HOUSE OF COMMONS

Justice Committee

Oral evidence: Strategic Lawsuits Against Public Participation, HC 11

Tuesday 10 May 2022

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Watch the meeting

Members present: Sir Robert Neill (Chair); Rob Butler; Angela Crawley; Maria Eagle.

Questions 1-55

Witnesses

I: Justin Rushbrooke QC, Joint Head of Chambers, 5RB, Catrin Evans QC, Barrister, Matrix Chambers, Michelle Stanistreet, General Secretary of the National Union of Journalists, Dr Peter Coe, Lecturer in Law, University of Reading, and Rupert Cowper-Coles, Partner, RPC.

Examination of witnesses

Witnesses: Justin Rushbrooke QC, Catrin Evans QC, Michelle Stanistreet, Dr Peter Coe and Rupert Cowper-Coles.

Q1 **Chair:** Good afternoon and welcome to this session of the Justice Committee. This afternoon we are having a one-off hearing on strategic lawsuits against public participation—SLAPP litigation—and the proposals that the Government have brought forward to reform it. I am grateful to our witnesses for coming to give evidence today. Before we start, Members have to declare any interests they have, as we do at the beginning of every meeting. I am a non-practising barrister and a former consultant to a law firm.

Maria Eagle: I am a non-practising solicitor.

Rob Butler: Prior to my election, I was a non-executive director of Her Majesty's Prison and Probation Service and a magistrate. Perhaps more relevant to this meeting, in a former career I was a broadcast journalist and therefore a member of the NUJ for about 20 years, from 1989 or so.

Chair: I will now ask our panel of witnesses to introduce themselves, starting from left to right.

Rupert Cowper-Coles: I am Rupert Cowper-Coles, a partner at RPC, which is a defendant firm acting for media organisations in private practice.

Justin Rushbrooke QC: My name is Justin Rushbrooke. I am joint head of chambers at 5RB, which is a barristers' chambers specialising in defamation, privacy and other aspects of media law.

Catrin Evans QC: I am Catrin Evans, a barrister specialising in media law at Matrix Chambers.

Michelle Stanistreet: I am Michelle Stanistreet, general secretary of the National Union of Journalists. We represent journalists across the UK and Ireland. We are also a member of the UK Anti-SLAPP Coalition.

Dr Coe: Good afternoon, everyone. I am Peter Coe, a member of the school of law at the University of Reading and an associate research fellow at the Institute of Advanced Legal Studies and the Information Law and Policy Centre at the University of London. I am also a member of the Council of Europe's recently formed expert committee on SLAPPs.

Q2 **Chair:** I should say that the coalition against SLAPPs has submitted some written evidence, which we have read and taken into account.

Perhaps we can kick off by looking at the background. We are told that this is a fairly recent phenomenon. Certainly it has grown in scale in the United Kingdom, from one or two per year a few years ago to rather more now. It is clearly regarded as a phenomenon elsewhere in the world as well. Perhaps, for those not involved in it, somebody could offer, for the record, a concise definition of what a SLAPP is. How would you define a strategic lawsuit against public participation? Shall we unpick that—the strategic bit and, in particular, the public participation bit? What are the distinguishing features of such matters?

Rupert Cowper-Coles: I would be happy to have a go. The term "SLAPP" was coined in the US. It is designed to describe a piece of litigation that imposes such expense and is brought in such a way that it has the effect of chilling speech or stopping public interest journalism, and it does so by the very nature of the litigation and not based on the merits. It is a term coined to describe proceedings brought for an illegitimate purpose and conducted in a manner that aims to achieve its outcome based not on justice, but on the way the litigation is conducted.

Q3 **Chair:** And what about the element of public participation that is referred to, as opposed to, let us say, defamation actions that are in the news at the moment?

Justin Rushbrooke QC: I think the public participation label is just another way of saying that it is brought against either a publisher who publishes to a wide audience or somebody who is, or is purporting to be, publishing on matters of public interest—the two are not always the same.

Chair: It is a broader version of the public interest, in a general sense, in terms of who it is aimed at.

Justin Rushbrooke QC: Yes.

Q4 **Chair:** Okay. That is helpful. I get the sense from that that it is essentially regarded as intimidatory in nature.

Michelle Stanistreet: Absolutely. From the NUJ's perspective, and that of our members, we see it very much as a misuse of a legal process, deploying bully-boy tactics that are squarely intended to intimidate journalists and deter them and maybe their publishers from going ahead and publishing material. They are often launched with the intent not of securing a successful legal outcome, but of tying up journalists in knots and intimidating people away from journalistic reporting and investigations.

Q5 **Chair:** We had a debate in the Commons—I think it was in January—that some of us spoke in, and in a sense this is a wearing-down process, either just financially or perhaps also emotionally, by stringing out the litigation.

Dr Coe: There are a number of things that are important to remember. First of all, it is not just journalists who are affected by this; it could be NGOs, charities, pressure groups or academics, for instance. I know lots of cases where people in my profession have been subjected to SLAPPs. They are not just affecting journalists. Also, it is not just defamation law that is used as a court of action or as a threat within the SLAPP. It could be data protection, privacy, copyright; a number of different laws are used.

Yet the costs involved are just the tip of the iceberg. Very often for SLAPP defendants, it is also the emotional, physical and mental toll that is taken on them, and the fact that they then have to put so much resource into defending the SLAPP means that they cannot put resource into other things that they should be doing.

Q6 **Chair:** I get that. Perhaps we could come back to that point in just a moment.

The Government have announced that they want to reform the law in relation to SLAPPs, either through legislation, changes to practice or a combination of both. Are they right to say that this is something that needs governmental and, if need be, legislative intervention?

Michelle Stanistreet: Absolutely. I think that action is overdue, in fact, so it is very timely indeed. We have seen an escalation in this type of lawfare and behaviour. I also think that it is a bit of a badge of shame that so many journalists around the world are subjected to these lawsuits and this kind of behaviour from lawsuits that emanate within the UK. So we are also a jurisdiction of concern in that context.

