HOUSE OF LORDS

# Communications and Digital Committee

## Uncorrected oral evidence: Lawfare and free speech

Thursday 31 March 2022

12.20 pm

Watch the meeting

Members present: Baroness Stowell of Beeston (The Chair); Baroness Bull; Baroness Buscombe; Baroness Featherstone; Lord Foster of Bath; Lord Griffiths of Burry Port; Lord Hall of Birkenhead; Lord Lipsey; Baroness Rebuck.

Evidence Session No. 2 Heard in Public Questions 8 - 14

## Witnesses

I: Caroline Kean, Partner, Wiggin LLP; Gill Phillips, Director of Editorial Legal Services, *Guardian*; Charlie Holt, Campaign Manager, English PEN; Thomas Jarvis, Legal Director, HarperCollins Publishers.

USE OF THE TRANSCRIPT

1. This is an uncorrected transcript of evidence taken in public and webcast on www.parliamentlive.tv.

2. Any public use of, or reference to, the contents should make clear that neither Members nor witnesses have had the opportunity to correct the record. If in doubt as to the propriety of using the transcript, please contact the Clerk of the Committee.

3. Members and witnesses are asked to send corrections to the Clerk of the Committee within 14 days of receipt.

# Examination of witnesses

Caroline Kean, Gill Phillips, Charlie Holt and Thomas Jarvis.

Q8 **The Chair:** We are moving on now to our second panel of witnesses today. We are joined by different lawyers. I will ask you all to introduce yourselves in a moment. I should add that you are all lawyers representing either journalists or publications. We have not been able to encourage a lawyer who might have represented somebody initiating a SLAPP to join us today. We have three people in the room and one person via Zoom. Could you briefly introduce yourselves please?

***Charlie Holt:*** Thank you very much and I appreciate you facilitating this Zoom link. I work as the UK campaigns manager for English PEN. In that capacity, I serve as one of the co-chairs of the UK working group on SLAPPs. I also work part time with Greenpeace International, where I have been working to build resilience to SLAPPs on a European level. I hope that that experience will also be helpful today.

***Thomas Jarvis:*** I am the legal director at HarperCollins publishers, and I have been working very recently with Tom Burgis and Catherine Belton in the defence of those two publications.

***Gill Phillips:*** I am the editorial legal director at the *Guardian*. I have been there for just over 12 years now. I have also worked for the BBC in the past at times and other newspapers, so I have been in the business for quite a long time.

***Caroline Kean:*** I am a partner in a law firm, Wiggin, which specialises in defending and representing media companies.

Q9 **Baroness Rebuck:** In this first question, we want to try to understand why there are so many SLAPP cases using the UK legal system, either at or pre legal action. How does this affect your advice and decisions on whether to publish pieces of investigative journalism or investigative non-fiction books? Caroline, you have been at the coalface fairly recently. I might start with you.

***Caroline Kean:*** I will start on why this jurisdiction. I suspect that Gill and Tom are better at what you do and do not decide to publish.

**Baroness Rebuck:** No, I understand that.

***Caroline Kean:*** Why this jurisdiction? Susan dealt with some of that. This is a jurisdiction that many people who have a reputation and interests that they want to protect have a connection with. We have a law here that is very pro-claimant. They do not have to prove that something that has been published is untrue. It is presumed that it is untrue.

We have law courts with a very high reputation worldwide. If you get a statement in open court here as part of a settlement, in which somebody apologises or confirms that what was said about you was not wholly correct, that can be published, under qualified privilege, worldwide. It is a

very easy way of getting worldwide vindication. In terms of how that affects what you decide to publish, I will hand over to you.

***Gill Phillips:*** To add to reasons why there are so many SLAPP cases here, Caroline has mentioned the burden of proof. There are other things that have been touched on in the earlier session: costs, such as lawyers' costs. They are prohibitive and put people off. For us to pay lawyers is quite expensive and we have some bargaining points. I have a case in Italy at the moment, which is a libel case against a journalist that will go to trial. I am told by the Italian lawyer that the costs will be €15,000. I asked, "Have you missed a nought off, or two?", compared to what it would cost us to defend a case here. It has got completely out of kilter somewhere along the line.

