CCT 66/21.

[58] International Covenant on Civil and Political Rights 1976 arts 19, 21 and 25.

[59] Office of the High Commissioner of Human Rights (n 22) 3.

[60] Human Rights Council, 'General Comment No. 34: Freedoms of Opinion and Expression' (2011) UN Doc CCPR/C/GC/34 para 35.

[61] International Covenant on Civil and Political Rights 1976 art 19(3).

To meet the test of necessity, there should be a pressing need for the restriction on rights.[62] For SLAPPs, the legitimate aim being pursued will depend on the particular claim brought by the plaintiff – in defamation cases, the most common claim for SLAPPs, the legitimate aim is protection of reputation. The need for the restriction on rights will therefore depend on the strength of the plaintiff's case, with low-merit claims failing to pass this bar.

To meet the test of proportionality, the restriction on rights should be tailored to the aim.[63] This requires a balance to be struck between the human right and the legitimate objective. Striking this balance "must not result in individuals being discouraged, for fear of disciplinary or other sanctions, from exercising their rights".[64] Given the suppression of rights resulting from SLAPPs, this is where SLAPPs are an issue on an IHRL approach. The objective to be achieved – protection of reputation, for defamation cases – should be achieved in the least restrictive way for human rights. Jurisdictions which permit SLAPPs are permitting a climate where public participation is restricted on the basis of tenuous legal claims, which by their nature do not have the merit to justify a restriction on political rights.

SLAPPs are thus a threat to human rights which requires regulation under international human rights law. By enacting anti-SLAPP statutes, and giving courts the tools to identify and dispose of SLAPPs at an early stage, states are protecting human rights from unnecessary and disproportionate restrictions.

Now that the position of SLAPPs in IHRL has been addressed, this thesis considers proposed solution to this problem: anti-SLAPP legislation. Four examples of anti-SLAPP statutes have been selected for analysis in terms of the OHCHR characteristics. Chapter 3 outlines these legislative attempts to address the problem of SLAPPs and the context surrounding them.

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[62] Nihal Jayawickrama (ed), 'Limitations' *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (2nd edn, Cambridge University Press 2017) 150–151.

[63] ibid 152.

[64] ibid.

# 3 Selected examples of anti-SLAPP statutes

Anti-SLAPP statutes are the focus of this thesis. Broadly, this legislation is structured so that if a claim passes the test set out to determine whether a claim is a SLAPP, procedural protections such as early dismissal or a reversal of the burden of proof can be granted by the court.

This is the solution generally favoured by advocates concerned about the issue of SLAPPs. However, it should be noted that legislation is not the only way forward and the common law is also capable of deterring SLAPPs. For example, the Constitutional Court of South Africa has adopted a broad definition of "abusive litigation" to provide greater protection where freedom of expression is at issue, adopting anti-SLAPP measures as part of the court's common law.[65]

The four examples of this kind of legislation discussed in this thesis (collectively, the "**Selected Statutes**") have been selected because they represent different solutions to the problem of SLAPPs. The anti-SLAPP statutes are broadly comparable because they seek to deter legal claims to protect human rights and fulfil equivalent functions, despite the different legal contexts in which they exist. Furthermore, the four examples all exist in jurisdictions (the **"Selected Jurisdictions"**) deriving from the English legal tradition. Defamation claims in these jurisdictions are uniquely plaintiff-friendly, because the tort is strict liability – meaning defendants can be held liable for damage to reputation without the plaintiff needing to show intention, recklessness or other fault from the defendant. The case normally depends on whether the defendant can establish a defence of justification or truth, rather than evidence brought by the plaintiff.[66]

This thesis refers to the cases which engage the procedural protections of anti-SLAPP legislation as SLAPPs, regardless of whether the legislation uses this term or not. The cases struck out by anti-SLAPP legislation are not necessarily termed "SLAPPs" by the legislation. In England and Wales, the most recent example of legislation analysed, cases that pass the test are considered SLAPPs. The courts in Canada take a different approach, noting that some good faith cases will fail under the legislation and that is the policy choice made to strike out these cases in favour of protecting expression.

This chapter sets out the Selected Statutes and relevant context from the Selected Jurisdictions. It provides background for each anti-SLAPP law, the statute's purpose, and the test for identification of SLAPPs, before setting out where the legislation falls on a global ranking of anti-SLAPP legislation.

## 3.1 Ontario and British Columbia

In the early 2000s, Ontario saw a string of defamation cases against environmental causes – with companies challenging advocates against airport expansions, community groups concerned about a port redevelopment and journalists for authoring a book on the actions of a Canadian company mining in the Democratic

[65] *Mineral Sands Resources Propriety Limited and Another v. Christine Reddell and Others* (n 57) paras 95–6.

[66] Hilary Young, 'Canadian Anti-SLAPP Laws in Action' (2022) 100 Canadian Bar Review 186, 188.

Republic of the Congo. Due to the high-profile of these issues and pressure from environmental NGOs, a panel reported to the Legislative Assembly of Ontario, and the Protection of Public Participation Act was enacted in 2015.[67]

British Columbia followed suit in 2019 with a piece of legislation which is "virtually identical", according to the Supreme Court of Canada.[68] For the purposes of this paper, cases from these provinces will be analysed together, as they use the same test to identify SLAPPs. While this statute only applies in these two provinces, for ease of comparative analysis in this thesis, it will be referred to as the **"Canadian Statute"**.

The purpose of the statute is to encourage expression on matters of public interest, promote participation in debates, discourage the use of litigation to limit freedom of expression, and to reduce the risk that participation in debates on matters of public interest will be hampered by legal action.[69]

The scope of the legislation appears broad, but in practice comes down to a weighing test. On an anti-SLAPP motion from a defendant, the legislation requires the judge to dismiss the case if satisfied that the proceeding "arises from an expression that relates to a matter of public interest".[70] However, if the plaintiff can make out the exception the case will not be dismissed. To prevent dismissal, the plaintiff needs to show their case has substantial merit and that the defendant does not have a valid defence.[71] They also need to show that the harm they suffered as a result of the expression outweighs the public interest in protecting it.[72]

It is this exception, and in particular the public interest weighing test, which in practice determines the scope of the legislation and the identification of cases which will be struck out as SLAPPs. This weighing test is fact-intensive and difficult to apply to cases with issues of credibility, such as allegations of sexual assault.[73] Hilary Young has noted that balancing reputational harm with public interest in freedom of expression is "apples and oranges" – one is private, the other public; one has a quantifiable effect, the other will be difficult to track; and the legislation provides little guidance on how such balancing is to be conducted.[74]

Nonetheless, the law has been rated as one of the best in the world by the Centre for Free Expression.[75]

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[67] Hugh Wilkins and Ramani Nadarajah, 'Breaking the Silence: The Urgent Need for Anti-SLAPP Legislation in Ontario' (Ecojustice and Canadian Environmental Law Association 2010); *1704604 Ontario Ltd v Pointes Protection Association* [2020] SCC 22 (SCC) [7–10].

[68] *Hansman v Neufeld* [2023] SCC 14.

[69] Protection of Public Participation Act 2015 (ON) s 137.1(1).

[70] ibid 137.1(3).

[71] ibid 137.1(4)(a).

[72] ibid 137.1(4)(b).

[73] Young, 'Canadian Anti-SLAPP Laws in Action' (n 66) 220.

[74] Hilary Young, 'Responsible Communication and Protection of Public Participation: Assessing Canada's Newest Public Interest Speech Protections Fake News and Weaponized Defamation: Global Perspectives Symposium: Articles' (2017) 47 Southwestern Law Review 385, 414.

[75] Brander and Turk (n 17) 23.

## 3.2 New York

New York was an early adopter of anti-SLAPP legislation, but the 1992 version of the state law covered only disputes over the government permitting process, for example for real estate development permits or zoning changes.[76] Fifteen years after its adoption, a judge noted there had never been a case in which a newspaper successfully came under the protection of the statute.[77]

Given the high profile of New York's media industry, scholars have commented that it is "something of a mystery" how the state went for so long without an anti-SLAPP law. The updated version of the law was passed in the post-MeToo context, with the law's sponsor Senator Brad Hoylman naming Harvey Weinstein and Donald Trump as famous perpetrators who had used New York courts to silence critics and victims as the bill passed the state senate.[78]

The updated version of the anti-SLAPP provisions significantly expanded the protections.[79] This 2020 amendment to the state's Civil Rights Law (the "**New York Statute**") was enacted with the express purpose of protecting "citizens' exercise of the rights of free speech and petition about matters of public interest."[80]

The relevant section to identifying SLAPPs is s 76-a of the Civil Rights Law. An "action involving public participation and petition" is a claim based on either a public communication or other lawful conduct (free speech or petition) in connection with an issue of public interest.[81] There is a statutory direction to construe public interest broadly.[82] Section 70-a of the statute provides the remedy, with a sliding scale based on the purpose of the action. If the action was commenced without a substantial basis in law – for example, where the plaintiff brought a claim in good faith but lacked evidence of malice – then costs can be recovered from the plaintiff.[83] The defendant may recover further compensatory damages if a purpose of the action was to maliciously inhibit the free exercise of speech, petition or association rights.[84] If this was the sole purpose of the action, then the defendant may recover punitive damages.[85]

The state's courts interpreted the legislature's amendment specifying the law should have immediate effect to apply to cases filed before the enactment of the amendment.[86] There have been many cases under the legislation already.

The latest version of the New York law is rated as one of the best in the world according to a global analysis of anti-SLAPP laws.[87]

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[76] Matthew Schafer and Tanvi Valsangikar, 'The Application of the New York Anti-SLAPP Scheme in Federal Court' (2023) 2 Journal of Free Speech Law 573, 580.

[77] *Cholowsky v Civiletti* [2007] 16 Misc A 3d 1138 (NY App Div).

[78] Matthew D Bunker and Emily Erickson, 'The Jurisprudence of Public Concern in Anti-SLAPP Law: Shifting Boundaries in State Statutory Protection of Free Expression' (2021) 44 Hastings Communications and Entertainment Law Journal 133, 156.

[79] ibid 147.

[80] New York State Senate Bill S52A 2020.

[81] New York Civil Rights Law s 76a(a).

[82] ibid 76a(d).

[83] ibid 70a(a).

[84] ibid 70a(b).

[85] ibid 70a(c).

[86] *Palin v NY Times Co* [2020] 510 F Supp 3d 21 (SDNY).

[87] Brander and Turk (n 17) 107.