Q7 **Chair:** Maybe that is just one other bit of terminology that we ought to get clear for the public. We are talking about "SLAPPs" and you used the phrase "lawfare", both of which get used. Are they interchangeable, are they synonymous, or is there a distinction?

Justin Rushbrooke QC: I think that for practical purposes they can be used more or less synonymously.

Perhaps at this stage I ought to make it clear that, in answer to the question that you just posed—I am sorry to sound a note of controversy among the evidence that you have already taken from witnesses—my answer would be no. That is because my own experience, and that of colleagues I have talked to, is that a SLAPP, as properly understood, is something of a chimera in this jurisdiction.

There are two possible kinds of improper libel claim. There is one that is based upon a case brought on a supposedly false allegation that is in fact true. Now, that essentially requires a claimant to base their case on a lie. Such cases, in my experience and in the law books, are almost vanishingly rare, although they do happen.

Then there is the kind of litigation that I think the Government appear to be more concerned about, which is the abuse of the conducted litigation, even allowing the possibility that it may be a well-founded claim—in other words, that the allegation that is being sued upon is false and defamatory, according to the modern law, which now sets a higher test than it used to. Nevertheless, there is something inherently improper or abusive, about either the bringing of it or the way in which it is conducted.

In the Lord Chancellor's call for evidence, his own description is that "SLAPPs can be characterised as an abuse of the legal process where the primary objective is to harass, intimidate, and financially and psychologically exhaust one's opponent via improper means." All of those component parts are important. I am sorry to say that I think there has been some misconception about the current state of libel law and libel litigation in this jurisdiction, because Parliament looked at this issue exhaustively in 2012 to 2013—

Chair: That was the Defamation Act?

Justin Rushbrooke QC: That resulted in the Defamation Act 2013, which in some respects has had a transformational effect on the way in which litigation is conducted. It gives a very, very important power of the court to decide disputes about meaning—what the article or broadcast actually means—at a very early stage, and the significant consequence of that is that libel litigation has become much less costly than it was before that was possible. The reason it was not possible before was we had juries for libel cases. That has effectively been abolished, and rightly so, I think.

The current state of play, in my view—I think this view is held widely, although perhaps not universally, among practitioners in this area who act for both claimants and defendants—is that the law more or less strikes the balance in the right place. What do I mean by that? I mean that it is possible, although I see little evidence of it myself, that an unmeritorious complaint, or even a threat, might lead to a publication being pulled that could, or should, otherwise have been published.

But I am afraid that we also live in a world where, in my experience, there as many, if not more, cases where defamatory and false allegations, or invasions of privacy, find their way particularly into the newspapers, about which a claimant finds himself or herself unable to take action, either because they are simply frightened off by the cost of it, or because of intimidatory tactics on the part of the defendant.

I respectfully suggest that it is important to see this with a degree of balance, because unfortunately we do not live in a perfect world. The starting point is: does the law strike the right balance between the right to protect reputation and the right of journalists and others to freedom of expression?

We have so many disincentives to bringing action, in terms of substantive defences, and case management controls, which regulate the cost of litigation, that I simply do not recognise the picture that has been painted by some, particularly those involved in recent, now celebrated, lawsuits, that the libel laws of this country are being regularly, or even occasionally, abused by so-called "one-stop shop" corruption firms—that is a phrase that is used. That is not a picture that I recognise, and I am very happy to expand on that. I am sorry that I have gone on already, but that is my position.

Q8 **Chair:** Ms Evans, as a fellow practitioner, do you agree with that assessment or take a different view?

Catrin Evans QC: I will give a slightly different perspective on it, which is neither at the far end—if I might call it that—nor Justin's end. It is important not to overstate the extent of the problem that SLAPPs represent. You have seen the figures in the Government's document about the number of cases, which is very small. But those are known cases and one of the problems, which Michelle has touched on and which Justin's emphasis on litigation underplays, is the pre-action situation that publishers face.

In my view, there is a systemic problem with the nature of English media law, not just libel law. It operates in a very simple way but causes what one would suggest is an imbalance between the claimant's and the defendant's position. It is simple, because all a claimant has to do to bring a libel action is identify an allegation that is relatively serious. If it is in a mainstream or widely read publication, you will already be over the line, in showing that that is serious harm to your reputation, which is the threshold.

Once you have done that, the burden passes to the defendant to justify what you have published or intend to publish. That is when the next important factor, as opposed to just the way that libel law works, kicks in, which is costs. Because the nature of our adversarial system, which is obviously applicable to all causes of action, is adversarial and requires the evidence to be tested. The way that we do that is that we give the opportunity for full testing at a trial, unless it is very clear cut.

The problem with the whole SLAPPs debate, if the Government are going to reform, is to identify how to short-circuit, in the right case, that process of a fair trial, which is obviously important to both sides, where you test the evidence.

Q9 **Chair:** Mr Rushbrooke seemed to think there was not really a problem. Do you think there is a problem?

Catrin Evans QC: A problem in relation to SLAPPs themselves?

Chair: Yes, with the caveat that there aren't many of them.

Catrin Evans QC: I think there is a problem, although I do not think it is a numeric problem. Like Mr Rushbrooke, the kind of work I do tends to be litigation post-publication, but I am aware that in-house newspaper lawyers and publishers are dealing with a lot of stuff that does not come across my desk pre-publication. That does consist of not only threats against publishing—and I am not suggesting those are improper. One of the problems here is that the terms "improper" and "abusive" are bandied around inappropriately, especially about lawyers. They are using the law that is available to them. But it is the consequences of it, and the objective of their client to stifle debate, that is the real heart of the problem, and how you balance those interests.

