Scientists facing a SLAPP: frivolous litigation stifles public comment

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ABSTRACT

Scientists presenting inconvenient facts or ideas that run counter to commercial interests may place themselves at risk of legal action. Frivolous or even vexatious lawsuits are a recognized tool for silencing criticism of corporate or individual commercial interests, particularly where the critics are private individuals or non-commercial entities. Termed SLAPPs, strategic lawsuits against public participation, are meritless defamation or damages actions designed to intimidate and punish scientists and others for speaking in opposition to commercial interests. Such cases are well known and appear frequently in some jurisdictions but are not regularly discussed in scientific circles. Evidence from the US suggests that even the threat of such litigation can stifle public comment and change scientific monitoring and reporting practices. Cases identified as SLAPPs mostly fail in court, but take the intended heavy toll on the defendant, draining energy, time, and money. In this chapter we examine SLAPPs in regard to scientists' involvement in public commentary and provision of scientific information to government and the wider public. Are evidence-based science and the right to speak out in the public interest under threat from SLAPPs? We highlight several known cases and discuss the implications for Australian scientists.

Key words: environmental protection; commercial activity; public participation; SLAPP; strategic litigation

Introduction

Litigation, or the threat of litigation, by commercial entities against scientists is seldom reported but appears to be a growing trend. Civil lawsuits increasingly are being brought against private individuals or groups because of their comments on matters where there is conflict between commercial and public interests or where scientific evidence runs counter to commercial interest (Ashenmiller and Norman 2011). The acronym SLAPP (strategic lawsuits against public participation) was coined by Canadian researchers Pring and Canan (1996) to describe legal tactics employed under the guise of common torts, primarily defamation lawsuits, but designed to silence criticism and punish defendants for voicing their concern or opposition. Many such cases fail on their legal merits but the protracted legal battle that arises can have the intended effect of crippling defendants and discouraging others from challenging commercial interests in the future (Pring 1989; Costantini and Nash 1990-1991). Whether a case proceeds to court, and whatever the outcome of the subsequent trial, SLAPPs often effectively intimidate opponents. "Even if defamation lawsuits against critics [...] fail in court, [...] the "large expenditure of time and money associated with defending them all too often accomplishes the goal of silencing those who stand up for their rights"" (Sullum 2009).

While recourse to defamation litigation is reasonable and legitimate, abuse of these legal avenues for the purpose of commercial gain and stifling criticism is of concern. Mischievous or vexatious litigation wastes the time of all parties involved and discourages free public discourse. Individuals and groups can be faced with a SLAPP for communications made to the public or the government on any matter of public concern that criticises or impedes commercial interests. This may include radio or television interviews, print or online media articles, submissions to government panels and enquiries, and scientific publications. With a SLAPP, a "unilateral initiative by one side to transform a public, political dispute into a private, legalistic adjudication, shifting both forum and issues to disadvantage the opposition" (Pring and Canan 1996), a plaintiff aims to discredit or intimidate the defendant for the purposes of commercial gain. In this paper we briefly review the origin and background of SLAPPs and similar legal actions and threats, discuss some examples drawn from the literature and from experience, and propose steps to take if you are promulgating research findings that run counter to the interests of commercial or industrial concerns.

Early examples

Threats of litigation have long been used by proponents of ideas, products or institutions to intimidate opposition and subdue criticism, especially where vested interests may be placed at risk if the criticism is sustained. In an early example, research in the late 1950s by American biologist Rachel Carson uncovered strong links between environmental damage and the use of synthetic pesticides such as DDT as well as evidence that the chemicals could have corrosive effects on human health. In 1962, with her research completed, Carson planned to serialize her findings in *The New Yorker* and then publish them in collected form in a book, *Silent Spring*. Her plans generated storms of controversy, with the major pesticide manufacturers being among the most vociferous detractors. DuPont – manufacturer of DDT