Damages awards here are generally much more than they are in Europe again, so it becomes a more attractive place. Feed into that the burden of proof issues, and the issue that was touched on in the earlier session about people being able to use not just defamation now but privacy and data protection, and you have a very toxic mix that has all come together.

That then feeds into my job daily, which is a risk assessment. You are looking at what the output is against the risk of being sued, the costs of that and what the evidence is. It is something that we will probably touch on at some point. There is a very good defence in the Defamation Act 2013, which Parliament brought in, of public interest, but that has become turned around and is used against the journalist, who has to show all their workings. It has become an enormously expensive exercise. That has also somehow moved from being a very good thing to being just deployed against journalists all the time.

**Baroness Rebuck:** I was going to ask Thomas in particular the extent to which you feel that the more claimant-friendly UK defamation law lends itself to these kinds of claims, given that HarperCollins is a global company. Would the two recent HarperCollins book cases have been much more difficult to get off the ground in the US, for example? To what extent do you have to weigh up these decisions? In the two cases we have seen, you went ahead and published two excellent books. In the past, how many books or the content of books have been different between the UK and the US precisely because of the difference in the burden of proof?

***Thomas Jarvis:*** I will try to start with the first question. We recognise that the risk of publication in the UK is far greater. As you probably know, we have a parent company in the US. We also have subsidiaries in India and Australia. In those different jurisdictions you can see the different risk profiles that are associated with the books. SLAPP is an issue in India, which is a common law system. It has been left unregulated and become a greater issue.

The difference, though, is that you do not have the extreme cost pressures that you do here. Part of the exercise we do on reviewing a

book prior to publication is the assessment of the risk, among other things. If you assess that book in another common law jurisdiction, you may see that the risk is the same in front of you on the pages, but it is how it plays out. Here, you can foresee the very significant cost, should it go to court.

If you look at other jurisdictions, such as the Indian jurisdiction, SLAPPs exist and are a significant problem, but the legal system is not as opposed to the defendant as it is here. In the US, it is far more claimant friendly. It is a common situation where the US publication will contain allegations that are not in the UK edition, because you have had to reduce your risk in that publication in a way that you would not in the US. It creates a sort of perversity. There is a tension with writers, because you have something that is being published in the pages of the US edition and it is not appearing here. People will ask, "Why is that? It doesn't make sense. Is that an editorial issue or a legal issue?"

**Baroness Rebuck:** It is really important to have that on the record as a background, because I know the next questions are going to get into SLAPPs in particular. It is a strange world. It is the English language. We are in a global world now, where something can be published in the US but cannot in the UK. It is very strange and has a chilling effect on freedom of expression. Charlie, would you say that the UK law courts are becoming tools of intimidation from what we have heard from the earlier session and the evidence that has been given to us just now?

***Charlie Holt:*** Yes, I would. I would only say that I am not sure "becoming" is the right word to use here. They have become and have long since been tools of intimidation. It is not a new phenomenon. Fiona Donson wrote a book, *Legal Intimidation*, 22 years ago now, about this phenomenon.

We have seen more SLAPPs. They are emerging with greater frequency and becoming increasingly shameless. To address this first question at that point, I really would reinforce the points that have been made already about costs. As part of the research we have done, we have been looking at jurisdictions around the world that have proven to be particularly fertile territory for SLAPPs.

You have already alluded to the United States of America. That is an important point, because of course the US enjoys the protection of the first amendment, but it is still a magnet for SLAPPs. That goes to show that SLAPPs operate through the legal process. The outcome is often beside the point. They tend to feed off deficiencies in the law, or rather in the legal process. The deficiency here is very much those costs.

This gives rise to two quite distinctly British problems. First, while we see something comparable in the US, we see what you might loosely term the emergence of a SLAPP industry. There are certain law firms that very much market themselves as being particularly aggressive in shutting down criticism. That is partly attributable on its own to these astronomical costs.