Q10 **Chair:** I understand. Ms Stanistreet, to what extent are you aware of the percentage of this potential litigation—or course of conduct, for lack of a better phrase—that actually comes to court, as opposed to that which results either in the article that might otherwise have been published not being pursued, or the claim being withdrawn before it gets to pre-court stage?

Michelle Stanistreet: I think those high-profile cases that we have all seen are simply the tip of the iceberg, because I think the most significant problem happens at the point of pre-publication. That is certainly all of the feedback that we get from our members, but also from publishers.

When you have that kind of climate and those kinds of tactics are used, it has a cultural impact on the approach that organisations take to threats of legal action or attempts to delay publication of a particular story. That often comes at the point at which a journalist quite properly approaches somebody for a right of reply and, instead of coming back with a response and information, they are met with a very robust legal letter.

Particularly in recent years, although there are still a lot of news outlets that have very good, well-resourced legal departments in-house, there has been a lot of cost cutting in the industry. We have seen a degree of increased timidity, as well. We certainly get that relayed to us in frustration from our members whose work ends up being spiked as a consequence.

Just following up on what Peter was saying earlier about the approach that is taken, which does go beyond journalists and into NGOs and many other organisations, quite often individuals are targeted. That is important from

an NUJ perspective, because we see increasing incidence of our freelance members being targeted in that way, not necessarily the outlets that have commissioned that work. They are gone after very much as individuals, and that brings with it inordinate pressure, as well as financial worry and constraints. It impacts on their livelihood in terms of servicing those cases and the process, whether it is at the early stage of a legal process or as a case progresses.

Q11 **Chair:** The other thing I just wanted to clear up was this: we have talked largely in terms of defamation cases at the moment, libel and so forth, but some of the figures we have seen suggest that although that is the majority—quite a clear majority—none the less, there are also cases that are brought under this type of behaviour and with this type of objective that are founded upon other legal bases, such as data protection, privacy or whatever. What is the percentage, and is that shifting or changing at all? Can you help?

Rupert Cowper-Coles: There were more data protection claims brought in the Media and Communications List—the High Court list—than privacy or defamation claims combined last year. A lot of those might be data breach claims, but one of the big concerns, which I think it would be useful to explain to the Committee, is just how the statutory protections that have been put in place for defamation law, such as the serious harm threshold, a one-year limitation period, and a public interest and truth defence, are being circumvented by law firms that do not want to face those thresholds. Instead, they base their claim on privacy—misuse of private information—or as a data protection inaccuracy claim, which follows where meaning is determined in the same way as a defamation claim, but there is no public interest defence and no qualified privilege defence to an inaccuracy claim.

That followed a decision in the Supreme Court last year, ZXC *v.* Bloomberg. A businessman brought a misuse of private information claim over a report about a law enforcement body investigating him for conduct in his professional life. The Supreme Court held that he had a reasonable expectation of privacy and was entitled to damages to compensate for harm to his reputation. Importantly, that claimant, or any hypothetical claimant in that position, could have sued for defamation but chose not to. They sue for misuse of private information, and it doesn't matter if the media organisation can show that the allegation is true; the truth defence—saying the allegation is true—is irrelevant at the moment. You can get reputational damages for information that might be wholly true.

Data protection is almost more concerning. We have seen individuals sanctioned recently, either in the UK, EU or the US, over alleged associations with Putin and Russia. If you avoid the one-year limitation period for defamation and bring a data protection inaccuracy claim, there is no public interest defence. There are certainly exemptions for data protection, including a journalism exemption, which has public interest tied in. If I were raising money laundering concerns internally at the law firm I work with and the individual who I was raising concerns about found out I was making these allegations, I could be potentially processing inaccurate

data. If I cannot prove that the money is actually dirty, there is no journalism exemption or protection. There is a big lacuna.

Q12 **Chair:** Are you saying, essentially, that there are fewer protections or safeguards and that the legal test—to use a neutral word—is different?

Rupert Cowper-Coles: Parliament's protections for defamation haven't been carried over.

Q13 **Chair:** You are a lawyer yourself. It is fair to say that if a client comes to you with a set of facts and says, "I believe this set of facts has led me to be wronged", it is right and proper—and arguably your obligation—to bring whatever course of action is most likely to assist your lay client's cause.

Rupert Cowper-Coles: My comment on that is, generally, yes, but speaking from practical experience of acting for clients such as Global Witness, and a couple of years ago for a journalist who exposed the 1MDB fraud in Malaysia, there are people around the world—globally wealthy people—who are subject to sanctions or are possibly fugitives from US justice, and can easily access legal representation in London and pay for lawyers to threaten defamation claims in this jurisdiction. People whose alleged frauds are well documented in Department of Justice papers or who are actually fleeing from frauds and hiding in China are still able to hire reputation lawyers to threaten booksellers and journalists.

There is an underlying issue. You can accept that there are fraudsters around the world, but they can come to England and—through what must be a lack of effective or not rigorous enough anti-money laundering processes—they can effectively use the swag that they have defrauded from their country or a person to spend on reputation lawyers to stop people writing about it.

Chair: That takes us into some broader issues.

Justin Rushbrooke QC: Could I come back on some of those points? A picture is being painted that I do not think accords with reality. Mr Cowper-Coles did not give an example of any particular publication in this country that was successfully prevented from publishing by improper threats of libel action by a foreign claimant. If there is such an example, I am not aware of it.

The fact that neither I, nor any of the colleagues that I have spoken to, can think of an example rather suggests that the evidence might be lacking. I am not saying that English lawyers are not asked to advise foreign-based claimants, but there is nothing inherently wrong with that. It is important to bear in mind that you cannot bring an action in this country for libel against a publisher who is not based in this jurisdiction, unless you can get over a very high hurdle to show that this is clearly the most appropriate forum to bring the claim. That is very difficult now, thanks to the 2013 Act. As far as suing in other jurisdictions is concerned, I am afraid that that is not really something I can comment on. It is also not within the remit of this Committee, if I may respectfully say so.