## 3.3 The Australian Capital Territory

The Australian Capital Territory (ACT) Protection of Public Participation Act 2008 (the "**ACT Statute**") was enacted following the prominent *Gunns 20* case, where the Tasmanian forestry company Gunns Ltd filed a case alleging economic torts by 20 activists.[88] Other Australian states considered similar measures after *Gunns,* but ultimately settled for a more limited review of defamation law. Neither the ACT Statute nor the other states' amendments have successfully addressed the issue of SLAPPs according to campaigners, who are pushing for federal legislation on the issue.[89] They highlight examples of cases where a major gambling company sued an anti-money laundering whistleblower for disclosures to an MP, as well as a case where an oil company took First Nations activists to court for their opposition to a planned pipeline.[90]

The ACT Statute aims to protect public participation and discourage proceedings that a reasonable person would consider interfere with engagement in public participation.[91] It applies to all civil proceedings where the plaintiff may claim damages, but notably not to causes of action for defamation.[92] The Act allows judges to impose fines on plaintiffs, but does not provide greater procedural protections such as early dismissal.

The cases which this statute identifies as SLAPPs must meet two requirements: that the conduct of the defendant is public participation, and that the proceeding is started or maintained for an improper purpose.[93] Public participation is defined as conduct a reasonable person would consider is intended to influence public opinion or promote action by public or private actors in relation to an issue of public interest.[94] However, criminal conduct, employment disputes, advertising and the incitement of criminal conduct are specifically excluded.[95] Improper purpose is defined with another objective test – if a reasonable person would consider the main purpose of the proceeding is to discourage, divert resources from, or punish or disadvantage the defendant's public participation, it has been brought for an improper purpose.[96]

The ACT Statute was originally based on a model drafted by the Greens following *Gunns* 20, but was heavily amended as it went through the state legislature. The eventual law was limited in terms of the cases it could apply to and its procedural remedies, which only provides for compensatory damages and not a strike-out of the case.[97] The Human Rights Law Centre critiques the law's narrow focus, but nonetheless recognises the law as a "crucial and commendable" first step to

[88] *Gunns Ltd v Marr* (n 1); Beeson (n 2).

[89] Human Rights Law Centre, 'Stop the SLAPP: Protecting Freedom of Expression in Australia' (n 15) 4.

[90] *Registered Clubs Association of New South Wales v Stolz (No 2)* [2021] FCA 1418; *Munkara v Santos NA Barossa Pty Ltd (No 5)* [2024] FCA 717.

[91] Protection of Public Participation Act 2008 (ACT) s 5.

[92] ibid 8.

[93] ibid 9(1).

[94] ibid 7(1).

[95] ibid 7(2).

[96] ibid 6.

[97] Greg Ogle, 'Anti-SLAPP Law Reform in Australia' (2010) 19 Review of European Community & International Environmental Law 35, 41.

protecting public participation in Australia.[98] This legislation is ranked as weak on a global comparison of anti-SLAPP legislation.[99]

## 3.4 The United Kingdom

England is known world-wide as a jurisdiction with the most plaintiff-friendly defamation laws.[100] As such is a "SLAPP hotbed" according to data analysing SLAPP trends in Europe, as well as reports from the Index on Censorship and Reporters Without Borders.[101] A survey of journalists investigating corruption in 2020 found England and Wales was the most common country of origin for the legal threats they faced after their home countries, with 31% of all threats originating in the UK – more than the EU and the USA combined.[102]

There is a broader push for anti-SLAPP laws in the United Kingdom, but the legislation currently in force is limited to the Economic Crime and Corporate Transparency Act 2023 (**"UK Statute").** As the name suggests, the anti-SLAPP provisions contained in this statute are confined to economic crime. While this legislation applies to the United Kingdom as a whole, it has only been applied by courts in England and Wales so far, so this jurisdiction is the focus of comparison in terms of the statute's application in court. The UK Statute's initial focus on economic crime reflects that SLAPPs are often brought to suppress whistleblowing and cover-up corruption.[103]

Cases will be struck out under the UK Statute if they meet the legislation's definition of SLAPP and the plaintiff cannot show that it is more likely than not that the case will succeed at trial.[104] The claim is defined as a SLAPP if it meets four requirements.[105]

Firstly, the plaintiff's behaviour in relation to the matters complained of must have or be intended to have the effect of restraining the defendant's exercise of the right to freedom of speech.[106] Secondly, the information that would be disclosed by the exercise of that right must be to do with economic crime – further defined as relating to behaviour the defendant reasonably believes to be evidence of such a crime, or that would facilitate an investigation into whether such a crime has occurred.[107] Thirdly, the disclosure must be for a purpose related to the public interest in combating economic crime.[108] Finally, the behaviour of the plaintiff in relation to the claim must be intended to cause the defendant harassment, expense, or other harm

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[98] Human Rights Law Centre, 'Stop the SLAPP: Protecting Freedom of Expression in Australia' (n 15) 4.

[99] Brander and Turk (n 17) 19.

[100] Peter Coe, Rebecca Moosavian and Paul Wragg, 'Addressing Strategic Lawsuits against Public Participation (SLAPPs): A Critical Interrogation of Legislative, and Judicial Responses' (2025) 17 Journal of Media Law 103, 112.

[101] ibid 108.

[102] Coughtrie and Ogier (n 38) 7.

[103] Open-ended Intergovernmental Working Group on the Prevention of Corruption (n 31).

[104] Economic Crime and Corporate Transparency Act 2023 (UK) s 194(1).

[105] ibid 195(1).

[106] ibid 195(1)(a).

[107] ibid 195(1)(b) and (3).

[108] ibid 195(1)(c).

or inconvenience beyond that ordinarily encountered in the course of properly conducted litigation.[109]

The UK Statute has been critiqued for the narrow definition focusing on the plaintiff's intention.[110] An assessment on a broader range of factors than those set out would enable "a more fact-sensitive, nuanced but principled assessment of whether a claim is a SLAPP".[111] The legislation is relatively recent and limited in scope to speech on economic crimes, so the law has not yet been assessed on a global analysis of anti-SLAPP laws.

## 3.5 Conclusion

One of the most difficult tasks for anti-SLAPP legislation is how to identify a SLAPP without discouraging legitimate lawsuits. This is a critical question for the protection of human rights under such statutes. Restrictive definitions of SLAPP may be overly permissive of lawsuits which unjustifiably restrict rights to freedom of expression or public participation – or, at the other end of the spectrum, may overly limit access to justice in legitimate cases. As outlined above, the jurisdictions each take a different approach to identifying SLAPPs.

The following chapters of this thesis compare how these different tests are applied by courts, based on the level of engagement with the characteristics of a SLAPP set out by the OHCHR. The hallmarks of a SLAPP may be wholly or partially considered, or ignored in the different jurisdictions. This paper compares the application of anti-SLAPP legislation in the jurisdictions listed above in terms of how they identify a SLAPP.

[109] ibid 195(1)(d).
[110] Coe, Moosavian and Wragg (n 100) 120.
[111] ibid 139.

# 4 First characteristic: power imbalance

This chapter assesses how courts across the Selected Jurisdictions consider the power imbalance between the parties in determining whether a case is a SLAPP. Power imbalance is the first characteristic of a SLAPP identified in the OHCHR's framework, alongside conduct linked to the public interest and abusive legal tactics used by the plaintiff.[112] None of these characteristics should be seen as definitive on their own, but a case with all three shows strong signs that it is a SLAPP.

The power imbalance test turns attention to how SLAPP plaintiffs take advantage of existing imbalances in financial, societal or political power. The archetypal SLAPP involves a well-resourced company suing an individual who cannot afford the legal resources required to defend the case. It is a common technique of SLAPP plaintiffs to sue an individual journalist as opposed to taking on the better-resourced media company who published the article. This can make the threat existential, by extending into the individual's private life and potentially threatening their financial stability, family and home.[113] For example, the case brought by Russian oligarch Yevgeny Prigozhin against investigative journalist Elliot Higgins concerned social media posts about the investigation, rather than the publication of the investigation itself.[114] In this way, plaintiffs deliberately maximise the impact of the legal case on the defendant.

The power imbalance between the parties is closely linked to the chilling effect on public participation rights.[115] The comparatively deep pockets of the plaintiff allow them to protract litigation and exhaust resources, putting the defendant in a position where they have to consider their potential liability if they lose, and will normally have to front with their own legal costs to defend the case.[116] Coe, Moosavian and Wragg argue that while it may be a difficult factor for courts to gauge, power imbalance is a crucial indicator of a SLAPP.[117] It is not only relevant when it comes to an imbalance in financial resources, but also in terms of power structures such as gender inequality which may work against women who are sued for their allegations of sexual abuse. They argue that while this element is not determinative of a SLAPP, it should be viewed in context and accorded appropriate weight by the court.

Three considerations mean that this element has not received significant attention in anti-SLAPP cases. Firstly, courts may be unwilling to give too much weight to the 'real-world' positions of the parties while assessing the strength legal case before them. Secondly, where power imbalance is not addressed in the legislation, it can lead to unjust outcomes which favour freedom of expression to the detriment of access to justice. Finally, courts appear to be more willing to consider financial power structures rather than societal power structures, which may nonetheless be relevant to SLAPP identification.

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[112] Office of the High Commissioner of Human Rights (n 22) 2.

[113] Barbara Longo-Flint, 'The Impact of Legal Intimidation on Investigative Journalists' in Neil Macfarlane, Barbara Longo-Flint and John Price, *Insights on Investigative Journalism* (1st edn, Routledge 2025) 89.

[114] Ursula Smartt, 'Who's Slapping Whom? Strategic Lawsuits against Public Participation, a Growing Threat to Freedom of Speech or Dividends for Hard-Nosed Law Firms Representing Unpopular Clients?' (2023) 2.

[115] Michaelin Scott and Chris Tollefson, 'Strategic Lawsuits Against Public Participation: The British Columbia Experience' (2010) 19 Review of European Community & International Environmental Law 45, 47.

[116] Office of the High Commissioner of Human Rights (n 22) 2.

[117] Coe, Moosavian and Wragg (n 100) 138.

## 4.1 Looking behind the law

Courts may be reluctant to look behind the law at the respective positions of filers. This is particularly apparent in England and Wales, where even with a statutory direction to assess the respective resources of the parties under anti-SLAPP provisions, the High Court has highlighted that this was an unusual consideration.[118]

The UK Statute explicitly directs courts to consider the resources available to the parties in considering whether a case is a SLAPP. The statute sets out a range of factors for consideration – with the plaintiff's selection of a comparatively under-resourced defendant (compared to other potential defendants) among them.[119] This is the UK's first anti-SLAPP provision and applies only to publications concerning economic crimes.