Secondly, even after the Defamation Act 2013, we still see the UK courts attracting a disproportionately high number of libel tourists. The Coalition Against SLAPPs in Europe recently published a report, researching 570 SLAPPs across Europe. It found that the UK had the highest number of cases, with 24.2% of cross-border cases, followed by France with 16%. The Foreign Policy Centre—I know Susan was here earlier—found a similar thing—that the UK was by far and away the most frequent country of origin for legal threats, almost as high as the EU and US combined. In answer to your question, yes, I am afraid to say that the UK courts are a tool of intimidation here.

Q10 **Baroness Bull:** I am conscious that we have students in the room. I am interested in your point, Mr Jarvis, about books being published in different jurisdictions with different information. What happens if an academic in their research or, indeed, a PhD student in writing their thesis in the UK draws on the information in the version of the book that is in another jurisdiction? What is the legal position in that case?

***Caroline Kean:*** If it is published here, they will get sued on it here and have to defend it under English law.

**Baroness Bull:** Do you think that that is widely understood?

***Caroline Kean:*** It is almost certainly not. The complications of libel law have become so extreme that they often defy common sense. You cannot rely on something else that has been previously published to defend the truth of what you write. It is what we call the repetition rule and this rule is relied on by claimants who are trying to stop free speech. It is common these days for people to research using the internet, using good resources, using things that have been published before, in the UK, and not attracted any criticism. That does not mean to say that they will not get sued this time.

***Gill Phillips:*** This is irrespective of what the topic or subject matter might relate to.

Q11 **Lord Lipsey:** I will make one preliminary comment to my question. It is now 30 years since I was, as deputy editor of the *Times*, in charge of our libel cases. Clearly, new things have happened, but much of what has been said in these cases is very familiar from the kind of correspondence I got across my desk and discussed with counsel. One of the big changes is that newspapers are a lot poorer than they were, and so less able to invest in their journalists' protection, and there are more rich crooks who are prepared to go to any lengths to clear their reputation. That is one of the factors making this a very imminent problem.

Among the ways in which we could tackle this and which our inquiry could lead to, what single thing might make most difference to preventing this kind of egregious activity?

***Caroline Kean:*** We have a lot.

***Gill Phillips:*** We are all agreed that there are problems. We all have possibly different suggestions on how they might be dealt with, or a

combination of things that might be used to deal with it. The number one thing that I think that we are all agreed on is that there needs to be a quick, early process that takes something that is identified as a SLAPP case out of the mainstream system and puts it into something where there are fixed costs, there are no-cost or low-cost risks for people, and a judge can look at something very early on and say, "This looks like a SLAPP case". Then you deal with it in a very different way and, if it is upheld as a SLAPP case, it goes no further.

That is not to say that you would not leave a claimant with no remedy if there was an inaccuracy, but it is a much more proportionate way when you are balancing the importance of the speech rights and the public interest into how it is dealt with than a three-year long, drawn-out court process. I think that we would all agree that something such as that would be very important.

***Caroline Kean:*** We have to make sure that any new process does not become satellite litigation by itself. I am sure that you are all aware that already, on any case, not just free speech cases, if a bad case is brought the defendant has the ability to go to court and say, "Please strike this case out. It shouldn't be brought".

You have that in these cases too, but if you go down that route this is not quick and simple. It is not something where a judge will look at it and go, "Yes, I see this is a bad case. Let's get rid of it". You have witness statements. You have a hearing. You have barristers' fees. You have the judge having to assume all factual things against the defendant before they can strike it out. You can very readily find that you spend £100,000 dealing with a case that you say has no merit at all, where the judge ends up saying, "I can't decide that on the papers. I need to see a witness in trial", and you are back at square one.