Chair: I think we will decide our remit.

Catrin Evans QC: I just want to say something about the use of non-libel claims. There is a connection with the consultation going on about the Bill of Rights and the proposal. One of the concerns that is at the root of recent developments in media law is the long reach of article 8—the right to respect for private life under the European convention, which under the Human Rights Act is part of English law. It has led to the evolution and creation of a new sort of privacy; it has also influenced data protection to a large degree. In so far as privacy is concerned, its significance is that claimants are allowed, quite properly, to use the misuse of private information to sue for reputational damage, effectively; Mr Cowper-Coles mentioned the ZXC case as an example. That is something that is going to continue to be tested, but it does mean that it arguably undermines the protections that the Defamation Act 2013 were intended to bring about to slightly redress the balance in favour of defendants.

Q14 **Maria Eagle:** There are a couple of things that I would like to ask the witnesses about. Is there evidence that the UK is a favoured location for SLAPP cases to be brought? We have already heard that there is a small number of cases, if one was to consider the entire work of the courts in this jurisdiction, but that that number is going up. There are certainly some concerns sent to us by the UK Anti-SLAPP Coalition, suggesting that as a jurisdiction we are particularly helpful to those who want to bring SLAPPs—that there are particular attractions to this jurisdiction. I want to tease that out a little bit. Is there evidence that the UK is a favoured location for SLAPP cases to be brought? If so, why? Could we start with Michelle Stanistreet?

Michelle Stanistreet: There was a survey done at the back end of 2020 by the Foreign Policy Centre of 63 investigative journalists across the world—in 41 countries—all working in the area of financial crime and corruption. They were very dogged investigative journalists. That survey found the UK to be by far the most frequent international country of origin for threats; there were almost as many threats emanating from here as all the EU countries and the United States put together. It was 31% for the UK compared to 35% between the EU and US. That is quite stark.

The cases that get off the ground and progress in that way are simply the tip of the iceberg. I agree with the comments that have been made about other types of legal suits being used, and certainly data protection is one of those areas. More and more frequently, particularly over the last year or 18 months, editors and our members are reporting more cases of that being used and cited in legal challenges they are receiving. That is in not just major national outlets and papers, but local newspapers up and down the country. Journalists in the round are facing these kinds of pressures.

I think there is evidence to show that there is a significant issue here in the UK. As there is also action happening elsewhere in the world—in the States and now in Europe—it is really important that this issue is approached in a joined-up way across the world. We do not want to remain an outlier or be an outlier in future if there are more protections

and clampdowns. Some states in the United States have instigated anti-SLAPP legislation and it looks like there will be federal law in that regard. They have also launched a defamation defence fund in the US, which is very much aimed at shielding investigative journalists. There are some really positive moves happening elsewhere. It is important that the UK, where I do think there has been a specific issue, keeps pace with that.

Q15 **Maria Eagle:** You just said that legislation is being brought in in other jurisdictions to deter this, and that is one reason why the jurisdiction here might be attractive to those who wish to bring these cases. Are there other reasons why we are an attractive jurisdiction?

Michelle Stanistreet: I think it is more attractive here full stop, not simply because there has been action to clamp down on it elsewhere.

Maria Eagle: Why?

Michelle Stanistreet: I am sure the lawyers on the panel can answer.

Maria Eagle: We will come to the lawyers.

Michelle Stanistreet: Litigation is incredibly expensive; it is prohibitively costly. If you are a struggling news outlet—

Maria Eagle: The inequality of arms.

Michelle Stanistreet: Absolutely, the inequality of arms. There is a complete imbalance of power, particularly when a lot of journalists who might be working on some of these areas of reporting are freelance. They do not have the deep pockets of a protective news outlet. In fact, we have seen cases where freelancers who have been running work in newspapers do not get fully supported along that legal journey. These are not individualistic issues; to me, that type of legal approach and activity has a chilling effect on the broader journalistic community. To me, it is aimed at sending a message, and deterring other reporting and scrutiny. That is why it is important to address it in the round.

Q16 **Maria Eagle:** Thank you. Dr Coe, do you have anything to add?

Dr Coe: Yes. I was going to add a point about the costs and damages that can be incurred and awarded in this country, which is a big issue. I have spoken to other people about this recently. Very often, the nature of a SLAPP, as we have discussed, is that threat itself is enough to stop the publication, expression and public participation. It does not have to get to any kind of formal claim—just the threat is enough.

Very often, these threats are made to publishers, NGOs, charities or whomever it might be, and they do not know at that point whether this is a meritorious claim or not. What they do know is that, with meritorious defamation actions, by way of example—it could be privacy or data protection—they could incur huge costs and large sums of damages could be awarded. Therefore, the fact that you have meritorious claims that are attracting those sorts of costs and damages underpins a sham claim; it

underpins the threat that is being used as part of a SLAPP, because at that point they just do not know and they do not want to take the chance.

I was talking to an academic yesterday who has been subject to a number of SLAPPs. His university takes the view that they cannot afford even to begin to try to defend these claims, so they just shut down that speech. They just say, "Right, that's enough. We are not going to go ahead with publishing whatever it might be that is the subject of the threat of legal action." Very often, you have really important public interest information that is just not getting to the surface because these organisations just do not have the resource to even begin to think about dealing with it.

Q17 **Maria Eagle:** Thank you. Perhaps not all three of you, but one of our lawyers might have something to add?

Catrin Evans QC: I am happy to do that. In a way, I said it at the beginning. There are four key reasons why England is a popular jurisdiction. I do not think it is necessarily more popular than it was, because I think it has always been popular, but possibly it is. Again, I do not want to overstate it. One reason is that the law is not very difficult to get going if you are a claimant. The claim is not very difficult to get going, and you put pressure on the defendant, as I said. You can use libel and some other courses of action now.

The second reason is that the procedure is conducive to spinning it out, because there is a need on the defendant's part to show that this is straightforward and not triable; otherwise, it will have to go to trial.