The first case based on that law, *Kamal v Tax Policy Associates,* struck out a defamation case against a tax blogger over an article expressing concerns that a financial influencer was promoting a tax avoidance structure.[120] The UK Statute was applied as an alternative argument, after the defendants had already won their case for summary judgement, so it was not necessary for the court to exercise the legislative strike-out power. However, the court declared that the case was a SLAPP and would have been struck out, had the defendants not already succeeded.[121]

In its reasoning, the court drew a distinction between SLAPPs in policy and SLAPPs in law. While in policy terms "a clear marker of a potential SLAPP is a claim brought by a wealthy and powerful suspected malefactor against the valiant but modestly financed lone journalist seeking to expose their wrongdoing", under the UK Statute the consideration of power imbalance is whether the plaintiff had chosen to create a "David and Goliath" situation.[122] This was an "unusual matter" for a court to consider, given that access to justice applies equally regardless of the financial positions of the plaintiff and defendant. The court interpreted the guidance to consider an imbalance in financial resources in a limited sense: "if they have targeted a less well-resourced opponent *for that reason* then that *may* be relevant to the imputation of something which might be identified as an oppressive animus".[123] The court considered that this matter went to an indication of intent on the part of the plaintiff.

This case shows that even where legislation directs the court to consider the resources of the parties before it, courts will only look at this background information in specific contexts. *Kamal* was not a classic SLAPP in terms of power imbalance, with the plaintiff and defendant on a relatively level playing field in terms of their finances – but this did not stop the court from finding that the SLAPP provisions would have applied if the case had not been struck out on other grounds.[124]

[118] *Kamal v Tax Policy Associates Ltd & Neidle* [2026] EWHC 551 (KB) [164].
[119] Economic Crime and Corporate Transparency Act 2023 (UK) s 195(4)(b).
[120] *Kamal v Tax Policy Associates Ltd & Neidle* (n 118).
[121] ibid 228.
[122] ibid 163–4.
[123] ibid 164.
[124] ibid 196.

## 4.2 The risk of injustice

The New York Statute, which allocates costs to plaintiffs whose cases are struck out as SLAPPs, demonstrates the risk of injustice when anti-SLAPP statutes are silent on a power imbalance between the parties.[125]

The previous version of the New York anti-SLAPP law was applied by courts with a distinction between media companies and citizen activists. The latter were described as being "at a disadvantage in defending lawsuits brought by financially able public applicants or permittees who seek to quell opposition".[126] However, that early form of the law was restrictively applied in the courts, essentially limiting the scope of protections to individual citizens challenging permitting decisions. The new anti-SLAPP provisions passed in 2020 were expanded to apply equally to all defendants and were celebrated as an improvement for entertainment companies and the media industry.[127] Courts have consistently applied the new law to protect publishers as well as individual journalists.[128]

Courts have signalled that the new law has potentially shifted matters too far towards protection of speech, with the automatic award of costs to defendants who successfully strike out cases leading to injustices. A defamation case against the New York Post brought by the parents of a 14-year-old, who had been arrested in relation to a murder, demonstrates this. In that case, the plaintiffs brought a defamation and privacy claim in good faith after their son's arrest was reported on. The judge commented that the automatic award of costs against unsuccessful SLAPP plaintiffs – with no consideration of power imbalance or financial means between the plaintiff and defendant – may have gone too far towards "overpenalizing individual plaintiffs who bring non-frivolous and good faith claims but are ultimately unsuccessful".[129] The judge suggested that this should be reconsidered by the legislature and factors including the finances of the parties could be considered at this stage of the process.

Recent case law in New York takes a more nuanced approach to power imbalance, where cases brought in good faith against large corporations may be excluded from this automatic award of costs. A 2025 case showed a court interpreting away the mandatory award in order to avoid penalising parents of a deceased Ukrainian reporter, who had unsuccessfully brought a case against Harper Collins for a misrepresentation about the circumstances of their daughter's death.[130] The judge quoted from the sponsor of the anti-SLAPP amendment, where the Bill's sponsor said that the anti-SLAPP amendments should only be applied where the litigation has been brought in bad faith, for the sole purpose of stifling free speech. In this light, the legislative history showed the anti-SLAPP laws were "not meant to apply to a case like this, where a large corporation moves to dismiss and seeks attorneys' fees against two grieving parents in a country that has experienced a brutal multi-

[125] New York Civil Rights Law s 70a.

[126] *Cholowsky v Civiletti* (n 77).

[127] NY St Bar Assn, 'Commentary on Media Law Memorandum in Support' Bill Jacket L 2020, ch 250 17.

[128] *USL Mar, LLC v Adirondack Wild* [2026] -- NYS 3d (App Div) 1.

[129] *ARP v The City of New York, The New York Police Department & The New York Post* [2026] 2026 WL 350737 (NYS) [9].

[130] *Kuvshynov v Fox News Network* [2025] 245 NYS 3d 920.

year invasion."[131] The motion to dismiss was granted, but the court would not grant costs against the plaintiffs because the litigation was brough in good faith.

The New York Statute shows that there is a real risk of over-capture where legislation is silent on the issue of power imbalance. This characteristic of SLAPPs is not only critical to identifying SLAPPs, but also in striking an appropriate balance between access to justice and freedom of expression.

## 4.3 Narrow focus on financial imbalance

The approach courts have taken under the Canadian Statute is not closely tied to the indicators of a SLAPP. Rather, the legislation implements a balancing test which seeks to weigh the potential harms to reputation and freedom of expression. It is only if the harm to restriction of freedom of expression outweighs the harm to the plaintiff's reputation that a case will be struck out as a SLAPP.

In one of the leading cases on the Canadian Statute, the Supreme Court of Canada noted that the archetypal indicia of a SLAPP, including "a financial or power imbalance that strongly favours the plaintiff", are only relevant to the extent that they can be tied to this weighing test under the legislation.[132] The court has noted that SLAPPs do not always follow the hallmark of being "initiated by the rich and powerful" – instead the defining feature is a proceeding which acts to silence rather than remedy serious harm.[133]

This does not render power imbalance irrelevant. The weighing test is seen by courts as an opportunity to assess "what is really going on" in the case before them.[134] In weighing the harm on both sides of the equation, the comparative advantage of a well-resourced plaintiff with little real stake in the claim (i.e. the archetypal SLAPP plaintiff) will tend to lessen the harm suffered. In *Pointes,* the Supreme Court sets out other factors which may be relevant to the weighing exercise under the legislation – including "disproportion between the resources used and the harm caused".[135]

However, courts vary on whether this test of "what is really going on" extends to a broad consideration of power imbalance beyond the financial resources available to plaintiff and defendant. In *Rooney v Galloway*, a case about a sexual assault allegation against a professor which was repeated throughout the academic community in British Columbia at the height of the #MeToo movement, the British Columbia Court of Appeal did not consider the power imbalance between the professor bringing the case and the various students, artists and academics he brought the case against.[136] Similar power imbalances have been raised in subsequent cases about sexual assault allegations, however the courts have not found the power imbalance to be relevant to the application of anti-SLAPP provisions in these cases.[137] This extends to other power structures too – in a case where a prominent medical business owner sued a member of the LGBTQ+ community over allegations

[131] ibid 10.
[132] *Platnick v Bent* [2018] ONCA 687 [99].
[133] *Hansman v Neufeld* (n 68) para 48.
[134] *1704604 Ontario Ltd v Pointes Protection Association* (n 67) para 81.
[135] *ibid 80.*
[136] *Rooney v Galloway* [2024] BCCA 8 [89].
[137] *Yates v Iron Horse Corporation* [2026] ONCA 38; *ApSimon v Hategan* [2026] ONSC 300.

of homophobia, the Ontario Court of Appeal did not find that the plaintiff or defendant's identity were relevant to the assessment.[138]

Where Canadian courts have considered power imbalance, it has been in the narrower area of financial disparities between plaintiff and defendant. *Catalyst Capital Group Inc v West Face Capital* found that power imbalance was very relevant in a decision to strike out a SLAPP brought by a finance company against journalists, whistleblowers and business rivals who had reported critically on the company.[139] There the financial and power imbalance between the parties was strongly evidenced through the "extraordinary record" of previous litigation and activities such as mounting a sustained PR campaign against their opponents.[140] The power imbalance was particularly stark in the case brought against the individual whistleblower.

Courts have identified a power imbalance as a relevant factor in applying the Canadian Statute, with the Supreme Court's guidance allowing consideration of "financial or other power imbalance[s]".[141] However, only in particularly clear circumstances where the plaintiff has a history of bringing cases to exhaust the resources of opponents that financial imbalances have been relevant. The courts have not yet found that a power imbalance between the parties in a non-financial sense is relevant for the anti-SLAPP test.

## 4.4 Conclusion on power imbalance

None of the approaches to power imbalance adopted under these examples of anti-SLAPP legislation take the broad approach to power imbalance encouraged in IHRL guidance. Instead, the courts tend to focus on a financial imbalance between the parties. Even in cases where there is a financial disparity, the principle of access to justice, the core value which needs to be balanced against freedom of expression in anti-SLAPP applications, tends to lead courts away from emphasising this element of the case. Overall, the cases analysed do not engage in a broad assessment of the power dynamics at work in a case to identify SLAPPs. Given that this element is often emphasised by the journalists and activists affected by SLAPPs, this is an area which should be given greater weight in the legal analysis.

Chapter 5 unpacks the approach in the Selected Jurisdictions to the OHCHR's second characteristic of a SLAPP – a subject-matter related to the public interest. Rather than looking at the real-world power relations between the plaintiff and defendant, this next element is a legalistic test about the subject of the claim. As the following chapter will demonstrate, the public interest test receives more attention under the Selected Statutes compared with power imbalance.

[138] *Mondal v Kirkconnell* [2023] ONCA 523 [91–93].
[139] *The Catalyst Capital Group Inc v West Face Capital Inc* [2023] ONCA 381 [3].
[140] ibid 119–120.
[141] *Platnick v Bent* (n 132) para 99.

# 5 Second characteristic: matters of public interest

Chapter 4 found that power imbalance, the first characteristic of a SLAPP identified by the OHCHR, was given limited consideration by courts dealing with anti-SLAPP motions in the Selected Jurisdictions. By contrast, the second characteristic identified by the OHCHR – conduct linked to a matter of public interest – receives significant attention in the case law. This chapter assesses how courts across the Selected Jurisdictions determine which expressions and conduct are linked to the public interest under anti-SLAPP laws.

By definition, SLAPPs seek to suppress political rights tied to public participation. Some focus on the defendant's conduct, which is brought into question by the lawsuit, is therefore an essential element of assessing whether the case is a private dispute or an attempt to suppress human rights. The OHCHR's briefing note sets out that SLAPPs are used to intimidate or silence people or groups taking action on matters of public interest – defined as "matters affecting the public or parts of it and in which the public might legitimately take an interest".[142] The examples given are alleged human rights violations, climate change, corporate accountability, corruption, and financial crimes. This aspect of the definition ensures that anti-SLAPP laws protect against litigation which has an impact on rights, instead of interfering in private disputes.