I am really concerned that, when we start something that will prevent SLAPPs being brought, we do not just start another layer of £100,000 before you have gone anywhere. I have been saying this to a number of people. It used to be that, in a libel case, you could not have a hearing on meaning at an early stage. It was the prerogative of the jury to decide what the words meant. I can expand on that if you want me to; that will take the rest of the session. You could have these arguments that we have, but you would have to go all the way to trial before you knew what the person was going to say the words meant and whether your defence was actually going to stack up. Post the 2013 Act, the judges now, at a very early stage, say, "I will decide what the meaning is", because we do not have jury trials any more. The judge reads the book, so you do not have evidence. You are not allowed to have evidence in support.

There are works of a high level of public interest, such as Catherine's and Tom's books, but it is not just that. It is an investigation into thalidomide. It is a cladding scandal. It is the maternity scandal that we have just had now, where a judge has the ability to say, "This is a matter of such importance that I'm sorry, but it doesn't matter if you got it wrong; we have to have the ability to debate it". Obviously the person who feels that

they are wrong should have a right of reply, and that should be published fairly, but you should not be requiring the author to adopt it, as we call it—to say that what they have said is true or to apologise for it. You should set them fairly against each other. On speech of that quality, there should be a guillotine and the case goes no further. That is what I would like to see.

***Thomas Jarvis:*** We would feel a very similar thing. It strikes me, with the way the system works at the moment, particularly when you are publishing books on a subject of public interest, as you saw with Catherine Belton's book and Tom Burgis's book, that you are publishing material where it is very difficult to get to the truth, because the people you are reporting on have incredibly elaborate and complicated ways to hide the truth. You need to publish it on a public interest basis.

Within that process, when you go through the legal review of the book, there is an author, a lawyer and an editor. The people have information before them and make a decision as to whether they think, "Is it in the public interest and is it reasonable to publish it?" There is a degree of intuition in that process. You do not have the luxury of limitless time and money. When you get to the point we got to, when you are sued on it, the public interest defence is very unwieldy. The cost involved in defending on that basis is enormous and you have a forensic examination—"Was it reasonable to publish that material?"—in a way that seems very artificial and removed from the way the newsrooms and publishers work.

It goes back to the first question. When you are reviewing a book, that is always in the back of your head. Even if you are very confident that either you are either right or it is in the public interest, the process that exists enables a claimant to keep going and keep going in a way that is disproportionate. Proportionality is a really key thing for me. What comes after publication needs to be proportionate and, at the moment, it is disproportionate by a long way.

***Charlie Holt:*** To add to something that Caroline was saying, it is an important point. I do not mean to challenge the premise of the question, but Caroline's point underscores the need for there to be a package of measures. The reason for that is that, as Gill says, it is crucial that we have a robust early dismissal mechanism that can filter out abusive cases, but also provide an extra layer of protection for those engaging in acts of public participation. It is also important that cost protections are instituted to ensure that, for a start, these mechanisms are not weaponised, but also to ensure that that mechanism is not perceived to be a gamble for the defendant.

I would add one thing, because it has perhaps not been mentioned here. Even if you institute these mechanisms, that in itself is not going to discourage the very wealthy from abusing the civil litigation system in this way. It really is important that a robust system of sanctions is instituted as well, which can work to deter plaintiffs from engaging in these tactics. Any type of system that can name and shame SLAPP

litigants, for example through a registry, is also something that we would like to see advanced. These things need to be presented together as a package, because they complement each other.

Q12 **Lord Foster of Bath:** Picking up on solutions, to Gill in particular, because you advised Guardian Media Group on Leveson, what are your thoughts on whether the solution that was discussed at Leveson would not be the bringing into force of Section 40 of the Crime and Courts Act?

***Gill Phillips:*** That is a bit of a leftfield question for me. The position of the *Guardian* is that that it is not something we want to see in force. There are elements of it that are very good, such as the costs suggestions, but it is all tied into the regulator that most of us are not members of and would not want to be members of. It is not a feasible option at the moment.