The third reason is the costs. There seems to be quite a lot of good evidence that it is much cheaper to bring litigation in the EU states, for example, than it is here. That is a point set against us, but it is the reality. That is largely because many, if not all, of the EU states have much less of an adversarial-based system; it is often inquisitorial, which is cheaper. Those are connected.

The fourth reason is that there are a lot of specialist media defamation firms of solicitors here, and they work with public relations experts these days. That is a relatively modern phenomenon. They can present a very professional package to their clients if they want to use the threat of litigation to stifle free speech. In some instances—I think they are not very high in number—you might be able to say that those are abusive situations, but not always.

Q18 **Maria Eagle:** Thank you. Mr Rushbrooke, you have talked a little about the Defamation Act reforms being good. Do you think the appropriate jurisdiction test is fit for purpose when it comes to SLAPP cases? I think you might say yes, but it is up to you to say what you want to say.

Justin Rushbrooke QC: I am grateful for the opportunity to explain not just what my answer is but why. That is one of the transformational changes brought about by the 2013 Act. The situation from a defendant's point of view has improved further still since we left the EU, because the section itself has subsequently been amended so that, as I summarised

earlier, if the defendant is not a publisher based in this country, they cannot be brought before this court unless the claimant can get over quite a significant hurdle to show why this is the appropriate forum to have a claim decided. In my view, that is rightly a high test, and one that the judges have shown themselves well able to apply.

We now exist in a world where, unless the publisher is here, the action is unlikely to take place here. That, to my mind, has really killed off the worst aspects of what was fairly described as forum shopping. Forum shopping is not in itself wrong. It depends whether it is being used improperly or to get an advantage that the claimant really shouldn't have. That playing field is now not just levelled; it is rightly in favour of the defendants.

The complaint that one sometimes hears now is that foreign claimants shouldn't be able to sue domestic publishers in this jurisdiction for libel, privacy or be it what it may. First, one has to resist the notion that there is something inherently improper about a foreign claimant having access to this court, because our law is quite capable of sifting out the claims that have a proper connection with this jurisdiction from those that don't. That is one of the many safeguards that I referred to in my opening answer.

The short answer is no, I don't think there is a jurisdictional problem. I am slightly concerned by two things that I have heard this afternoon. One is Peter's observation about an academic at a university, presumably in this country, being deterred from supporting or allowing others to publish, or his university not supporting them. That causes me concern, because if it is threats of litigation from people in this country over publications here, that should not be happening if the law is being correctly applied. One of the other advantages of the 2013 Act is that we have a proper statutory qualified privilege for peer-reviewed journals and things of that nature.

I would like now to come back to—

Maria Eagle: Briefly, if you would.

Justin Rushbrooke QC: Briefly. The elephant in the room that has so far not really been talked about is the public interest defence under section 4 of the 2013 Act. Any libel lawyer, whether they act for claimants or defendants, will tell you that if a journalist goes through a proper pre-publication process and puts the allegations to the subject, and does so properly and behaves responsibly with the material they get back, they should be pretty much bulletproof from litigation. That is a massive and important part of the landscape of libel law in this jurisdiction.

I'm sorry to be sceptical that that is the tip of the iceberg. We heard it before—before the reforms—and we hear it now. I would love to see the evidence of it, but it is very difficult to disprove. Section 4 should be doing its job properly.

Q19 **Maria Eagle:** Thank you. Briefly, is there is a need for an agreement on laws of jurisdiction between the UK and other international partners to

prevent multiple jurisdictions being used by those bringing such cases? We have seen examples of, "We'll sue in this country, and if that doesn't go so well, we'll sue the same person somewhere else." Is there a way of deterring that, and would it be appropriate? Mr Cowper-Coles?

Rupert Cowper-Coles: As Justin pointed out, we fell out of what ass called the Brussels regulation recast, which decided which EU state should take a media claim. There is a lot more discretion over our judges on whether to take on cases. Although those anti-forum-shopping protections in the Defamation Act do protect foreign defendants, that does not stop the threats being made.

As we have been alluding to in other areas, the latest way of getting around those defamation protections is to bring a data protection inaccuracy claim. The GDPR has very, very wide territorial effect. If a news organisation has effectively targeted even a small number of its readers in this jurisdiction, under a recent decision called Soriano, that data controller should ensure that it is processing accurate data. So there is another way of getting around the forum-shopping protections that Parliament put in place for defamation claims by bringing your claim in data protection.

Q20 **Maria Eagle:** Do you think, then, that the defamation protection should be extended to data protection?

Rupert Cowper-Coles: Yes, urgently.

Q21 **Maria Eagle:** That is a very short, sharp answer.

We talked a little earlier about the statutory definition of SLAPP cases and whether they could be defined or should be defined, and how. Would a legal definition be necessary for or help other reforms that might be considered, such as limits on costs, early dismissal mechanisms and other ways of limiting SLAPPs? Would they be entirely contingent on having a proper definition in statute, or are they the kind of thing that can be managed without such a definition?

Dr Coe: I have a serious concern about having a definition of SLAPPs or SLAPP claimants that could be too rigid. It would stop some SLAPPs, of course, but you would also prevent meritorious and legitimate claims from happening and so prevent people from being able to vindicate their reputation quite properly.

There are a couple of options. One option that has been suggested, and something that we have certainly talked about at the Council of Europe, is having a key features-type thing—this is what a SLAPP looks like, feels like, smells like. In a very quick, short and sharp preliminary hearing, a judge would determine whether it looks like a SLAPP. The hearing would look into the various different aspects, including the behaviour of the claimant in the past; whether the correspondence with the defendant has been particularly oppressive or abusive in some way; whether there is evidence of forum shopping or of using different causes of action; and what the claimant has done in relation to that particular expression, perhaps in respect of other organisations that have published it—are they

picking on an individual publisher or NGO, for instance? It would look at all those sorts of things. None of them would necessarily be a determining factor; we would look at it in the round on a case-by-case basis. That is one thing that could happen.