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and 2,4-D – was particularly concerned about the effect of Carson's research on public opinion, while the Velsicol Chemical Company – producer of chlordane and heptachlor – threatened legal action to protect its interests (Lear 1997). Fortunately, both Carson and her publishers, *The New Yorker* and Houghton Mifflin, had managed to secure reviews and opinions from independent researchers with particular expertise in synthetic pesticides and their effects and felt themselves to be on sufficiently firm ground to withstand any legal challenges. *The New Yorker* began serializing Carson's work on 16 June 1962 and *Silent Spring* (Carson 1962) was published on 27 September of the same year (Lear 1997). Had the threatened lawsuits against Carson and her research succeeded, the environment movement would have been deprived of a cornerstone work and broadscale pesticide contamination of land and water would likely have continued unabated for some years (Moore and Sideris 2008).

Not all defamation lawsuits are SLAPPs. Coming to prominence in the US in the 1980s in the context of land use disputes and citizen actions for environmental protection (Pring 1989), suits of this nature were designed to intimidate critics and recover the reputation of the plaintiff. These types of cases were, and continue to be, filed mostly by companies or individuals of generous means and with the intent to punish critics by forcing them to engage in costly and protracted litigation. Such tactics have been deployed most commonly by commercial entities against a diversity of critics: print and broadcast journalists (Bunker and Gates 2002; Rasmussen 2011), bloggers (Lidsky 2000), activists, community groups and social critics (Pring and Canan 1996; Lane 2000) communicating to government or the general public on issues of environmental or social concern.

High profile cases outside the US include the UK 'McLibel' case in the 1990s, in which the fast food chain McDonalds sued a private citizen for distributing leaflets claiming the company showed poor social responsibility and environmental credentials (Morris 1999; Gray and Martin 2006), the 'Gunns 20' case in Australia in 2004 in which the Gunns Limited timber company sued 20 environmental activists, individuals and community groups, for "ongoing damaging campaigns and activities" against the company's operations (Beeson 2010), and the 'FIDO' (Fraser Island Defence Organisation) case in Australia in which the Queensland government challenged environmental activists opposed to sand-mining on Fraser Island (Lines 2006). In all of these cases the plaintiffs lost some or all of their claims but placed the defendants under severe financial and personal duress for many years while the cases were processed. The McDonalds corporation won some of the actions in the libel lawsuit and lost others but, lasting three years, the trial essentially 'backfired' on the corporation; it is considered a public relations disaster and resulted in the release of information about the corporation's products and behaviour that the corporation would not otherwise have released (Morris 1999; Gray and Martin 2006). The Gunns 20 case, lasting more than four years, has been described as "the most sustained private attack on environmental activism of its kind in Australia" (White 2005). The FIDO case pitted sand-mining interests and the fiercely pro-development Queensland government of Johannes Bjelke-Petersen against FIDO and its charismatic president, John Sinclair (Hutton and Connors 1999). Despite enduring many legal battles and criticism from the Queensland Premier about his performance as an Education Officer in the Queensland Education Department (Martin 1988), Sinclair was eventually victorious. The Australian government of Malcolm Fraser placed Fraser Island on the Register of the National Estate in 1976 and banned mineral exports from the island; Sinclair's perseverance and personal achievements were recognized formally when he was named Australian of the Year for 1976 (Hutton and Connors 1999). These high-profile cases arguably became so due to the will and tenacity of the defendants to withstand years of legal battle, enter into political debate, and sustain withering media attention, as much as to the inherent public relevance of the cases.

Threat of action changes scientific practice

Often all it takes to silence criticism is the threat of litigation by a commercial entity. SLAPP cases rarely go to trial because critics can be cowed either by simply threatening to bring a lawsuit or by settling before the case goes to court (Pring 1989). Given the potentially intimidating effects of SLAPPs, how often do threats against critics and other protagonists go unreported? In a study of forensic medical practitioners in the US, Oliver (2011) found that 13.5% of respondents had modified and 32.5% would in future modify their diagnoses due to the threat of litigation. Ashenmiller and Norman (2011) reported that the introduction of anti-SLAPP laws significantly improved the environmental monitoring and reporting behaviour of government officials charged with enforcing the US Clean Air Act.