There are some cost sanctions in there, such as the reverse costs if someone brings a claim against you and you are a regulated entity. If you transferred that into a more flexible route, that would go some way to answering some of the questions. Here, we are discussing not so much those wider costs of fighting a case to trial. It is having a system that means you never have to even get that far, and that is quite important.

***Caroline Kean:*** One of the things that would help enormously here is if we had something equivalent to the US law in Sullivan—that a public figure or corporation must show that there has been actual malice or that they have genuinely suffered some damage before they can sue. That would make an enormous difference.

Q13 **The Chair:** Can I get your view, as lawyers, of the Solicitors Regulation Authority, on the way in which it is conducting itself in the face of the situation that we have been hearing about today?

***Caroline Kean:*** I know that it has looked at this and has issued some guidance recently. I ought to know it off the top of my head and I am afraid that I do not. Someone on the earlier panel said that solicitors obviously do not have a duty just to their clients. I cannot quite remember how my panel colleague put it, but he did not get it quite right.

We are also officers of the court. You do not have to test whether the words that your client has told you are true. That would probably ask too much of us, but in some of these cases, where the claimant lawyers are highly intelligent experts in their field, they must be advising some of these SLAPPs claimants that they do not have a good claim. If you think that the claim is not good, you should not be presenting it as though you think it is good.

***Gill Phillips:*** This guidance came in in early March from the SRA, where it expressly recognises SLAPPs and talks about the bringing or threatening of proceedings to discourage public criticism or action. That is a big step forward, because it is something that we can quote back now, which we have not had before.

It is very hard. As an in-house lawyer who has been in this business for a long time, we take a lot on the chin. To be honest, in part it is something that Tom said. You get your piece out, move on to the next piece and stop thinking about whether you are going to make a complaint to the SRA about the pre-action letter that came in from X or Y, because life is too short. If there was nothing, and there had been nothing in the past, that you could really tie it into, why would you bother, in part?

This new language is really encouraging. I was looking back at some of the correspondence our journalists have had before. They do what they are supposed to do ethically. They send an invitation to comment or a right to reply out to someone: "This is what we've got. This is what we're thinking of writing. Have we got it right?" They get back a barrage of selective quotes from cases in the law that are designed to put them off and frighten them, no answers to the questions and generic intimidatory language.

We can read through and see through that, but we are reasonably well resourced, comparatively speaking. Freelance journalists, small entities and community journalists are not. It is so easy at that stage to be put off altogether. Lawyers' letters have been a big problem. As I say, I looked back over some of them and went, "Wow, the language in here is just extraordinary". In some instances, we have had lawyers who are replying to a journalist's inquiry on behalf of their client. They send the letter to me and they will not let me pass the letter on to my journalist. I am going, "I'm sorry, but that's just wrong. I've got to take instructions. It's not me who's writing the story".

There have been some egregious things going on. As someone said at the beginning—Susan, I think—the legal proceedings in the court are just the tip of the iceberg. There is masses going on behind the scenes that you never see. Some of that could be addressed through the SRA now.

***Thomas Jarvis:*** I feel that there needs to be some form of code of conduct. We need to recognise that, as a claimant's solicitor in this position, you have almost a privilege. There is a potential fettering of public discussion and debate. There is an obligation in that correspondence that there is a greater degree of accuracy and fairness in the way that information is presented.

As Gill said, we can read through things, but it is forgotten that those letters are shared with authors and journalists, who take a lot more of what is said at face and literal value. That is sort of a deterrent and that needs to change. There needs to be more regulation. You have a responsibility, if you are seeking to stymie debate, that it is done in a way where there is an absolute requirement for more accuracy in what is being said and it is said in a slightly more objective manner.

**The Chair:** Moving from that to something far more substantial, do you think that there is a need for an anti-SLAPP law?

***Thomas Jarvis:*** We have slightly differing views on how you tackle it. From our perspective, one thing I have spoken about already is the need for a far more succinct public interest defence. The other thing that we have been interested in at HarperCollins is a model in the intellectual property courts called the intellectual property enterprise court. That is a much more streamlined process that is generally limited to a two-day hearing. There is less disclosure and less evidence. It is dealt with more on paper. For us, something like that provides a much neater model to fast track, in a way, some of these claims.

