

BEATING A SLAPP SUIT

GREG OGLE

Two widely publicised cases have again highlighted the significance of SLAPP (Strategic Litigation Against Public Participation) suits. Tasmanian forestry giant Gunns Ltd is still pursuing a massive lawsuit against environmentalists (now reduced from 20 to 15 defendants).¹ And recently David Jones initiated litigation in the Federal Court of Australia over the launch of The Australia Institute's report on 'corporate paedophilia'.² At their broadest, SLAPP suits are litigation (or threats of litigation) which have, or could be assumed to have, a chilling effect on the rights and ability of people to participate in public debate and political protest.

While some definitions refer to an intention to silence, or to cases having no merit, such definitions are too narrow and often counterproductive.³ The effect on public participation is the same regardless of the merit of the case or intention of those suing, so the real issue around SLAPP suits is their impact not just on the defendants, but on the broader community's right to public participation. SLAPP suits can effectively intimidate people — literally scare them into silence on issues of public concern. To quote commentator Julie Marcus, a SLAPP writ:

forces those named in it into court and to employ lawyers in their defence. ... If the corporation wins, it can then take all the property, apply to garnishee the wages of those involved and force bankruptcy if necessary. ... Win or lose, the effect of a SLAPP writ is to silence protest and financially penalise those subject to it. It serves to soak up the time and money of those named, distracting attention from their cause.⁴

While the concept of a SLAPP suit may have arisen in the United States, the ever-growing list of local SLAPP suits shows that the problem is widespread and increasing in Australia.⁵ More than that, the nature of these suits is changing with a new wave exploiting commercial torts and the *Trade Practices Act 1974* (Cth), rather than the more traditional defamation suits.

However, having myself contributed to raising awareness of the problem, I now want to ring a warning bell: the literature that highlights the problems of SLAPP suits may also contribute to the fear such suits engender in the community and the silencing of free speech. Certainly, a description like that of Julie Marcus quoted above, while not inaccurate, would make people think more than twice about participation in public debate and political protest.

While such descriptions are important in generating awareness of the problem, and hopefully to move for

law reform to protect the right of public participation,⁶ SLAPP suits do not need to result in fear and paralysis. Approached as an activist project with a political rather than legal mindset, in some circumstances at least, SLAPP suits can be turned on their head both politically and legally.

Brian Martin has described the strategy of 'backfire' — using the case to generate publicity that far outweighs the benefits for the proponent of the SLAPP suit. Rather than the effect of the lawsuit being a silencing of public debate, the case itself can be used to drive whole new areas of publicity for the issue.⁷ The best-known example of this is the *McLibel* case,⁸ where two activists refused to bow to McDonald's defamation action and made the case into a major international campaign against the fast food giant.⁹

So successful was the *McLibel* case that it is often forgotten that Steel and Morris actually lost the case, although the victory was a pyrrhic one for McDonald's. Steel and Morris were found to have defamed McDonald's and a hefty damages claim was awarded against them — notwithstanding that the judgment also made damning findings about McDonald's (with additional damning claims by Steel and Morris sustained in the appeal¹⁰). It is a tribute to the tenacity of Steel and Morris that they never paid any money, and later successfully sued the British government in the European Court of Human Rights on a range of grounds, including the failure of the government to provide legal aid in defamation cases.¹¹ Nonetheless, the court record shows judgment in favour of McDonald's, and however heroic the *McLibel* story is (and it is heroic), any case which sees damages awarded against activists exercising free speech is limited in its precedent value. Moreover, most political issues that people may be 'SLAPPED' over are much less general and long term. The issue may be dead politically long before a trial can be used to create the *McLibel* style 'backfire'.

Thus, alongside a campaign for law reform and international *McLibel* style campaigns, other models of dealing with and defeating SLAPP suits are needed. One such model was very deliberately developed in a South Australian case when Animal Liberation SA was sued in August 2000 for a 'raid' on a battery cage egg farm.¹²

Takhar v Animal Liberation SA

On the face of it, when they were sued, Animal Liberation SA should have been facing a large damages