Different examples of legislation strike this balance differently. The New York Statute seems "expressly designed to push public concern to its furthest possible borders" and assesses the public interest in a broad subject-matter assessment.[143] The Canadian Statute, in contrast, requires both a threshold assessment of public interest and a more in-depth assessment of the weight of the public interest in the specific expression involved. Given that the proceeding is unlikely to be allowed to continue if there is a high level of public interest in the expression, Canadian courts take a cautious approach to this weighing assessment.[144]

Assessment of the public interest is present in all examples of anti-SLAPP legislation analysed, but the tests vary. Three comparisons can be drawn from the cases and statutes. Firstly, there is a contrast in the public interest conduct which will be protected – the New York Statute and the ACT Statute protect public interest conduct as well as expression, while the Canadian Statute and UK Statute limit the law's application to expression only. Secondly, across the examples, the test for the public interest is generally drawn from defamation law principles and is always present as a threshold test for the anti-SLAPP legislation. Finally, the Canadian Statute's secondary assessment of the weight of the public interest is particularly in-depth, and has limited the scope of the protections offered.

## 5.1 Public interest expression or conduct?

Two pieces of legislation analysed – the ACT Statute and the UK Statute – include limits which greatly reduce the scope of the kind of public interest expression or

[142] Office of the High Commissioner of Human Rights (n 22) 2.

[143] Bunker and Erickson (n 78) 162.

[144] Young, 'Responsible Communication and Protection of Public Participation' (n 74) 409.

conduct protected. In England and Wales, the SLAPP provisions only apply to a particular type of public interest – speech linked to the public interest in combating economic crime.[145] The ACT Statute takes an objective approach to defining public participation. The definition includes more than just expression – the test is what a reasonable person would consider is intended to influence the public, a corporation or government entity on an issue of public interest.[146] Several kinds of unlawful conduct are also expressly excluded. However, with the exclusion of defamation – the tort of choice for SLAPP plaintiffs – from the protections of this statute, the legislation has never been tested in court and it is unclear what kind of conduct would be protected on this definition.

The Canadian Statute applies only to expression, which is defined as "any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity".[147] The focus on expression and communication excludes protection for protesters or activists who might face civil claims for trespass or economic torts such as interference with contractual relations.

The New York Statute is the only legislation analysed which has been used to protect conduct other than expression or speech. This can be linked to the history of the law, which was first enacted in the 1990s based on Canan and Pring's original definition of SLAPP – which explicitly linked it to the right of petition and had in mind the context of residents' associations who faced lawsuits over their use of permitting and zoning processes related to land use.[148] The updated statute kept previously used language about the SLAPP concerning an "action involving public petition and participation", but rewrote the definition expansively.[149] The New York Statute applies to conduct linked to the public interest which can be the exercise of free speech, action in connection with the exercise of free speech, or in furtherance of the exercise of petitioning rights.[150]

Outside of the usual cases about the publication of statements and defamation suits, this has seen the New York Statute applied to a complaint laid about a judge through a confidential process, because the fitness of a public officials is a matter of public interest.[151] Even lawyers have been able to use the law for their filings in court and statements to community members about an ongoing case about misconduct at a nightclub.[152] On the other hand, the attempted use of the anti-SLAPP provisions by a foreclosure law firm to protect against litigation from the son of a debtor was not sufficiently linked to the public interest, as the firm had not engaged in any public-facing speech which placed the case in the realm of public discourse.[153] However, the approach in New York nonetheless draws on defamation law to assess the link with the public interest, which centres expression rather than other rights such as freedoms of assembly and association in the analysis.

Overall, the combination of this broad approach to conduct which may be protected with the relatively low threshold for public interest in New York sees the law apply broadly.

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145 *Kamal v Tax Policy Associates Ltd & Neidle* (n 118) para 147.
146 Protection of Public Participation Act 2008 (ACT) s 7.
147 Protection of Public Participation Act 2015 (ON) s 137.1(2).
148 Bunker and Erickson (n 78) 135.
149 ibid 156.
150 New York Civil Rights Law s 76a.
151 *Mora v Koch* [2023] 190 NYS 3d 575 [438].
152 *Sharp v Bar Fluid LLC* [2025] 233 NYS 3d 271 629.
153 *Fein, Such & Crane, LLP v Buczek* [2026] 246 NYS 3d 918 [2].

## 5.2 Framing of the public interest

The statutes vary on what level of public interest is required to activate the anti-SLAPP provisions.

To be protected under the UK Statute, speech must be made for a purpose related to the public interest in "combating economic crime".[154] As noted in *Kamal*, this is not a straightforward public interest test – the speech needs to only be *related* to the public interest in combating economic crime.[155] In that case, with the author's opinions linked to a possible tax avoidance scheme, calls for investigation and law reform in the blog post, the speech was found to be sufficiently related to the public interest in combating economic crime.[156] However, the UK Statute is inherently limited as it protects only speech which can be linked to economic crimes and not, for example, environmental advocacy.

The New York Statute requires that the conduct or communication must be made "in connection with a matter of public interest".[157] Furthermore, there is an express statutory direction that this be construed broadly "and shall mean any subject other than a purely private matter".[158] The quality of the expression is not relevant to the analysis. Instead, it is the subject-matter which is central. Courts have interpreted this in line with the state's existing "public concern" jurisprudence under the state's defamation laws – where the identity of the persons involved does not matter as much as whether the issue holds importance or interest for the general public.[159] The level of interest must be higher than "mere gossip and prurient interest".[160] This has led to a very broad interpretation of public interest and a hands-off approach where courts lean towards finding that a matter is in the public interest. For example, a case about negative online reviews of a plastic surgery practice has been held to fall within this public interest test.[161] Similarly, a tenancy dispute where tenants took their landlord to court for the poor condition of a rental property was protected, as matters of public interest include judicial proceedings.[162]

The Canadian Statute also takes a broad approach to the initial inquiry of whether the expression is in the public interest. This approach draws on the broad way Canadian courts approach "public interest" in defamation law, with the test being whether "some segment of the community would have a genuine interest in receiving information on the topic".[163] Nonetheless, Canadian courts appear to be applying a more stringent standard than is seen in New York. In a case where ex-employees of a nightclub questioned their pay rates and made allegations of sexual harassment and racial discrimination, the Ontario Supreme Court found that the expressions were not made in the public interest, because they primarily related to the private dispute about pay.[164] Allegations of harassment and discrimination did not convert this dispute into a matter of public interest, as there was "no aspect of political speech fundamental to the functioning of a democracy involved in these postings on social

[154] Economic Crime and Corporate Transparency Act 2023 (UK) s 195(1)(c).
[155] *Kamal v Tax Policy Associates Ltd & Neidle* (n 118) para 149.
[156] *ibid 150.*
[157] New York Civil Rights Law s 76a.
[158] ibid 76a(1)(d).
[159] Bunker and Erickson (n 78) 143.
[160] *Aristocrat Plastic Surgery, PC v Silva* [2022] 206 AD 3d 26 (NY App Div).
[161] *ibid 3.*
[162] *Sales v Justiniano* [2026] 246 NYS 3d 914 [4].
[163] *1704604 Ontario Ltd v Pointes Protection Association* (n 67) para 27.
[164] *Okoh v Okoye* [2025] ONSC 2509 [23].

media".[165] However, some private disputes do pass this threshold test – in a case involving a sexual assault allegation against a drag queen, the British Columbia Supreme Court found that at this initial stage of the test, the threshold of public interest should be construed generously. A survivor speaking about sexual assault in the drag scene did relate to the public interest.[166] The Canadian courts may be taking a narrower approach in contrast with their defamation jurisprudence because of the legislative framework – once the court determines that the expression is in the public interest, there is a presumption that the lawsuit will be struck out.[167]

One core difference is that under the Canadian Statute, this initial threshold test of public interest is not determinative of whether SLAPP provisions apply. The Supreme Court of Canada has noted that the ultimate weighing test under the legislation provides a "robust backstop" to ensure that there is an appropriate balance between protecting expression and allowing access to justice.[168] In New York, the broad assessment of public interest is enough on its own to activate the protection offered by the legislation.

## 5.3 Weighing the public interest in Canada

In New York, there is no consideration of the quality of the expression under the anti-SLAPP test. If the petition or speech is in the public interest, the protection of the anti-SLAPP law – requiring the plaintiff to prove actual malice on the part of the defendant in order to recover damages – will apply.[169] Likewise, the UK Statute does not contemplate an analysis of the quality of the expression beyond the threshold test, instead focusing on the intention of the plaintiff to determine whether a case is a SLAPP.[170]

Under the Canadian Statute, the public interest is doubly relevant. At the first stage of the test, discussed above, the court asks whether the subject-matter is related to the public interest. The second stage, discussed here, is a more in-depth inquiry into the public interest in the expression. This assessment ultimately comes down to the weighing test between the harm to the plaintiff's reputation and the public interest in the expression. On the public interest side of the equation, this involves assessing the quality and motivation of the specific expression at issue. This is the crux of the analysis under the Canadian Statute, with some judgments on this issue running to hundreds of pages despite the preliminary nature of the anti-SLAPP proceedings.[171]

The value of the expression – i.e. the weight that it will be given in this weighing analysis – is determined by reference to values underpinning the right to freedom of expression.[172] Expression which aligns with the "search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing" will be given a higher weight. The most recent Supreme Court case on the anti-SLAPP provisions, *Hansman v Neufeld*, found that the defendant's counter-speech on the issue of trans rights fell very close to those core values, as well as other

[165] ibid 24.

[166] *McDonald v Goranko* [2023] BCSC 231 [51].

[167] Young, 'Responsible Communication and Protection of Public Participation' (n 74) 409; Protection of Public Participation Act 2015 (ON) s 137.1(3).

[168] *1704604 Ontario Ltd v Pointes Protection Association* (n 67) para 53.

[169] New York Civil Rights Law s 76a(2).

[170] Economic Crime and Corporate Transparency Act 2023 (UK) s 195(1)(a) and (d).

[171] *Rooney v Galloway* (n 136).