It seems important—I think the point has been made here—that there is an access to justice for everyone. That type of model was set up partly with that in mind and it made justice more accessible. Maybe that dovetails with specific anti-SLAPP legislation. I do not know, but I fell that it is the process itself that needs radically reducing.

It is often thrown at you by claimants: "If our client's wrong, you get your costs back". I know that, talking to smaller book publishing houses, they simply do not have the cash flow to go through the process, so they will not even contemplate publishing it. In our case—I think it has been reported—it cost millions of pounds. A small publishing house would not have that as cash. It would withdraw the book, and withdraw it quickly. The damages and penalisation at the end of the process do not help publishers get books out that need to be published on matters of public interest.

***Gill Phillips:*** I am not sure what an anti-SLAPP law would look like, as opposed to the sort of procedural reforms we have talked about where you can side line something so that you do not need massive changes. You do not need to rewrite the Defamation Act, but you need to look at some other little bits of law.

For example, one problem that was touched on in the earlier session is the use of privacy and data protection claims. In 2013, with the Defamation Act, Parliament brought in some important reforms in defamation. That has made a difference. There is the serious harm test in Section 1 and what they call the single publication rule, so there is a one-year limitation period from when something was published. Those do not apply in privacy or data protection cases. There is no limitation period that applies.

Some sort of continuity or protection should be brought into those areas, so that there is at least a level playing field that stops making them more attractive. If you have a privacy or data protection case, there is no fair comment defence to that. There is no truth defence to that. There is a reasonable belief in the public interest. As Tom says, that is when you then get pulled apart as to what your reasonable belief is, how you came to form it, et cetera. There are some small reforms that could be done to some areas, rather than necessarily something that you call an anti-SLAPP law per se. Charlie, you may have a better view on that.

***Charlie Holt:*** This is something that we have looked into. We ran two legal round tables last year to explore this question and asked whether it was necessary. We reached the unambiguous conclusion that it was necessary to have a separate anti-SLAPP law. We did this with a tripartite approach. We first explored whether judicial training or practice directions would be sufficient. We then looked at whether reforming the Civil Procedure Rules would be sufficient. In both cases, we found that they would not be.

The reason for that is that, unless you have some statutory underpinning, judges will go only so far to develop the mechanisms needed to filter out SLAPPs from the legal process. For example, one thing they will not do is raise the threshold for cases that target acts of public participation. That is something that we think is really needed here to ensure that SLAPPs are not able to proceed to trial.

To respond to the earlier question about regulatory reform, that is important. It is important in part to change the legal culture, which has given rise to some SLAPPs. Again, there will always be some ambiguities and tensions when it comes to conflicting obligations that lawyers have. The main focus of any sanctions, which I mentioned before, therefore needs to be on the SLAPP litigant and not just on the SLAPP litigator. These are processes that really need to run in parallel.

There are various things that need to be done, but I really would emphasise that, if we are to introduce the type of robust procedural protections that we need, a separate anti-SLAPP law is necessary.

Q14 **Baroness Bull:** I might come right back to you, Charlie, but I would be very interested in everybody's views on this. This committee has published a report into freedom of expression online, but freedom of speech and balancing that is a very live issue right now. My question is about the balance we need to strike between protecting free speech and protecting the rights of individuals to access justice. Where might we draw that line?

***Charlie Holt:*** The short answer to your question is that we draw the line at abuse. The purpose of civil litigation is to redress wrongs and vindicate rights. It is not for intimidation and harassment. Given that they are filed with the purpose of shutting down speech, SLAPPs are, by their very nature, abusive.

When we talk about access to justice, we should think about the fact that SLAPPs themselves in some way represent efforts to constrict that access to justice. It is the access of the defendant. They squeeze out the defendants from the legal system by forcing them out through the sheer costs of proceedings.