The other potential option is that we do not define a SLAPP at all. Instead, we look at giving a definition of, say, public participation, perhaps using public interest as a way of defining that; look at what the European Commission has done in that regard in its new draft proposal; and if it meets the threshold for public participation, then we would have the preliminary hearing and that is when a judge would look at it in the round and consider all of these factors.

I just think that trying to nail down definitive definitions of SLAPPs could cause more problems than it solves.

Maria Eagle: Thank you. Anybody else on that?

Catrin Evans QC: I agree that it would be dangerous to have something that was inflexible. I just don't think it would work.

I think it is helpful to take what you can glean from the Canadian jurisprudence on this—Canada is further ahead than England on anti-SLAPPs—and to focus on the two key elements of what a SLAPP is, I suppose. One is the value of the expression in question, which is tied up with the public interest nature of the expression. In some ways this is easier to say than to do because you know it when you see it, but an allegation being pursued into the corruption of an ex-Soviet state state company or individuals associated with that company might be a good example.

The second is the motive of the claim, in so far as it is possible to discern what that motive is. I think that is the really difficult thing, because you can be a private individual claimant whose reputation has plainly been damaged, in the sense that the allegation is of very serious corruption, but what is the motive for bringing the claim? That is really very difficult to establish, but if the court were able to embark on that exercise of analysis without having to get into the depth of the evidence—there would have to therefore be pre-disclosure, and that is where the costs really kick in—then maybe we would be on to something.

Q22 **Angela Crawley:** It has been suggested that some of the civil procedure rules, for example 3.4 on the strike-out mechanism or 25.12 on security for costs, could be one way to address these points. Could reform of the practice and guidance and civil procedure rules be sufficient to tackle the problems created by SLAPPs? Alternatively, and as I think we have addressed partially, is some form of legislation required, and if it is not solely defamation how would you address that piece of legislation? Rupert, you look like you would like to come in first.

Rupert Cowper-Coles: In the past, I have had cases where we think litigation is being brought for an ulterior purpose; it looks like a foreign state might be behind it. And we have looked at the common law on

striking out a claim as an abusive process. It is about 100 years old and it is incredibly uncertain, based on outdated authorities.

I remain pretty convinced that just by bringing in a piece of a shield law—a piece of statute that has the checklist that we are discussing and factors that a judge could use to identify a SLAPP—the deterrent effect of that would be huge. It would be a piece of statute that doesn't shy away from the challenge that Catrin is talking about of trying to identify a SLAPP, but that gives our very able judiciary the ability, without having to look back 100 years at old cases, to consider the wider factors, make a quick assessment and say, "This looks like abusive litigation. This foreign mining company suing over 100 internet views in England looks abusive. I am going to stay it," or, because this is a preliminary view and there might be an access to justice question, certain consequences flow, like security for costs. If it is too onerous to kick out a case completely at an early and quick determination, you could have the burden of proof reversing, so that suddenly the claimant has to explain why the allegation is false.

I think that a piece of statute would have a massive effect. Because those factors will be pointing at abusive elements, legitimate claimants based in England and those abroad who really are harmed here, when they are taking on a well-resourced media organisation, and it is a fair fight and does not look abusive, there will be no chilling effect on the claimant's rights. I do not think procedural tweaks will be enough to deal with the problem.

Dr Coe: I want to add that this should be an ongoing assessment. Even if, for instance, we introduced some sort of preliminary hearing where the decision may or may not be made that this is a SLAPP or a SLAPP claimant, it should continue to be assessed all the way through, because more evidence may come to light. It may well be that what did not appear to be a SLAPP to start off with actually does then become a SLAPP. Or perhaps the claimant's behaviour changes at some point. It should be an ongoing assessment.

Q23 **Angela Crawley:** It has been suggested that there is scope to improve regulation of the pre-action stage, which you have indicated. To what extent is the use of private investigators and other agencies a problem that the Government should address as part of plans to tackle abuses and SLAPPs cases?

Dr Coe: If I could comment again, I must admit that I don't have any evidence from this country that I can share, but I know from the conversations I have had with colleagues on the expert committee at the Council of Europe that this is certainly a problem in other jurisdictions. My colleagues from different countries in Europe have said that there is a big problem where you have reputation management companies, for instance, that are advising clients on using SLAPPs. The advice is coming from them, but of course they are outside of regulation; they are not necessarily lawyers. I don't know if that is so much of a problem in this country and I can't comment on that; I am just talking anecdotally.

Q24 **Chair:** We get that point. There is something that follows on from this. Several of you referred to identifying early whether it is a SLAPP case, and whether, if it is, you can strike it out for being unmeritorious, for example. Our colleagues on the House of Lords Committee heard pretty unanimous evidence that there should be what was described to them as a "quick early" process that identifies a SLAPP, and then you move to a particular regime to deal with that. Do you broadly agree with that? Is there a case for saying we ought to have an early identification process, and in cases where the court has decided that it is a SLAPP—there is always that action to be done first—an early striking-out mechanism? Some people are nodding but Mr Rushbrooke is shaking his head.

Justin Rushbrooke QC: I'm sorry but I come back to some familiar points. First, where is the evidence of ongoing or recent litigation that can fairly be described as a SLAPP? There is none. It is by no means insignificant that none of the defendants in the recent cases to do with Putin suggested at the time that the litigation was a SLAPP; described it as an abuse of process; sought indemnity costs, which is available for unreasonable conduct; or sought a declaration from the judge that the litigation was totally without merit, which is also one of the many tools that the court has. I would not be against the idea of having some sort of preliminary go at abusive litigation if I thought there was a problem with abusive litigation, but as I say, I haven't seen the evidence.

Chair: I understand.