[172] *1704604 Ontario Ltd v Pointes Protection Association* (n 67) para 77.

human rights such as non-discrimination and equality.[173] The expression was accorded a great weight in the weighing exercise and the case was struck out under the anti-SLAPP provisions. On the other hand, in *Burjoski*, the defendant was a school board member who shut down the plaintiff's speech at a meeting and justified his actions on the basis that the plaintiff was transphobic. This expression was accorded low weight because the context in which it was made – to justify a school board member shutting down a speech – went against the values of open debate underpinning the anti-SLAPP provisions.[174]

Factors such as the defamatory nature of the expression and malicious motivations are a factor which reduces the public interest in the decision. The majority of the Supreme Court in *Bent* applied the law this way in an apparent attempt to maintain the deterrent effect of defamation suits on communications which are reckless as to truth.[175] The dissenting judgment by Abella J noted that this decision appeared to go against the goal of protecting individuals who hold others to account for misconduct. "If [the anti-SLAPP provision] is to be given meaningful effect, vindication of reputation – a value engaged in all defamation cases – cannot be allowed to overwhelm the analysis and goals mandated by statute."[176] This approach appears to double-count the harm to the plaintiff's reputation by considering it on both sides of the equation – as adding weight to the harm suffered by the plaintiff and reducing the public interest in the expression.

It appears that the limited evidence available to the court at this preliminary stage mean that most allegations of criminal conduct will be accorded low weight in the analysis because of their inherently defamatory nature. For example, in two cases about sexual assault allegations, courts have found that defamatory statements should be accorded lower weight in the analysis and were not linked to the core values underpinning the Canadian Charter of Rights and Freedoms.[177] Similar reasoning has also been applied to whistleblower complaints made for potentially malicious purposes. In *Hobbs v Warner*, a whistleblower complaint made to law enforcement about a previous employers' financial misconduct was not protected under the anti-SLAPP as the judge found it was likely that the statement had been motivated by malice.[178]

## 5.4 Conclusion on public interest

Public interest is generally seen as a threshold test for whether anti-SLAPP legislation applies, to ensure that its scope is limited to cases deserving of protection. The case law at this threshold stage generally accords with the jurisdiction's assessment of public interest under defamation law. Even under the New York Statute, which includes a wide range of conduct in its ambit, the principles drawn from defamation law mean that the principles applied are designed to protect expression rather than freedoms of assembly or association.

However, under the Canadian Statute, the courts' assessment of public interest is more involved. This assessment limits the scope of the legislation, particularly in cases where allegations involve classically defamatory claims of criminal

[173] *Hansman v Neufeld* (n 68) paras 81–82.
[174] *Burjoski v Waterloo Region District School Board* [2025] ONSC 6528 [28].
[175] *Bent v Platnick* [2020] SCC 23 [167].
[176] *ibid 264.*
[177] *McDonald v Goranko* (n 166) para 133; *Rooney v Galloway* (n 136) para 696.
[178] *Hobbs v Warner* [2021] BCCA 290 [93].

wrongdoing or appear to be motivated by malice. This is an issue for human rights protections – Young has noted that malice does not necessarily make expression less valuable, especially in cases where whistleblowers are involved.[179] This approach to weighing public interest expression has shifted the balance under the anti-SLAPP legislation to favour protection of reputation.

Overall, the courts tend to spend the most time focusing on the public interest test when deciding on anti-SLAPP motions, in comparison with the power imbalance between the parties and the legal tactics deployed by the plaintiff. This places the focus of SLAPP identification on the conduct of the defendant and the right to be protected in the given case, which is valuable. However, the Canadian approach demonstrates that placing expression at the centre of the analysis risks replicating the plaintiff-friendly approach to defamation, where the spotlight is on the defendant's expression and the plaintiff's conduct is not assessed.

In Chapter 6, the thesis turns to the third and final SLAPP characteristic: the plaintiff's use of abusive legal tactics.

[179] Young, 'Responsible Communication and Protection of Public Participation' (n 74) 413–4.

# 6 Third characteristic: abusive legal tactics

Chapter 4 outlined how power imbalance was rarely addressed by courts, suggesting that looking outside of the legal framework at the 'real-world' positions of the parties was seen as a step too far for courts assessing anti-SLAPP motions. Chapter 5 highlighted that, by contrast, the public interest in the defendant's conduct was given significant attention in anti-SLAPP motions. This chapter turns to the third characteristic of a SLAPP set out by the OHCHR: abusive legal tactics used by the plaintiff. It assesses how courts across the four legal systems consider the legal tactics used by the plaintiff in determining whether a case is a SLAPP. Perhaps surprisingly, given the existing prominence of legal tactics in deciding similar pre-trial motions for abusive claims and the significant focus on this characteristic academically, it does not receive significant attention under the Selected Statutes.[180]

Abusive legal tactics are relevant to the identification of SLAPPs because they signal that the plaintiff is not motivated by a legitimate legal dispute, but instead to target the defendant. This final element of identifying a SLAPP is central under the UK Statute, with the court stating that the feature which converts a claim into a SLAPP and gives a public policy basis to intervene in libel litigation is "*how* litigation is conducted".[181] The other jurisdictions analysed in this thesis, however, give the issue limited consideration.

The OHCHR's briefer on the issue identifies five common signs of abusive legal tactics: disproportionate or unreasonable claims, targeting individuals rather than organisations, multiple lawsuits, frequent amendment of pleadings and excessive disclosure requests.[182] These factors are signals that the case is not being brought for its legal merit, but as a means to apply pressure to the defendant. However, abuse of process is another ground for strike-out in most common law systems, so the OHCHR's language of "abuse" is not often found in anti-SLAPP statutes or cases, likely to avoid overlap.[183]

Abusive legal tactics – in particular, whether an improper purpose is required on the part of the plaintiff – is the most contentious element of anti-SLAPP legislation. Academic recommendations for anti-SLAPP legislation tend to favour the North American approach (exemplified by the Canadian Statute and the New York Statute in this thesis) for its focus on the protected expression rather than the plaintiff's conduct or intention. Coe, Moosavian and Wragg write that the requirement for the court to make "subjective judgement as to the claimant's state of mind" is problematic because it will be difficult for a court to assess.[184] Anthony writes that the improper purpose test is difficult for defendants because of its focus on the "purpose and motivations of the filer" rather than the rights the defendants are trying to assert.[185]

The legislation in the ACT and England and Wales requires the court to make a finding about the intention of the plaintiff before applying anti-SLAPP legislation to

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[180] Coe, Moosavian and Wragg (n 100) 127.
[181] *Kamal v Tax Policy Associates Ltd & Neidle* (n 118) para 156.
[182] Office of the High Commissioner of Human Rights (n 22) 2.
[183] Hanna (n 8) 134.
[184] Coe, Moosavian and Wragg (n 100) 122.
[185] Thalia Anthony, 'Quantum of Strategic Litigation — Quashing Public Participation' (2009) 14(2) Australian Journal of Human Rights 1, 21.

the claim. The test in the ACT is the highest-threshold test. As Greg Ogle – who was legal coordinator for The Wilderness Society, one of the *Gunns* defendants – wrote after the introduction of the ACT Statute, the statute failed to come to terms with the basic fact that once a case starts, there are no good options for defendants facing a SLAPP – "all options will be costly, stressful and a deterrent to public participation". The high-threshold test for improper purpose "simply misses the point".[186] Hilary Young, the leading scholar on Canada's anti-SLAPP legislation, notes that narrowly framed anti-SLAPP laws requiring improper purpose would miss cases such as *Hansman v Neufeld*, which do not bear SLAPP hallmarks such as abuse of process. That case, brought in the context of public debate between a union representative and a school board member, was grounded in "important public interest speech" which was worthy of protection.[187]

Under the New York Statute and the Canadian Statute, a merits-based test assessing the strength of a plaintiff's case is the central safeguard against cases which attempt to abuse the legal process. Hanna recommends that merits and purpose be used as alternatives in his proposed definition of SLAPP for the UK, with the alternative of either an improper collateral purpose or a lack of substantial merit.[188]

This section begins with an assessment of how abusive legal tactics are relevant to the tests applied in the ACT and England and Wales to assess the purpose of the plaintiff. Following that, it turns to assessment of whether the merits-based tests adopted under the New York Statute and the Canadian Statute adequately identify cases where abusive tactics are used. Finally, it identifies that where abusive legal tactics of the kind listed by the OHCHR are considered, they are assessed as part of the award of damages rather than at the stage of identifying a SLAPP.

## 6.1 Abusive tactics as evidence of plaintiff's purpose

The Australian law is perhaps the best evidence of the issues with improper purpose. To identify a SLAPP, the ACT Statute asks whether a reasonable person would consider the proceeding's main purpose is to discourage, divert resources from, or punish or disadvantage the defendant for engaging in public participation.[189] Proving that the SLAPP purpose is the "main purpose" of a claim will be difficult even for well-resourced defendants – especially with the application of legal privilege to documents which might show such an intention. This high threshold is another potential reason for the under-utilisation of this anti-SLAPP statute – a single case in the ACT has cited the law, and that was only as the case was transferred to another state, so the legislation has never actually been applied.[190]

The UK Statute asks whether the plaintiff intends to cause harm or harassment to the defendant "beyond that ordinarily encountered in the course of properly conducted litigation".[191] To assess this intent, the court is directed to have regard to a range of

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186 Ogle (n 97) 42.

187 Hilary Young, '*Hansman v Neufeld*: The Supreme Court of Canada Protects Counterspeech under Anti-SLAPP Law, but Is It Even Defamatory?' (2023) 15 Journal of Media Law 125, 132.

188 Hanna (n 8) 140.

189 Protection of Public Participation Act 2008 (ACT) s 6.

190 *Bateman and Idameneo (No 123) Pty Ltd v Fairfax Media Publications Pty Ltd* [2013] ACTSC 72.

191 Economic Crime and Corporate Transparency Act 2023 (UK) s 195(1)(d).

factors, including whether the claim is a disproportionate reaction to the subject matter, whether costs incurred are disproportionate to the remedy sought, whether the defendant has been selectively targeted, and whether the plaintiff has failed to comply with court rules or directions.[192] These factors align closely with the OHCHR test.

In *Kamal*, the court views this as the heart of the SLAPP definition – the question is *how* the litigation has been conducted by the plaintiff.[193] Under this test, and the factors which the court is given a mandate to assess, the High Court found that the litigation history between the parties was relevant.[194] The repeated attempts by the plaintiff to request the publication's subscriber base was one indicator of disproportion, as was the plaintiff seeking various forms of compelled speech – apologies and retractions – in his pursuit of the case.[195] The court did hesitate over the fact that the plaintiff was a self-represented litigant, who was a qualified lawyer but not an expert in defamation law, meaning other procedural errors could be negligence or mistake rather than intention. What tipped the balance to intention was the excessive damages sought (£8 million) alongside the other disproportionate remedies. These manoeuvres were intended to and did have a chilling effect.