Access to justice is a component of a fair trial, but so too is equality of arms. Not only is equality of arms inherent in the broader concept of a fair trial; it is also crucial to the operation of an adversarial system of justice. If we are to ensure that that adversarial system of justice is fair

and provides equal opportunity to both parties to advance their case and represent themselves, we need to ensure that there are procedural protections in place to allow the defendant to build a full defence to those claims as well.

***Caroline Kean:*** I will slightly pick up on the last question as well. I think we are all in agreement that we need to change the law to protect ourselves against SLAPPs. Where it is difficult is, as Charlie has said, to prevent abusive lawsuits. While you know it when you see it, defining what it is will open up a world of pain. That is why we need anti-SLAPP laws, but not necessarily an anti-SLAPP law. We need to look at what we have at the moment and address that. That will be procedural. It will be amending statute. It will be things such as changing Section 4, the public interest defence, so it is not the reasonable opinion of the journalist that becomes the entire focus.

We need to revisit some of the old case law, which is still applying post the 2013 Act and is distorting the intention of the Act. We need to change some of the Civil Procedure Rules. At the moment, when you can have a preliminary trial of an issue is quite constrained. It has to be something that will dispose of the whole case, which is why we can have a trial on meaning, but we cannot have a trial on various other things, such as whether the words actually refer to the claimant, when they have not been named in a piece.

For example, last summer my clients had published something that did not name any names. Somebody came along and said, "That refers to me and it defames me". My client's genuine position was this: "We don't say that it's got the meanings that she says it has, and it wasn't her we were talking about". They were quite happy to go to court and have a judge say, "I think it does mean this and I can see why she'd be identified", in which case they would have said, "We never meant it, sorry". Although they did not think it carried those meanings, they wanted to defend it.

We could not have that trial because of the way the rules are set up at the moment, because it meant calling witnesses, so take that out of the way. We ought to be able to break it up a little bit, so that you can have trials that will make a big difference to how you would defend something.

We are concentrating on libel. We need to look very hard at privacy and where that has gone. As Gill said a little while ago, truth is no defence to privacy. Whatever Parliament thought back in 1998 about what it was doing with Article 8 and Article 10 rights, the right to reputation has now almost certainly slid into the privacy rule. It is a great deal easier for a claimant to get an injunction in privacy and claim that the privacy aspects affect their reputation.

In privacy, one key consideration is the effect of the publication on the claimant and how they felt about it. That is not the consideration in a libel case, which is the objective meaning of the words. Virtually anybody can come along and say, "I'm very upset by what you have written about me. I feel that my autonomy has been lost because this is now in the public

domain". Then there is no real question of whether it should or should not be.

I am obviously simplifying this hugely, but privacy has moved so far from what I think Parliament intended it to be. It deserves scrutiny on what you think should properly fall into people's private lives worthy of protection.

***Gill Phillips:*** To add a couple of really short points, to me, it is about proportionality. In the two book instances that Tom has dealt with, there were changes made, as I understand it, to one of the books. I do not think you need to have gone through an enormously expensive process. For newspapers, there is already IPSO. The *Guardian* has its own code. There is IMPRESS. There is a starting point for accuracy complaints that should be utilised. If that cannot be resolve something, you go somewhere else. Maybe there should be something like that for not just newspapers but other publishers that is quick, cheap and easy to resolve, where you cannot start a case until you have tried to use that process, in which there are no costs, essentially.

There is a proportionality issue. In some instances, the correct proportionate response for a claimant who has had something inaccurate written about them is not enormous amounts of damages but maybe a correction or a right to reply. In France they have a droit de réponse route, where you have to publish a response that says what they want to say. There are smaller, less draconian routes that achieve the right end, it seems to me.

The US has a lot of SLAPP cases, as Charlie said, and it has state SLAPP laws. It has a uniform law there. There is an example there that you can look at as to how things have been defined and looked at. Likewise, in Canada, both Quebec and British Columbia have anti-SLAPP laws. There is a lot already out there where people have done the hard work in terms of how these things might look, definitions and that sort of thing. I would urge people to have a look at those examples, which are there and a lot of thought has gone into.