Anti-SLAPP laws

Since the late 1980s, 'anti-SLAPP' laws have begun to be enacted to protect free expression on issues of public concern. According to Wyrwich (2011), the need for such laws arose not out of a lack of legal protection for free communication but out of the inefficient way in which the US judicial system provided that protection. More than 30 US jurisdictions have adopted protective laws to discourage this type of frivolous legal action and reduce the costs and time involved (O'Neill 2011; Wyrwich 2011). Anti-SLAPP laws take many forms and their level of protection and effectiveness vary across jurisdictions (Hurley and Shogren 1997; O'Neill 2011; Wilson and Shaw 2011). However, they generally enable SLAPPs to be dealt with quickly by requiring judges to take special measures to identify SLAPPs or by allowing defendants to file a quick dismissal motion to dispose of cases deemed intimidating, frivolous, or violating a person's right to free speech or their right to petition government (Rasmussen 2011). Defamation laws usually place the burden of proof on the defendant (Kenyon 2004). By requiring the plaintiff to provide proof, at an early stage, that the defendant's actions were malicious rather than the other way around, the burden of proof is shifted to the plaintiff to prove that their case has merit.

In Australia, law reform activists and public interest groups have long called for the introduction of new laws or amendment of existing legislation to protect public interest communication and discourage SLAPPs, and some law reform has occurred (Walters 2003; Donald 2009; Ogle 2010). Prior to 2006, defamation suits were the most common Australian SLAPPs and defence of such cases often rested on the implied constitutional right to freedom of speech, which has limited application(Ogle 2010). In 2005 and 2006 the *Uniform Defamation Acts* brought defamation laws into line across Australian jurisdictions and included several mechanisms to discourage frivolous defamation action; these include restricting the rights of corporations to sue for defamation. However, other legal avenues for SLAPPs remain and commercial interests and their lawyers continue to explore and try to extend the application of various legal instruments to support SLAPP-type litigation; more-recent Australian SLAPP cases rest on commercial and industrial laws such as the Commonwealth *Trade Practices Act* 1974 (replaced on 1 January 2011 by the *Competition and Consumer Act* 2010) and economic torts (Donald 2009). In passing the *Protection of Public Participation Act* 2008 (ACT), the Australian Capital Territory became the first Australian jurisdiction to enact an anti-SLAPP Act. The ACT Act specifically protects public participation and allows the court to impose heavy penalties on frivolous litigators. As far as we know, no specific anti-SLAPP laws are in place in other Australian jurisdictions. Current Australian law is not considered to provide adequate protection against SLAPPs.

Australian experiences

While SLAPPs are considered less frequent outside the US, SLAPPs are becoming increasingly common in Australia (Beder 2002; Walters 2003; White 2005). The example of the 'Gunns 20' case is one high-profile Australian SLAPP widely reported in the media; how often are similar, less widely reported, suits brought against scientists or environmental activists in Australia? As Pring (1989) noted, it is difficult to quantify the occurrence and impact of SLAPPs as many cases do not go to court and therefore do not result in reported decisions. Do SLAPPs succeed in blocking the dissemination of scientific knowledge? Does the spectre of a SLAPP discourage scientists from providing expert opinion, evidence to a court of law, or a submission to a government enquiry? Are Australian scientists aware of the possibility of such legal action?

If one of the roles of academics and scientists more generally is to engage in discussion with their peers, the wider public, government, and private companies on issues of public significance, shouldn't we be concerned about the apparent ease with which meritless lawsuits can be utilized to suppress criticism? Academics are often encouraged, or at least not actively discouraged, by universities to speak on issues of public concern and engage in discussions as a representative of the university. There are, however, examples of public institutions, at the behest of commercial interests, discouraging academics from speaking freely on matters of public concern in which they have expertise. Government employees are not generally encouraged to publicly express their individual views on matters of public concern (e.g. other chapters in this volume). Rather, they are required to represent the views of the government agency and the relevant minister or abstain from commenting.