It is worth noting that the analysis under the UK Statute did not duplicate the abuse of process reasoning earlier in the judgment, which demonstrates that anti-SLAPP laws do offer something different to established civil procedure. Overall, the *Kamal* case is the most sustained engagement with the abusive tactics of SLAPP plaintiffs under anti-SLAPP legislation so far.

## 6.2 Merits instead of tactics

Legal tactics are not a consideration under the New York Statute, which focuses squarely on the protected expression rather than the plaintiff's behaviour. However, the burden of proof falls to the plaintiff once public participation is established, which limits the opportunity for abusive tactics to be used by stopping tenuous claims from proceeding at an early stage.[196] The burden of proof falls on the plaintiff to show that they have a substantial basis to support a claim in malice against the defendant.[197] The substantial basis standard is a "more exacting standard" than a normal strike-out application under civil procedure rules.[198] In practice, this means that cases will be struck out where, for example, a plaintiff is claiming disproportionate damages but has limited evidence of harm.

In Ontario and British Columbia, the statute does not require evidence of the legal tactics used. Like New York, the merits-based test under the legislation does shift the burden of proof at an early stage, making it more difficult for plaintiffs to abuse the process on with weak claims. The "substantial merit" standard means that in proceedings where public participation is at issue, technical validity is not enough for the case to proceed.[199] To proceed under the anti-SLAPP law, the prospect of

[192] ibid 195(a)-(c).
[193] *Kamal v Tax Policy Associates Ltd & Neidle* (n 118) para 156.
[194] *ibid 169.*
[195] ibid 201.
[196] *Gottwald v Sebert* [2023] 220 NE A 3d 621 (NY); New York Civil Rights Law s 76a.
[197] *Danko v WNYT-TV, LLC* [2026] 245 NYS 3d 920.
[198] *InkMango, Inc v Warren* [2024] 243 AD 3d 476 (NY App Div).
[199] *1704604 Ontario Ltd v Pointes Protection Association* (n 67) para 47.

success should favour the plaintiff at this early stage.[200] However, this is not a bar that should be set too high – for example, in a case where the merits were fairly even between a plaintiff and defendant who engaged in vitriolic public debate on Twitter, the appellate court ruled that the case did have substantial merit.[201] The courts are careful to ensure that the legislation addresses the use of litigation as a tool to limit expression, rather than to deprive parties of remedy in appropriate cases.[202]

A lack of merit does not necessarily mean that a case is improper or abusive. In *Cheesman,* a professor who had been vocal in his support of Palestine claimed he had been defamed by stickers around campus reading 'I Love Hamas' linked to the social justice institute where he was co-ordinator. His claim was struck out because the stickers did not identify him personally. However, the court rejected the defendant's argument that there was an insidious purpose behind the case.[203] The serious flaws with the case did not mean there was an improper purpose on the part of the plaintiff.[204]

Another issue with the use of merits-based tests is that these tend to take the court into in-depth fact-finding – including consideration of whether the defendant can make out one of the notoriously complicated defences to defamation – at a preliminary stage. This is not desirable, and has seen some cases in Canada run to hundreds of pages.[205] New York does not appear to have the same issue, presumably because the standard of actual malice is so high that plaintiffs rarely contest the issue once the anti-SLAPP statute is found to apply.

## 6.3 Legal tactics as a secondary factor

On the Canadian approach, legal tactics can also be considered as part of the weighing inquiry between the public interest and harm to the plaintiff. A "punitive or retributory purpose" was identified as one of the hallmarks of a SLAPP by the Ontario Court of Appeal in *Platnick v Bent.* On appeal, the Supreme Court of Canada noted that disproportion between "the resources being used in the lawsuit and the harm caused or the expected damages award" was a factor which could be relevant to the analysis.[206] Other signs of abusive tactics – that the plaintiff had filed complaints with other administrative bodies on the same issue and claimed significant damages – were factors that were "unmoored" from the proper analysis and should not have been considered.[207]

The hallmarks of a SLAPP must be secondary to the weighing analysis required by the legislation, but can be considered in a limited sense.[208] For example, where defendants attempt to use the law to strike out some claims made by the plaintiff but not others, that is a signal to the court that the case does not bear the hallmarks the anti-SLAPP legislation was intended to address.[209] The merit in the claims means

[200] *ibid 49.*
[201] *Mondal v Kirkconnell* (n 138) para 45.
[202] *Okoh v Okoye* (n 164) para 18.
[203] *Cheesman v Dobrer* [2025] BCSC 1428 [150].
[204] ibid 151.
[205] *Galloway v AB* [2021] BCSC 2344.
[206] *1704604 Ontario Ltd v Pointes Protection Association* (n 67) para 80.
[207] *Bent v Platnick* (n 175) paras 170–171.
[208] *1704604 Ontario Ltd v Pointes Protection Association* (n 67) para 79.
[209] *Rooney v Galloway* (n 136) para 136.

that the court is "not concerned about a strategy or abusive action on the part of the plaintiff" and the entire case should proceed.[210]

Merits-based tests provide safeguards against abusive actions by putting the plaintiff to the burden of proof at an early stage. However, these tests provide no assistance where a plaintiff has a strong case but is nonetheless using the process to harass or intimidate – for example, Hanna uses a hypothetical example of a wealthy businessman who waits for an investigative journalist to "slip up" and publish something that crosses the line so that the case will not fall under anti-SLAPP laws such as these.[211]

Overall, while the leading case from the Supreme Court does suggest disproportion in legal tactics can be considered,[212] this is rarely applied in courts as a factor to identify SLAPPs.

## 6.4 Relevant to damages and costs but not scope

In New York abuse of legal tactics is relevant if a successful SLAPP defendant seeks punitive damages, which require "an additional demonstration that the action [began] for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights"[213]. This requires passing a high bar of showing that the lawsuit was brought solely for the purpose of harassing. It does not apply, for example, where legal errors were made in the case by someone unfamiliar with the law.[214]

The statute in Ontario and British Columbia is silent as to these matters, but in practice the court does consider the abuse of legal tactics when considering the basis for costs and damages. It is clear that costs will not be awarded against every plaintiff whose case is struck out under the anti-SLAPP law. For example, in *Cheesman,* no damages were awarded to the defendant because the case fell far outside the scope of the anti-SLAPP law. The court noted that the closer the case fell towards the hallmarks of a SLAPP, the closer the defendant would be to an award of costs on a full indemnity basis.[215]

For example, in *Gill v Maciver* an anti-vaccination doctor sued 23 different people in defamation, and ended up owing $1.1m in legal costs when the case was struck out under the anti-SLAPP legislation. He appealed the award of costs, but the court noted that it was his choice to sue so many people. This kind of case was exactly the kind of thing the anti-SLAPP law was designed to prevent.[216] These assessments are more commonly considered at the stage of costs rather than the weighing test. In *Catalyst*, the plaintiff was a serial litigant and the proceedings were described as "vindictive", but this was only relevant to the question of costs and not the application of the legislation.[217] *Yates* made a similar finding where the stress and anxiety caused to the defendant as a result of "hardball" litigation tactics were

[210] *ibid 135.*
[211] Hanna (n 8) 137.
[212] *1704604 Ontario Ltd v Pointes Protection Association* (n 67) para 80.
[213] New York Civil Rights Law s 70a(c).
[214] *Hamelin v Patterson* [2025] 231 NYS 3d 393.
[215] *Cheesman v Dobrer* (n 203) para 160.
[216] *Gill v Maciver* [2024] ONCA 126 [67].
[217] *The Catalyst Capital Group Inc v West Face Capital Inc* (n 139) para 171.

relevant to the issue of costs and not considered earlier in the case, when applying anti-SLAPP test.[218]

## 6.5 Conclusion on abusive legal tactics

It is somewhat surprising that abusive legal tactics are not more of a consideration in anti-SLAPP legislation, given that these tactics are well within the court's competence to assess and draw on established civil law principles. Three of the strongest statutes, according to the Centre For Free Expression's ranking, make no mention of this factor in terms of identifying SLAPPs.[219]

The New York Statute and the Canadian Statute both raise the bar for the strength of the plaintiff's case once it is shown that the subject-matter of the lawsuit relates to public participation. This is a useful approach and leans into the competence of the court to assess the strength of the parties' positions, however it does risk missing strong cases which nonetheless have a disproportionate impact on the public interest.

If *Kamal* – which is admittedly the first case to apply the UK Statute – is anything to go by, this is an area where courts are comfortable, as it centres on the conduct of the parties rather than looking behind the law at an imbalance between their real-world positions. While the intention of the plaintiff may be an overly restrictive test for SLAPP identification, abusive legal tactics remain an under-utilised factor which could help courts to identify obvious SLAPPs.

This chapter concludes the analysis of how courts have applied the Selected Statutes. In Chapter 7, the thesis synthesises the findings of the previous chapters in order to propose improvements for the protection of human rights under anti-SLAPP statutes.

[218] *Yates v Iron Horse Corporation* (n 137) para 73.
[219] Brander and Turk (n 17).

# 7 Analysis

This chapter evaluates the protection of rights under the Selected Statutes as outlined in previous chapters. The preceding analysis in Chapters 4, 5, and 6 has identified that the attention to the OHCHR SLAPP characteristics is patchy. In Chapter 7, I argue that heightened focus on the characteristics of a SLAPP would strengthen the human rights protections provided by such statutes.

To make this argument, this chapter begins with an acknowledgement of the challenge of identifying a SLAPP in court. Nonetheless, I argue that the characteristics of a SLAPP need to be a consideration, in order for courts to accurately assess the case's full effect on human rights. The extent of the public interest in the impugned conduct or expression is rightfully at the centre of the analysis, but should be interpreted broadly to cover freedom of association and public participation rights, and protect whistleblowers who make disclosures behind closed doors.

Next, I analyse the characteristics of a SLAPP which have been most neglected in the tests applied under the Selected Statutes. Power imbalance and abusive legal tactics both deserve greater attention in the analysis in order to ensure that courts are considering not just the legal case before them, but the broader chilling effects which result. These considerations are crucial for future anti-SLAPP statutes which enable courts to go beyond the case on paper and understand SLAPPs as an attempt to suppress public participation rights.

I conclude with three recommendations for a model of anti-SLAPP legislation which pays greater attention to the characteristics of a SLAPP and protects a broader range of human rights.

## 7.1 The challenge of identifying a SLAPP

Anti-SLAPP legislation does not clearly define SLAPPs on the basis of their characteristics. Instead, to convert this policy concept into law, legislators have used other tests. In general there are two camps: legislation focuses on either the public interest in the conduct at issue (the Canadian Statute and the New York Statute) or the conduct of the plaintiff in combination with a public interest test (the ACT Statute and the UK Statute).