REFERENCES

1. *Gunns v Marr* (Unreported, Supreme Court of Victoria, Bongiorno J, 28 August 2006) [No 9575 of 2004] was originally brought against 20 defendants. At the time of writing (and after three statements of claim were struck out) the plaintiffs have filed a fourth version of their claims against only 15 defendants, following an order of Bongiorno J of the Supreme Court of Victoria on 3 April 2007. The proposed new claims cover six of the original 10 actions in the case: see Friends of Forests and Free Speech <www.gunns20.org> at 15 May 2007.
2. *David Jones Ltd v The Australia Institute Ltd* (Federal Court of Australia, NSD No 2490 of 2006).
3. Such definitions can limit, or distract, the analysis into arguments over intent. Bruce Donald cites a number of cases where defendants have been sued for referring to a case as a SLAPP suit: see Bruce Donald, 'Defamation Actions Against Public Interest Debate' (paper delivered to the Free Speech Committee of Victoria, 22 April 1999) Conservation Council of South Australia. <http://www.ccsa.asn.au/HIB/Bruce_Donald_article.html> at 15 May 2007.
4. Julie Marcus, 'Parallel Lies: The Fascist Analogy and Australia's Slide from Democracy to Gunns' (2006) 21 *Dissent* 14, 20.
5. A list of Australian SLAPP suits is provided by the Center for Media & Democracy, SLAPP's in Australia <http://www.sourcewatch.org/index.php?title=SLAPP%27s_in_Australia> at 15 May 2007.
6. On law reform, see Greg Ogle, *Gunning for Change: The Need for Public Participation Law Reform* (2006) The Wilderness Society <http://www.wilderness.org.au/campaigns/corporate/gunns/g4c_report/> at 15 May 2007.
7. Brian Martin and Truda Gray, 'How to Make Defamation Threats and Actions Backfire' (2005) 27 *Australian Journalism Review* 157, 160.

payout which would have crippled the organisation. By its own admission, persons associated with Animal Liberation SA had entered private property in the middle of the night and aggravated the trespass by taking a video of rows of crowded chicken cages and publishing it to the media. But Animal Liberation SA not only survived the law suit, it won some legal costs on the way and used the case to generate several rounds of media publicity about the plight of battery hens.

The key was that Animal Liberation SA learnt from previous cases and campaigns, and in particular from the carnage caused by the various defamation cases brought in relation to the Hindmarsh Island Bridge in South Australia. There, a broad-based community campaign opposed to the building of the bridge was silenced by litigation and the fear and inertia which followed the cases. In the end, not only was the bridge built but key activists were crucified in a judgment which was profoundly undemocratic¹³ and which flew in the face of findings in the Federal Court based on a much more thorough investigation of the facts.¹⁴

From the outset, Animal Liberation SA was determined not just to defend a lawsuit, but to be proactive and use it as a political opportunity. In doing this, Animal Liberation SA was helped by what appeared to be mistakes by the lawyers for the egg producer (eg trying to get injunctions stopping production of a T-shirt that Animal Liberation SA had published specially for the case). However, Animal Liberation SA's determination was crucial to look for and exploit these opportunities and to turn each move against them into a platform for legal and political action.

For instance, when the egg producer took out injunctions preventing Animal Liberation SA from publishing the video footage it had taken, he swore an affidavit about the conditions in his chicken shed, including the fact that RSPCA inspectors had only found minimal overcrowding of cages. Seizing on this admission, Animal Liberation SA countered with a prosecution for overcrowding, and promptly subpoenaed the RSPCA inspection records. This prosecution provided a great boost to the campaign against battery egg production, although in the end the prosecution was dropped because the farmer successfully applied for security for costs, which the organisation could not meet.

A further example of Animal Liberation SA's desire to legally attack rather than defend the suit was the counterclaim for defamation. In attempting to prevent the media publishing the Animal Liberation SA video, lawyers for the egg producer wrote to TV stations stating, amongst other things, that Animal Liberation SA had broken into the farm. As Animal Liberation SA claimed entry was through an open door, they regarded this as defamatory. Later, an abuse of process counterclaim was added on the ground that the way in which the case had unfolded showed that it was, in substance, a SLAPP suit and an abuse of the proper processes of the court. (While this counterclaim survived a strike out application, it was never tested in evidence.) The counterclaim had the effect of

increasing the cost to the egg producer of going to court and stopping him from completely controlling the course of the case.

It was not all smooth sailing for Animal Liberation SA though. The video footage they shot of the battery hen facility was the subject of an injunction preventing publication for three months, and they lost some legal arguments along the way. But Animal Liberation SA continued to push the law to the limit in order to protect their right to campaign. They published the video footage two minutes after the injunction was lifted,¹⁵ thus effectively rendering the mooted appeal useless. Such an appeal could have seen the injunction remain in place for much longer. They also served their defence, counterclaim and other documents wearing a chicken costume, to show that they were not intimidated by the legal system, and they did other media stunts outside the courts. And over two years they pushed discovery orders to the point where the egg producer abandoned all claims of economic loss.