What kinds of legal persuasion can be brought to bear on individuals who make comments on issues of public interest? We describe here three examples that have involved one of us (CRD), although many other examples would likely be uncovered in informal discussions with ecologists and other environmental scientists.

In the first example, as an individual researcher, Dickman had discovered that many native mammals that occurred formerly in the west of New South Wales had become regionally or entirely extinct, and that historical and contemporary evidence implicated overgrazing by sheep as a primary cause. This work, carried out in the late 1980s and early 1990s, allowed recommendations to be made about how partial recovery of the fauna and their habitats could be achieved, and resulted in several publications (e.g. Dickman *et al.* 1993; Dickman 1994) and radio interviews on the topic. The researcher was publicly critical of continued clearing of native vegetation so that more sheep could be run and also of the practice of maintaining flocks during dry times when the environment was particularly susceptible to damage. He advocated thinking about alternative practices, such as harvesting kangaroos, that would maintain farm incomes but reduce grazing pressure from the hard-hoofed ungulates. Not all of these ideas were new and some were being pursued already in other fora (Grigg 1987; Lunney and Grigg 1988), but their public airing was evidently not appreciated by some in the pastoral industry. This was made clear in 1992 when the university received a representation from an aggrieved industry body asking for the researcher to be removed from his position. Fortunately, the Dean of Science at the time, Professor R. G. Hewitt, was supportive of the primary research and for any recommendations based on it to be made public. Such support could be expected generally for *bona fide* research within a supportive university environment. No legal action was forthcoming in this case; the researcher was able to continue his research and advocacy unnerved but secure in his employment.

In the second example, in March 2000, the NSW Scientific Committee received a nomination to list an endangered ecological community in the lower Hunter region. Established under section 127 of the *Threatened Species Conservation (TSC) Act* 1995 (NSW), the Scientific Committee has the power to review and amend lists of threatened species, endangered populations, endangered ecological communities and key threatening processes. Following the procedures set out in the *TSC Act* (and described in detail by Dickman 1997), in December 2000 the Scientific Committee made a preliminary determination in support of the nominated community, the Kurri Sand Swamp Woodland (KSSW), and gave public notice of the determination to allow for public comment. The following month the Scientific Committee received a legal submission objecting to the listing of the KSSW. The submission was lodged on behalf of VAW Kurri Kurri Pty Limited, a company that operates the Kurri Kurri aluminium smelter on land close to the KSSW. After considering the legal objections and obtaining further advice, the Scientific Committee made a final determination to list the KSSW as

an endangered ecological community, and provided public notice of this in early June 2001. By March 2002 VAW Kurri Kurri Pty Limited, via its lawyers, launched a 99-point claim against the Scientific Committee to nullify its listing of the Kurri Sand Swamp Woodland. For the Scientific Committee at that time and Dickman as its then-chair, the claim caused considerable concern. Although every effort had been made to ensure that the ecological community had been described and delineated correctly and all due procedures had been followed in the assessment and listing process, there was uncertainty about how such a challenge might affect past and future determinations by the committee as well as how biodiversity conservation more broadly might be affected. There was uncertainty also about the extent of personal liability should adverse findings be made. The Scientific Committee was assisted by legal representatives engaged by the NSW National Parks and Wildlife Service (now Office of Environment and Heritage); the case was heard in the Land and Environment Court of New South Wales and dismissed in June 2002 (VAW (Kurri Kurri) Pty Ltd v Scientific Committee [2002] NSWLEC 60). Further action launched the following year on behalf of VAW Kurri Kurri Pty Limited was heard in the New South Wales Court of Appeal and dismissed, with costs awarded against VAW Kurri Kurri Pty Limited, in October 2003 (VAW (Kurri Kurri) Pty Ltd v Scientific Committee[2003] NSWCA 297).