The policy idea of a SLAPP does not easily flow through into a legal test.[220] By definition, a SLAPP depends on whether the plaintiff is attempting to suppress political rights through legal threats and lawsuits.[221] At first glance, given this focus, it would appear that assessing the plaintiff's intention is a workable test for whether a case is a SLAPP. However, this is strongly advocated against by anti-SLAPP campaigners and academics on the basis that it is too difficult to prove.[222] This conclusion is supported by this thesis. The one jurisdiction analysed which does use an improper purpose test, ACT, has not seen any cases use the legislation. While this can be explained partially by the exclusion of defamation from its scope, the burden of proving the plaintiff's intention also likely had an impact. The issues pointed out

[220] Hanna (n 8) 125.

[221] Office of the High Commissioner of Human Rights (n 22) 2.

[222] Coe, Moosavian and Wragg (n 100) 122; Pamela Shapiro, 'SLAPPs: Intent or Content? Anti-SLAPP Legislation Goes International' (2010) 19 Review of European Community & International Environmental Law 14, 25.

by Ogle with restrictions on access to legally privileged materials make it a difficult test to pass in practice.[223]

Anti-SLAPP legislation also conflicts with courts' values of allowing access to justice. Young notes in her study of lawyers' perceptions of the Canadian Statute that judges tended to be conservative and reluctant to dismiss without a hearing on the merits.[224] When deciding on striking out a case, courts take their role seriously due to the considerations of fairness. SLAPP identification is further complicated by the fact that most cases reaching courts do have some merit – meaning that courts have to balance competing values of access to justice and public participation rights. However, the strength of a case is not necessarily an indicator of a SLAPP either. As Hanna argues, meritorious cases can nonetheless be directed at suppressing the exercise of political rights – giving the example of a businessman waiting for an investigative journalist to make a mistake.[225] The plaintiff-friendly nature of defamation allows for this approach.[226] In a case like that, there is some merit which the court which needs to be assessed against the public interest conduct in question, to determine whether a restriction on rights is justified or not.

Furthermore, anti-SLAPP motions are often fought as if they were a substantive case, making the pre-trial assessment difficult, as it is by nature based on less information than would be available at a full trial. As Young points out in her article interviewing practitioners about the legislation in Ontario, the consequences of striking out a SLAPP are make-or-break for the plaintiff, so they are incentivised to contest the case fiercely.[227] The many anti-SLAPP cases related to allegations of sexual assault in Canada and New York demonstrate that assessments under anti-SLAPP legislation can require engaging with deeply contested facts.[228] Deciding what value to ascribe to an allegation of sexual assault or other criminal offending, requires a preliminary determination of whether the allegation is credible – which is difficult at the pre-trial stage. The fact that there are so few easy cases appearing under the statutes could also be an effect of the legislation deterring weak cases – a sign that it is working. The effects of anti-SLAPP legislation, i.e. whether more plaintiffs with particularly weak claims are choosing to settle rather than have their cases struck out, is not clear. By nature, this is a difficult metric to gauge. Young's interviews suggest that there is some kind of deterrent effect, with lawyers reporting more of their defamation clients were choosing to settle. However, they note the protection of reputation is usually deeply felt and centred on emotion and principle, so some plaintiffs will not be deterred by financial factors.[229]

Overall, these difficulties have led to limited consensus across the jurisdictions on how to identify a SLAPP. While the hallmarks of a SLAPP – reflecting a similar approach to the OHCHR's three characteristics – have been acknowledged in Canadian courts, they are given marginal relevance in the analysis. In the other jurisdictions, the characteristics of a SLAPP are simply not relevant as the legislation sets out a different test. In New York the public interest is the focus, while the UK Statute defines a SLAPP with its own test focusing on the plaintiff's intention. The access to protections for human rights therefore varies greatly depending on the scope of the anti-SLAPP laws.

[223] Ogle (n 97) 41.
[224] Young, 'Canadian Anti-SLAPP Laws in Action' (n 66) 211.
[225] Hanna (n 8) 137.
[226] Coe, Moosavian and Wragg (n 100) 111.
[227] Young, 'Canadian Anti-SLAPP Laws in Action' (n 66) 200.
[228] *Gottwald v Sebert* (n 196) 625; *Rooney v Galloway* (n 136) paras 6–10.
[229] Young, 'Canadian Anti-SLAPP Laws in Action' (n 66) 209–210.

## 7.2 Public interest and public participation should be broad

A certain level of public interest in the defendant's conduct is a key requirement in all of the Selected Statutes. However, there is a great range in terms of the scrutiny of the defendant's conduct. In this section, I argue that the focus on public interest is appropriate but suggest that a broad assessment of whether the conduct at issue is linked to the public interest is preferable to a preliminary assessment of defamation or other tort claims. Furthermore, I note that a focus on the defendant's expression at the exclusion of the plaintiff's conduct will likely fail to identify some SLAPPs.

It is appropriate for public interest to be central to the analysis of SLAPPs, as it is in Canada and New York.[230] This question is fundamental to the IHRL analysis too, in terms of assessing what rights are at stake and whether a restriction is proportionate to those rights.[231] However, when the value of the expression is not considered alongside other factors, the Canadian cases demonstrate that courts replicate analysis of expression from defamation law.[232] This undermines the ideal that anti-SLAPP legislation can limit the impact on rights by shortening the length of cases, with judgments under the Canadian Statute assessing the value of every statement from the defendant in factual detail and running to hundreds of pages.[233] This in-depth analysis of the defendant's expression comes at the expense of the other factors and ultimately becomes a mini-trial of the plaintiff's defamation claim, because defamatory speech is accorded less weight.

Statutes should reflect that freedom of expression is far from the only right affected by SLAPPs. For example, the UK Statute only protects speech; the Canadian Statute protects expression; while the statutes in New York and the ACT protect conduct as well as expression. An approach which also protects conduct covers a broader range of human rights – protecting freedoms of association and assembly,[234] and protection of whistle-blowers who lay complaints.[235] Journalists are some of the most common defendants in SLAPP cases but they are not the only group whose rights are limited.[236] A broad range of activities can contribute to the public interest, including protests, demonstrations, formation of groups and organisations, and campaigning activities. The public interest should be defined broadly to ensure that SLAPP protections cover all public participation rights.

Recent trends in the use of data privacy and anti-money laundering laws to target NGOs demonstrate why a broad conception of public participation is also important to ensure the laws can evolve to cover new situations.[237] The New York Statute, with

[230] *1704604 Ontario Ltd v Pointes Protection Association* (n 67); *Gottwald v Sebert* (n 196).

[231] Article 19 (n 19) 14; Jayawickrama (n 62) 153.

[232] *Bent v Platnick* (n 175) paras 96–98.

[233] *Rooney v Galloway* (n 136); *Galloway v AB* (n 205).

[234] Special Rapporteur on the rights to freedom of peaceful assembly and association (n 43).

[235] Open-ended Intergovernmental Working Group on the Prevention of Corruption (n 46) para 100.

[236] Coalition Against SLAPPs in Europe (CASE) and Daphne Caruana Galizia Foundation (n 25) 20.

[237] Article 19, 'How Are Courts Responding to SLAPPs? Analysis of Selected Court Decisions from around the Globe' (Columbia Global Freedom of Expression 2023) 8; Coalition Against SLAPPs in Europe (CASE) and Daphne Caruana Galizia Foundation (n 25) 24 and 30.

its statutory direction to take a broad approach to public interest, its use of "conduct" rather than speech or expression, and its inclusion of petitioning rights, could offer a model for a broad approach to the public interest under anti-SLAPP laws.[238] However, as I argue below, even with a broad framing of the public interest, the other characteristics of a SLAPP require consideration too.

## 7.3 What is missing?

Throughout the examples analysed, it is clear that except where explicitly instructed to do so (under the UK Statute), neither the power imbalance between the parties nor the legal tactics used by the plaintiff are considered. I argue that this means courts are not considering the full chilling effect of a SLAPP in their analysis. On an IHRL approach, this means that the full impact of the restriction on rights is not being assessed. While over-focus on the defendant's expression is not desirable, as discussed in the previous section, it is especially skewed where it occurs without regard for the plaintiff's conduct in the case.

The assessment should take into account all three characteristics of a SLAPP as required by the context of the case – the power imbalance between the parties, the public interest in the defendant's conduct, and the abusive legal tactics used by the plaintiff. The Canadian courts' framing of the test as stepping back and looking at "what is really going on" in a case is appropriate.[239] However, as one Canadian lawyer interviewed by Young pointed out, the exclusion of the characteristics of a SLAPP from this assessment has been unhelpful for defendants and limited the "best use" of SLAPP characteristics in the Canadian context.[240] The broad, contextual framing of the test is appropriate, but courts should be required to assess whether a case has all the characteristics of a SLAPP, with specific attention given to the power imbalance and abusive legal tactics.

These other factors should not be determinative of a SLAPP. It is right that the protected conduct or expression is at the core of the analysis. Nonetheless, these factors should be considered and may assist in identifying a SLAPP. As Coe, Moosavian and Wragg argue, the determination should be made on the basis of many factors – such as those suggested by the Council of Europe – but any single factor should not be determinative.[241] Taking this flexible approach to the characteristics of a SLAPP "enables the court to take the weakness of a claim, or dubious, problematic conduct of a case into account and weight it according to the specific facts of a dispute".[242]

### 7.3.1 Power imbalance

The power imbalance between the parties in a SLAPP is not determinative, but it does amplify the impact of the legal threat – psychologically, reputationally and financially. In the one jurisdiction where this factor was taken into account, England and Wales, it did not appear that the importance of this factor to the identification of SLAPPs was understood by the court.[243] The court raised the principle that all parties

[238] New York Civil Rights Law s 76a.
[239] *1704604 Ontario Ltd v Pointes Protection Association* (n 67) para 81.
[240] Young, 'Canadian Anti-SLAPP Laws in Action' (n 66) para 203.
[241] Coe, Moosavian and Wragg (n 100) 137.
[242] ibid.
[243] *Kamal v Tax Policy Associates Ltd & Neidle* (n 118) paras 163–164.

are equal before the court as a factor weighing against the consideration of power imbalance.[244] If this factor is taken into account alongside others, however, it is simply one characteristic to consider as opposed to a restriction on access to justice for the privileged.