**Baroness Bull:** Before I bring Thomas in, in those examples, has there been a debate around this tension between freedom of expression and the right to access justice? Has that been live?

***Gill Phillips:*** Yes.

**Baroness Bull:** How has it been resolved?

***Gill Phillips:*** For example, the Quebec law came in in about 2009 or 2010 and was preceded by a report that looked at where the abuses were, how you might deal with them and what the proportionate outcomes were. The SLAPPs procedure that they deploy in the US does not stop all cases ever going to court by any means and they can be quite expensive. There is a problem in the US on costs as well, as you will probably guess. It is in terms of resolving and knocking out these ones

that we are talking about that are abusive, where the law is being used for an improper purpose and someone is saying, "The value of the discussion here, the public interest, the public utility in the content outweighs the other things that there may be"—the small inaccuracy or whatever it is.

As the panel before said, there is a chilling effect. Once someone is sued, once it is known that company X or oligarch Y is out there, making threats, you think twice about it, if not three or four times, before you go there. You go, "I don't want all that pain". You have to be really determined to take that on. It is about proportionality, not saying that you do not have any rights here, but they are more restricted and controlled.

***Thomas Jarvis:*** Particularly when you are talking about anti-SLAPP, the type of companies that you often see in this litigation have phenomenal, almost unlimited resources. ENRC was one of the claimants. We were sued by a shell. It was an intermediary company. It just received dividends and paid them out, of hundreds of millions of pounds. It seems fanciful to suggest that it is going to suffer any form of damage. There must be an acceptance that, if you are a corporate, you have slightly broader shoulders.

If you are that scale, whether you control mining or technology, you have to accept that criticism comes at you to an extent that is far greater than others. Maybe within the anti-SLAPP framework, it applies more to large companies. It really is that malice thing. If people are publishing things, and they may ultimately be found to be not accurate, the importance of the dialogue and debate about those companies outweighs the risk of things being said that may, ultimately, not be right, and that is corrected through an apology. To suggest that they are suffering damage is sometimes, frankly, ludicrous.

You are possibly in the same position as certain figures where you have a quasi-political position. Mr Abramovich is perhaps one of those, consistently saying throughout the correspondence that there was no association between him and Mr Putin. Events in the papers this week would perhaps suggest otherwise. If you are that type of figure, maybe you accept that you are treated slightly differently, for good reason.

***Caroline Kean:*** We come back to the serious harm test that was introduced. Going back to what I was saying about how you cannot have preliminary issues, effectively that now has to be dealt with at trial. Again, your defendant is looking at the prospect of at least £1 million, and quite often upwards of that, to get to a point where the evidence shows that they did not suffer serious harm. This is wrong; it is insane.

***Charlie Holt:*** I would like to add a point to what was said about the US examples. It is important to emphasise that there are now laws that exist across 32 states in the US. The first one was introduced in 1989. There are years of debates on a state level that we can benefit from. These laws have not stayed static in that time.

One example is the California law, which had a very broad understanding of what constituted public participation. There was some concern that it was being weaponised in order to shut down legitimate strategic litigation from non-profit organisations. Since then, two exemptions have been introduced, 10 years after the law was first passed, that allow and ensure that public interest legislation has the space and cannot be used as a target in an anti-SLAPP motion.

It is the sort of thing where you can look at that. You can see their experiences. We are in a position now where we can benefit from what is often termed the laboratory of the states in the USA.

**The Chair:** Thank you. I am going to draw this to a close, not least because we are probably about to have a Division, so the bells will start ringing and it will be quite disruptive anyway. I am hugely grateful to all our witnesses today, the four of you who have been on this panel and the three of you who were with us earlier. It has been incredibly informative and we have covered an awful lot of ground in quite a short space of time. You have been able to do what I hoped, which is to provide is with interesting evidence that will inform how we make our submission to the Justice Secretary in his call for evidence on SLAPPs. On that basis, thank you.