In the final example, in mid 2008 wildlife ecologists were alerted to the possibility that a novel felid, the savannah cat, might be imported to Australia as a new addition to the exotic pet trade. Savannah cats are crosses between African servals *Felis serval* and domestic cats *F. catus* and, depending on the genes expressed in individual hybrids, can range in weight from 3.5 to 18 kilograms (Anon. 2008*a*). At the 14th Australasian Vertebrate Pest Conference (AVPC) in Darwin in June 2008, reports circulated that the Australian government was preparing a paper to assess the risks associated with the importation of savannah cats; this report, published just after the conference (Anon. 2008*a*) allowed public comment on the document for a period of 20 days until 17 July 2008. In view of the documented impacts of feral domestic cats on native fauna in Australia and elsewhere and the listing of 'Predation by feral cats' as a key threatening process under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*, Dickman and other scientists from the Invasive Animals Cooperative Research Centre who were attending the AVPC spoke out on radio and in the print media against importation of the savannah form (Anon. 2008*b*). Proponents of the importation threatened to seek up to $2 million in compensation against the scientists should their comments lead to a ban on the savannah cats being allowed entry. On 3rd August 2008 then Environment Minister, Mr Peter Garrett, banned the importation of savannah cats, saying that they posed an extreme risk to native animals and the environment. Following challenges to the decision, the Federal Court upheld the ban on 29 June 2012 with costs awarded in favour of the Australian government (Parker v Minister for Sustainability, Environment, Water, Population and Communities [2012] FCAFC 94).

In each of these examples one or more scientists faced threats that could have led to considerable loss of reputation, time and financial resources from giving voice to words or actions that were not aligned with commercial interests. In two cases support was available had it been needed (from the University of Sydney and the Invasive Animals Cooperative Research Centre) and in the third it was provided by NSW National Parks and Wildlife Service. Without institutional support, it is likely that the already character-building task of publicising scientific results that challenge commercial or corporate interests would become more difficult still.

Be prepared but not put off

Before commenting or providing advice or evidence in the public domain, particularly when the issues are related directly to commercial interests, scientists should be prepared for public debate and may want to seek legal advice on the possible implications of their comments. Opportunities for litigation and potential for damage can be minimized by being aware of the risks, making comments that you can substantiate, and making use of any advisory services that are available. Many research institutions, including universities, have legal advisory services, and the Australian Network of Environmental Defender's Offices may also offer assistance. In essence, be prepared, but don't be put off from communicating your science, being an advocate, and contributing to public debate.

If you are faced with a SLAPP, or the threat of a SLAPP, how should you respond? According to Pring and Canan (1996), the first step is to identify a SLAPP and then respond to it as a public and political action rather than privately and purely on the facts presented by the plaintiff. Get legal advice and support and ensure the issue at hand is shifted back into the public arena. Be prepared. Be open to public debate. Expose the action as a SLAPP. Seek support. Refuse to be intimidated.

Conclusions

Increasing involvement and cooperation between the private sector, community, government and non-government agencies in conservation initiatives is allowing much benefit to accrue to conservation and the promotion of evidence-based environmental management. However, there are also increasing numbers of instances in which evidence-based science and the provision of expert scientific opinion are under threat by commercial interests with significant legal and financial backing.

Martin (this volume) highlights systemic pressures that are being placed on science and suggests an alternative approach to counter these pressures, including valuing scientists who speak out against vested interests or make their science politically and socially relevant. Unless scientists are able to stand up for evidence-based science and advocate in the public interest, we stand to lose an important avenue for informing the public and having an impact on the way our world progresses. While truthfulness and well-substantiated scientific claims do not preclude litigation, scientists can minimize the risk of frivolous or vexatious litigation by being aware of – and prepared for – the risks, and continuing to inform public debate and communicate their science clearly to a wide audience.

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