Justin Rushbrooke QC: The next point is that the court also has not ancient tools, but modern living and breathing laws available to it to get rid of abusive libel claims. It is just that defendants are not invoking them, or if they are, they are not succeeding.

Even before the Jameel decision, which you may have heard about and which gets rid of trivial libel claims, there was a case in the Court of Appeal, Wallis *v.* Valentine, which bears reading, though I am sorry to give you a one-sentence quote. The court has the power, indeed the duty, to strike out as abusive certain kinds of libel litigation—this is one of the examples—where "The conduct of the proceedings themselves [is] not so as to vindicate a right but rather in a manner designed to cause the defendant problems of expense, harassment, commercial prejudice or the like beyond those ordinarily encountered in the course of properly conducted litigation."

That jurisdiction is available to defendants, and probably has been for decades, along with the early resolution of meaning questions and the case management powers that judges do use—judges are aware of this problem, or at least the alleged problem. We had a combined meaning hearing in these Russian cases, where the costs were capped—the litigation costs were kept admirably low by the judge—to get rid of the claims one way or the other at an early stage. That is part of the panoply of tools available to the court.

Q25 **Chair:** It seems that it is inherent jurisdiction that one argues.

Justin Rushbrooke QC: It is similar to it, yes.

Q26 **Chair:** A bit like the way that in a criminal jurisdiction, it would be abuse of process, for example, and thrown out of what is regarded as inherent jurisdiction. Do you think that is a route, Ms Evans, or should it be done by reform of the civil procedure rules, for example?

Catrin Evans QC: If there is going to be some reform that is intended to recognise SLAPPs, it would need to be done by primary legislation, but the rules would also probably need to be amended, because it would be saying that this is a special class of case; that again is controversial.

I just want to say one extra thing about the paucity of evidence about claims. On Justin's point, there might be some dispute in relation to Catherine Belton's book case about whether they were notified to be SLAPPS or not. Certainly, the claim by Rosneft was not regarded by many as a proper claim.

Justin Rushbrooke QC: You need to be a bit careful about the outcome of that.

Chair: Yes, If there is any ongoing litigation still involved, you have to be careful as it is sub judice.

Catrin Evans QC: The point I wanted to make is that it is one thing to say, "Where are the cases?" but it doesn't deal with the cases that don't happen because publication does not happen.

In response to the call for evidence, there will I hope be evidence from lawyers with overseas experience in America, which has anti-SLAPP legislation. One of the things I know from talking to American lawyers is that they believe that it is the very existence of the legislation on the statute book that provides some protection to media publications, because it puts off potential claims of this sort. I don't know how you measure that, but that is their feeling.

Q27 **Chair:** I get that. One caveat raised in the Lords Committee was the risk of satellite litigation. How would you structure something to avoid that, which is a legitimate concern, I would have thought?

Catrin Evans QC: I think it is inevitable that to begin with, if there is such a change—

Q28 **Chair:** You will have some, and you just have to let that work its way through, and then precedent will ultimately find a solution to that?

Catrin Evans QC: Yes, I think so.

Q29 **Chair:** Okay, fair enough. Mr Rushbrooke said that you can achieve limiting costs through costs caps and so on. Do you have any thoughts about how that might be done in such cases? If there is a need to identify these SLAPPs and so on, how would you structure a costs cap regime? Would that be a difficult thing to do, or would it simply be adapting that which exists at the moment and perhaps enhancing or accelerating it?

Catrin Evans QC: The mechanism to do it is there now. It would probably need adjustment to make it clear that it applies—

Q30 **Chair:** So just an adjustment to what we've already got.

Catrin Evans QC: These cases are already budgeted, but they are budgeted at a point when costs are sometimes already very high. That might be a complaint about the current system.

Chair: So it doesn't need anything major; you think a mechanism is there. Okay, that's helpful.

Q31 **Rob Butler:** Flowing on from that, I was very struck by your comments right at the beginning, Mr Rushbrooke, about the need to strike a balance, as you put it, because false and defamatory statements find their way into the media. I have to say that some Back-Bench MPs feel that they have been on the receiving end of that. In some ways, I wonder whether we have essentially been talking about two sides of the same coin, and that it boils down to the fact that whoever has the most money has the greatest advantage. When we are talking about SLAPP cases, we are talking about the likes of oligarchs potentially preventing free speech and debate. In other cases, we see individuals and much smaller organisations that have insufficient means to take on the power of the media, particularly the bigger organisations—I absolutely take your point about freelancers—that can sometimes publicise defamatory material and they kind of know what they are doing, but they also know that the individual hasn't got the cash to take them on. Having spent a long time in the media, I am conscious of that being an idea. Is legal aid potentially one way of resolving that? Mr Rushbrooke, I will come to you first since I quoted you.

Justin Rushbrooke QC: That very thought had occurred to me: that actually there may be a case, and this may be the best solution. I am concerned that knowledge about the way in which our law works does not appear to be even filtering down to freelance journalists. That does concern me, because we all used to get a book called "McNae's Essential Law for Journalists"; you may remember that.

Rob Butler: Indeed—I still have it.

Justin Rushbrooke QC: Anybody who is given a copy of that and reads the section on public interest will be very well equipped to deal with threatening libel claims. Yes, I would respectfully agree: having legal aid available for what will be, I think, a small category of cases where an unresourced or poorly resourced defendant—journalist or whoever—is being threatened or has been sued over a libel or data protection privacy would seem to me to be a good thing. They should have access to legal representation.

The problem with the legislative route—I understand why the Committee wants to take action in respect of what seems to be more of a tip of the iceberg problem than an actual litigation problem—is that it will give Catrin and me work to see us into our retirement, because we will have satellite

litigation with newspapers saying, "This is a SLAPP, this is a SLAPP," and on it goes. As I say, there is already a very carefully contrived balance between the various rights in libel litigation, with very proactive judges managing the litigation. When I say "managing", I mean that tens of thousands of pounds is all it takes, maximum, to get to a hearing on meaning. The judges cap the cost, and that usually resolves the case.