In the end, Animal Liberation SA saw off three different sets of Australian Farmers' Fighting Fund-backed lawyers, and survived applications for summary judgment, a strike out of all defences and counterclaims, two sets of injunctions, a contempt of court proceeding, and two attempts to get the names of those involved in the original raid. And while the egg producer followed traditional legal advice of not talking to the media, Animal Liberation SA used the court hearings to get additional screening of footage of the oppressive battery cages on television. Actively seeking media advantage in this way is also a marked contrast to the approach of The Australia Institute, defending the claim by David Jones, which is now not talking about its law suit, and even Animal Liberation NSW, who have not used the wool farmers' litigation against them to spearhead a campaign to stop the painful 'mulesing' of sheep.¹⁶

Legal games

This court success was a good result for Animal Liberation SA, but importantly, much of it was achieved with self-representation. Indeed, Animal Liberation SA took the withdrawal of their legal representation as an opportunity — to telephone, write to and generally take up the opposing lawyers' time, and to file pleadings and applications that legal representatives (who owe a duty to the court) would not normally file. Animal Liberation SA was prepared to do the homework on court rules and legal procedures — an arena usually left to the lawyers, given community activists often see themselves as making political not legal arguments.

Animal Liberation SA's ability to play legal games was probably a surprise to the black-suited lawyers who first served documents at Animal Liberation SA's ramshackle office and who would have been forgiven for thinking the case would be easy. But this element of surprise or uncertainty as to when SLAPP suits might blow up may well be an important deterrent to their future use. Who would have thought that Steel and Morris would make *McLibel* the longest running

8. *McDonald's Corporation v Steel* [1997] EWHC QB 366 (Unreported, Bell J, 19 June 1997). A first-hand account is provided in this Journal by one of the defendants: see David Morris, 'McLibel: Do-it-yourself justice' (1999) 24 *Alternative Law Journal* 269.

9. A comprehensive account of this litigation can be found at McSpotlight, the *McLibel trial* <<http://www.mcspotlight.org/case/trial/story.html>> at 15 May 2007. The case became the longest-running civil trial in British history.

10. *Steel v McDonald's Corporation* [1999] EWHC Civ 1144 (Unreported, Pill and May LJ and Keene J, 31 March 1999).

11. *Steel and Morris v United Kingdom* [2005] ECHR 103 (no 68416/01, 15 February 2004).

12. *Takhar v Animal Liberation SA Inc & Or* (Supreme Court of South Australia, No 754 of 2000) ('*Animal Liberation*').

13. *Chapman v Conservation Council of South Australia* (2002) 82 SASR 449 ('*Hindmarsh Island*'). An appeal was allowed in part: see *Conservation Council of South Australia v Chapman* (2003) 87 SASR 62. For a critical discussion of the trial case see Mark Parnell, 'Hindmarsh Island Bridge Defamation Case' (2002) *Impact* (EDO NSW, 2002), reprinted at Conservation Council of South Australia <http://www.ccsa.asn.au/HIB/latest?Hindmarsh_Isld_def_Parnell.htm> at 15 May 2007.

14. *Chapman v Luminis Pty Ltd* (2001) 123 FCR 62.

15. See *Takhar v Animal Liberation SA* [2000] SASC 400 (Unreported, Lander J, 24 November 2000).

16. The case relates to campaigns overseas allegedly calling for the boycott of Australian wool because of the painful practice of 'mulesing' (cutting skin from the backside) of sheep: *Australian Wool Innovation v Newkirk & Ors* (Federal Court of Australia, NSD No 1630 of 2004). Animal Liberation NSW is a co-defendant but the case is not even mentioned on Animal Liberation NSW's website (see <<http://www.animal-lib.org.au>> at 15 May 2007).

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libel case in British legal history, especially when the other activists sued with them apologised? Just as the randomness of SLAPP suits — never knowing when or why you may be sued — can be a deterrent to public participation, so the fear of running into legally savvy activists prepared to fight may also function as a deterrent to SLAPP suitors.

The contrast between the *Animal Liberation* and *Hindmarsh Island* cases and the lessons learned could not be starker. Instead of being shocked and confused by the legal action, Animal Liberation SA thought about the political possibilities and drew in activists with the relevant political and legal experience. The key calculus in the decision-making was not just legal, it was also political. The question was not 'will we get sued or have costs awarded against us if we do this?', but 'will there be a political advantage in this being part of the

legal process?' In the case of actions such as wearing a chicken suit to serve documents, the question was more like 'how stupid are they going to look if they bring this up in court?' Similarly, Animal Liberation SA's approach as to whether the farmer would seek an injunction to prevent production of a T-shirt about the case was 'great — win or lose, it will be more publicity about the conditions of battery hens'. As it turned out, Animal Liberation SA won the legal argument against the injunction, but that was just a bonus.