The power imbalance should also be relevant to cases where other power structures, like gender or race, come into the picture. Power structures including gender are an underlying factor in SLAPPs, with Article 19 reporting that SLAPPs on sexual violence are increasing.[245] Allegations of sexual abuse and hate speech have been frequent subjects of anti-SLAPP motions, but the power imbalance underlying the cases is not a factor which courts have explicitly addressed.[246] Cases like *Mondal v Kirkconnell* demonstrate that courts are inclined to place parties on a level playing field, even in situations where prominent business owners bring cases against their critics.[247] As the New York cases demonstrate, the power imbalance is also an important factor in a finding that a case is not a SLAPP. Considering the power imbalance between the parties can mitigate against the harsh effects of anti-SLAPP laws for the plaintiff too.[248]

The power imbalance between the parties, in a broader sense than just the disparity in their financial resources, should be considered in order to assess SLAPPs in their proper context.

### 7.3.2 Abusive legal tactics

Abusive legal tactics are another classic signifier of SLAPPs. Claimants typically claim excessive damages, make excessive disclosure requests, amend pleadings frequently or otherwise abuse procedure.[249]

Even where claimants are known for this style of litigation – consider, for example, *Catalyst Capital Group* which was clearly initiated as part of a campaign of harassment[250] – it does not factor into the analysis of whether a case is a SLAPP. The fact that it is considered at the costs stage in New York and Canada shows that courts do engage in analysis of the plaintiff's tactics. This consideration could be part of the earlier determination of whether the anti-SLAPP provisions apply.

Overall, the UK Statute is the only example analysed which considers this factor. The *Kamal* case, which at this point stands on its own under these anti-SLAPP provisions, demonstrates that these factors can be effectively considered by the court. In that case, the power imbalance was a neutral factor, while the abusive legal tactics – including the apologies requested and the conduct of the legal proceedings, alongside the "spectacularly inflated" claim of damages – weighed in favour of the finding that the case was a SLAPP.[251] This is a factor which can be objectively assessed by the courts.

While the UK Statute – and in particular, its requirement that the plaintiff intends to cause the defendant harassment or inconvenience – is not an ideal model for anti-

[244] ibid 164.

[245] Article 19 (n 19) 11.

[246] *Rooney v Galloway* (n 136); *Yehudah v Optoid Print3d Eyewear 2025* [2025] WL 2453183 (NYS).

[247] *Mondal v Kirkconnell* (n 138) paras 91–93.

[248] *Kuvshynov v Fox News Network* (n 130).

[249] Office of the High Commissioner of Human Rights (n 22) 2.

[250] *The Catalyst Capital Group Inc v West Face Capital Inc* (n 139).

[251] *Kamal v Tax Policy Associates Ltd & Neidle* (n 118) paras 208–210.

SLAPP statutes in general, on this aspect it demonstrates promise. Where abusive legal tactics are present, this factor should add weight to the identification of the case as a SLAPP. Once again, it should not be determinative but it should be a consideration, to ensure that the court assesses the whole effect of the plaintiff's case on human rights.

## 7.4 Recommendations for anti-SLAPP statutes

On the basis of this analysis, this thesis makes three recommendations for future anti-SLAPP statutes. While these recommendations have been drawn from the experience of the jurisdictions that this thesis analyses, they are broadly framed and could be applicable for examples of anti-SLAPP legislation in other jurisdictions.

Firstly, a power imbalance between the parties and the plaintiff's use of abusive legal tactics should be factors which a court is directed to consider in assessing whether to strike out a case under anti-SLAPP laws. This would ensure that all three characteristics assessed, and the full impact of the potential SLAPP is apparent to the court. These factors need not be determinative of the case, but provide relevant context in assessing whether the case aims to suppress rights and to what extent it would do so.

Secondly, where all three of the characteristics are present, courts should have the discretion to make a declaration that the case before them *is* a SLAPP, to reinforce the concept in law. This would go some way towards clarifying a workable legal definition of SLAPP, and ensure that particularly damaging abuses of the legal process are flagged as such. In time, this strengthened jurisprudence on SLAPP identification could support access to remedies for those subject to the suppression of their rights through SLAPPs.

Finally, public interest analysis is at the heart of anti-SLAPP laws and should remain so. However, conduct linked to the public interest should be broadly conceived, applying to more than just speech. It should not be limited to disclosures made in public or to an audience, but instead should centre on assessing the public interest promoted by the conduct. This extension ensures anti-SLAPP legislation protects whistleblowers and human rights defenders laying complaints, as well as journalists and NGOs who publicise those concerns. It also ensures that freedoms of association, assembly and public participation rights are safeguarded alongside freedom of expression.

# 8 Conclusion

This thesis explored four anti-SLAPP statutes and their application in court, in terms of how SLAPPs are identified. While these statutes have been in use in North America for decades, in the rest of the world, the issue has gained prominence more recently. In particular, the emergence of SLAPPs as a concern for international human rights law is a recent phenomenon, with the past decade seeing increased references to SLAPPs and recommendations for states to enact statutes to address the problem. In comparing and evaluating SLAPP identification under such statutes, with reference to a human rights framework, the thesis aimed to place focus on one potential solution to the problem. However, it is important to reiterate the even in jurisdictions with anti-SLAPP legislation, SLAPPs can still have chilling effects on rights. There is no perfect way to address this problem, but increased awareness of the issue and attempts to draft these protections into statutes is a promising first step.

The primary objective of this thesis was to evaluate different approaches to identifying a SLAPP in terms of protecting human rights. To do so, the thesis asked the following research questions, as set out in Chapter 1:

i. What are the characteristics of SLAPPs that make them a human rights concern?
ii. How do the Selected Statutes characterise SLAPPS?
iii. How are the Selected Statutes applied in court in relation to each SLAPP characteristic? This sub-question breaks down the following for each SLAPP characteristic:
    a. How do the Selected Statutes assess the *power imbalance between the parties*?
    b. How do the Selected Statutes assess whether the *defendant's conduct relates to a matter of public interest*?
    c. How do the Selected Statutes assess *abusive legal tactics used by the plaintiff*?
iv. What lessons does this analysis have for future attempts to protect human rights through anti-SLAPP statutes?

Chapter 2 addressed the first research question. It identified the characteristics of a SLAPP which make them a human rights concern through the OHCHR definition. This definition was adopted because it encapsulates factors which authoritative reports on SLAPPs have emphasised, without being overly prescriptive. On this approach, SLAPPs are characterised by a combination of a power imbalance between the parties, a subject-matter linked to the public interest, and the use of abusive legal tactics by the plaintiff. Not all factors have to be present in order for a case to be identified as a SLAPP, but these considerations should be assessed during the analysis. This chapter also provided background on the empirical research about SLAPPs and made the case that SLAPPs are human rights concern, as an unnecessary and disproportionate limitation on public participation rights with a broader chilling effect. Accordingly, the answer to the first research question is that the combination of three characteristics set out by the OHCHR – a power imbalance, a subject-matter linked to the public interest, and abusive legal tactics deployed by the plaintiff – are the factors which make SLAPPs a concern for human rights.

The second research question was addressed in Chapter 3. This chapter outlined the way that SLAPPs are characterised in the Selected Statutes. This description provided context for the comparative analysis in the following chapters. The jurisdictions – New York in the United States, Ontario and British Columbia in Canada, the ACT in Australia and England and Wales in the United Kingdom – do not share an approach to identifying a SLAPP. The characteristics are not fundamental to the analysis in any of the jurisdictions, leaving room for anti-SLAPP laws to be developed which better assess the chilling effect on human rights. The answer to the second research question is that there is no unified approach to how SLAPPs are characterised under the Selected Statutes, but there are some commonalities including a statutory purpose of protecting public participation rights.

The next research question asked how the Selected Statutes have been applied in court, in relation to each characteristic of a SLAPP. This question was broken into three sub-questions. Chapters 4, 5 and 6 each compared a separate characteristic of SLAPPs across the Selected Statutes to assess how much attention it is given and what that means for the protection of human rights.

Chapter 4 explained how a power imbalance between the parties is assessed under the Selected Statutes. It found that, except where explicitly required under the UK Statute, this characteristic is absent from the analysis. The answer to this sub-question is that power imbalance is not comprehensively addressed under any of the Selected Statutes.

Chapter 5 explained how the public interest test is applied under the Selected Statutes. This is an area of focus in New York and Canada, where the approach to the public interest is drawn from established defamation jurisprudence. The emphasis on the public interest appropriately places the defendant's human rights at the centre of the analysis. However, the public interest tests vary on whether conduct other than expression is included, and on how in-depth the assessment is. The answer to this sub-question is that the public interest is assessed with reference to defamation law, which limits the protections of statutes to a focus on expression rather than conduct.

Chapter 6 explained how abusive legal tactics used by the plaintiff are assessed under the Selected Statutes. The UK Statute expressly required consideration of this factor, but included a problematic requirement around the plaintiff's intention. Overall, the answer to this research question is that there is limited attention to this factor when determining the scope of application of the Selected Statutes, but it is considered when courts considered their power to award costs and/or damages.

Finally, Chapter 7 synthesised the findings to identify lessons that could assist in future attempts to protect rights through anti-SLAPP statutes. Three recommendations were put forward which may be valuable for future examples of anti-SLAPP statutes. The first recommendation was to include power imbalance and abusive legal tactics as factors which should be considered where relevant. This was on the basis that these factors have not received significant attention in the Selected Jurisdictions, despite their apparent relevance to some cases. The second suggestion was that statutes should include a power for courts to declare a case is a SLAPP, even if it is not required to access the protective mechanisms of the law. This could help clarify the bounds of a SLAPP in the different jurisdictions. Finally, it is suggested that the public interest test be broadened to capture conduct as well as speech, in order to make sure these statutes protect human rights defenders and organisations as well as individuals. The answer to this research question is that the Selected Statutes show there is room for more attention to the characteristics of a SLAPP. An approach which assesses all three characteristics would place the impact on the rights of the defendant remains at the centre of the anti-SLAPP inquiry, and empower courts to assess the broader impact of a potential SLAPP.

It is assumed that anti-SLAPP statutes which address all three characteristics of a SLAPP have a better prospect of limiting the chilling effect of SLAPPs on human rights, the way that these statutes intend. The exact form of provisions which would maximise protections for a broad range of public participation rights was beyond the scope of this thesis, but presents an important question for future research. Furthermore, there is an unresolved issue around finding a definition of SLAPP which places less reliance on the intention of the plaintiff and can be developed into a legal test. There are many other aspects of SLAPPs which merit future research. Future anti-SLAPP legislation is being produced this year, with the transposition of the EU Anti-SLAPP Directive into law. Furthermore, the fact pattern of cases under the Selected Statutes demonstrate allegations of hate speech and sexual assault are commonly brought anti-SLAPP laws. Critical perspectives on gender and race are essential for future research on SLAPPs, to ensure a full understanding of these lawsuits and their chilling effect.

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