Throughout the legal action, Animal Liberation SA knew the bottom line. As an incorporated body, Animal Liberation SA could be 'bankrupted' and replaced at a cost of just \$100 to incorporate a new organisation. In some other cases many people seemed to take the suits against organisations as potential personal liabilities — which only heightened their legal

17. AFFE Secretary, Denita Wawn, 'Farmer vindicated in animal rights case', *Saleyards Operators Information Centre*, <http://www.saleyards.info/news/news.asp?id=1683&nc_id=1> at 15 May 2007.

18. *Rural Export & Trading (WA) Pty Ltd v Hahnheuser* [2004] FCA 1053 (16 July 2004).

timidity. And with this fear and timidity, activists often ceded strategic decisions to lawyers.

Indeed, somewhat bizarrely, community activists under threat or in contact with the legal system often seek the assistance of a (pro bono) lawyer, and then expect the lawyer to get them out of trouble or to make their case. It is a curious abandonment of the usual approach of community activists, which centres on empowerment. While not all activists have the educational, cultural or time resources to deal with an often-strange and foreign legal system, the key lesson of the *Animal Liberation* case is that activists can play the legal game — from design of actions to representation in court — and that this can make for better outcomes both politically and in court. Although it was hard work and not every individual or group has the necessary time to devote to such cases, the ability to run the case was an empowering experience, by contrast with the despair and disempowerment experienced in the *Hindmarsh Island* case and associated actions (which also ran for a long time and required extensive resources).

Another key lesson learned was the lack of value of pressing in court the 'moral high ground' of having a democratic right to campaign. The *Hindmarsh Island* case and associated actions had shown that such high moral ground carried little legal weight, especially as cases were often lost before they reached trial. More importantly, in seeking this high moral ground, the campaigns were effectively silenced — often by their own lawyers' advice. Abandoning the high moral ground and 'punishing' the plaintiffs for bringing a legal action caused some concern within Animal Liberation SA, but silence was not a moral option either. Accordingly, Animal Liberation SA determined to play hard, to push the law to the limits and to use any technical points they could in what was essentially a war of attrition. Essentially it was a 'top end of town' legal strategy employed by a self-represented defendant with little to lose. It took long hours of work, and it was not always 'nice', but it was effective in promoting the cause and ensuring survival. If civil suits are increasingly used against activists, and if courts and parliaments continue to turn a blind eye to the implications of such cases for free speech, then such hardline approaches will increasingly be needed in order to take these cases off the political agenda.

Endgame

After five and a half years, the case ended with a whimper — a quiet settlement. While some in Animal Liberation SA were disappointed the case did not come to trial (with all the publicity opportunities that entailed), others were exhausted and it had been difficult to maintain ongoing media attention after such a long period. Most importantly though, the politics had changed and the case was less relevant to Animal Liberation SA than it had been earlier. While the Australian Farmers' Fighting Fund hailed the settlement as a victory,¹⁷ in reality the Fund had probably spent hundreds of thousands of dollars and achieved nothing but bad publicity — no money and a

set of undertakings which were essentially meaningless. To my knowledge, no Animal Liberation SA campaign plans were changed by the settlement, and even the undertaking that Animal Liberation SA will not enter or interfere with the plaintiffs' businesses provides no real barrier to future raids by other animal activists or by Animal Liberation SA on different premises.

In the context of a case which should have closed the organisation down, Animal Liberation SA's survival and ongoing campaigning is itself a victory — and a defeat for a SLAPP suit as an instrument of silencing public debate. Of course, the fact that the end result of the case was a waste of farmers' money, Animal Liberation SA's time, and the courts' time and resources, is a further argument for law reform to prevent these types of cases. But in the meantime, the Animal Liberation SA example is a clear demonstration that community activists can, and increasingly must, learn legal rules and be prepared to play legal games in order to exercise the right to participate in public debate and political protest.

Addendum

Animal Liberation SA and its former organiser, Ralph Hahnheuser, were also sued in the Federal Court of Australia over allegedly rendering a live sheep export unmarketable by putting pizza ham in sheep feed.¹⁸ The case went to trial on 2 April 2007. Animal Liberation SA accepted a favourable settlement offer on the eve of trial. Hahnheuser, now retired from animal activism, did not turn up to the trial which proceeded without defendants.

GREG OGLE supported (in various roles) the defendants in the *Hindmarsh Island Bridge* defamation cases, Animal Liberation SA during the *Takhar* case, and the *Gunns* defendants, and publishes a website advising activists facing litigation threats:

<<http://users.senet.com.au/~gregogle/index.htm>>

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email: greg_ogle@yahoo.com