Q32 **Rob Butler:** Ms Evans, do you have a view on the concept of legal aid in these situations?

Catrin Evans QC: In principle it sounds good, but I am not sure that the state would want to spend what it takes to give equality of arms with the claimants we are talking about. I think £35,000 to run a piece of litigation, if we take the Aarhus convention cases as an analogy, would get you to the meaning hearing and that's it, and it does not talk about how you are then liable for the loser's costs.

Q33 **Rob Butler:** Ms Stanistreet?

Michelle Stanistreet: I completely agree that a different approach to costs would be progress for everybody who ever finds themselves involved in that kind of legal process, whether they are a journalist or an individual bringing a case or not. Having a cap on costs—them being at a sane level—would obviously be desirable. We do not have a fixed view about whether that is done through a legal aid mechanism or some kind of cost cap.

In terms of the scale of the problem, though, or there even existing a problem, I would just add that the NUJ is part of a coalition of more than 20 organisations. There is obviously the separate submission from that group collectively. Every organisation involved in that coalition is absolutely clear that there is a problem, and that there are cases to demonstrate the scale of that problem and the impact it is having on journalists, NGOs, other whistleblowers and people involved in human rights work. The notion that there is not a problem—that it does not exist—is fanciful, and of course journalists are fully availed of the law as it pertains to their industry and their trade.

Q34 **Rob Butler:** Are they really? You said yourself earlier on that there has been a lot of cost-cutting, and I would have a concern about the amount of training and experience that there is in many media organisations these days. The big national ones still have good and decent resource on the whole, but even the BBC national newsroom has changed. When I was there, you had nine producers working on one programme; that may well have been overstaffed, but now you have maybe a third of that, and they are working on three or four different programmes at the same time. Lots of levels of checking—senior sub-editors and the like—have been stripped away. So, are you absolutely sure that journalists really are as conscious of the law—even of McNae's book—as they once were and as they ought to be?

Michelle Stanistreet: Yes, in any training course that journalists go through. Seek evidence from the National Council for the Training of

Journalists or the Broadcast Journalism Training Council, and they will explain to you the role that the law plays at the heart of the training they provide.

You are quite right that after entry into the industry, the on-the-job ongoing professional training—if you like—of any kind from some media outlets is pretty rubbish. They do not invest as much as they should in a whole gamut of training for their staff, and freelancers fall outside of that and so take that on board themselves in terms of costs. But it is also why the NUJ has a whole programme of training for its members across the entire union, on all manner of issues. I think the journalists we are talking about who are often on the receiving end of many of these types of legal cases are investigative reporters who are absolutely steeped in the industry, their knowledge and legal processes as it applies to them as a journalist. I think to suggest that their knowledge and understanding is somehow lacking and that is the issue, is silly.

Q35 **Rob Butler:** But of course, these days anybody can set themselves up as a journalist. They do not even have to call themselves a journalist—they can publish what they like. We have social media, which in many ways has been great but in other ways brings disadvantages. Does there not have to be some balance there? You can go on social media and say anything you like.

Michelle Stanistreet: I do not think they are the kinds of cases or the types of journalists that we are talking about.

Q36 **Rob Butler:** No, but if we have legislation, we have to look at both sides of the coin, don't we?

Michelle Stanistreet: Of course you do. Any kind of change or new legislation has to have its checks and balances; I completely agree with that.

Q37 **Rob Butler:** Let us think a little bit about deterrence and sanction. We have talked around this quite a bit already, but I wonder whether there are any additional thoughts about whether the Government should introduce measures to sanction and deter litigants in cases that are found to be SLAPPs. Dr Coe, let's start with you.

Dr Coe: If we are able to identify that a particular claim is most definitely a SLAPP claim—this goes back to the point I made earlier that we have to be very careful how we define a SLAPP claim, because we could be wrongly characterising an individual or a claim as being a SLAPP that, actually, is not. I think if there is a way of saying, "Yes, absolutely that is a SLAPP claim, undoubtedly," perhaps measures could be taken against that claimant, whether it be cost measures or something along those lines. I am still concerned about having this kind of definitive definition that could wrongly categorise an individual as a SLAPP claimant.

Rupert Cowper-Coles: I think legislation is needed. Privacy law and data protection law need the same sort of statutory protections that defamation has. This early, quick evaluation of SLAPP cases, with capped costs

relating to it, would be a very desirable one and would leave to a judge's discretion the ability to look at factors that might indicate it is a SLAPP. You have to keep it cheap and quick, and capping costs is a sensible way.

One perhaps illustrative example of the problem with pre-action threats and how that is chilling, with articles not getting off the ground because of threats, is in copyright law. If you make an unwarranted threat to intimidate another business over your trademark, and that threat is improper, the recipient of a threat has a statutory claim against the person bringing that bullying threat. Actually, in copyright law we have a precedent where businesses that bully improperly with their trademarks face repercussions.

When we are advising a defendant, we say, "Look, if you can find the money to fight this to trial, that will cost you probably a truth defence that will be two or three years down the line, and will cost probably £1 million, and if you lose, you will be liable for the other side's costs, which is another £2 million. Even if you are successful, you will only get back 60% or 70% of your costs, so you will be £300,000 down." When you look at those sorts of numbers, you can see why it has such a big chilling effect. Statute is the key—that is the deterrent. An abusive oligarch or a fraudster who wants to use our judicial system for a nefarious purpose, probably without their lawyer's knowledge—you want them to be worried about a judge effectively having a sniff test and saying, "What is this case all about?" A bit of statute, I think, is the way to do that.

Dr Coe: To go back to the point I made earlier, the problem we have at the moment is that if we start capping costs for SLAPP claims, we may also need to think about capping costs for defamation claims generally. That is because of the fact that the threat is often enough. At the point the threat is made, the person does not know whether it is a SLAPP or not, or how meritorious the claim is. They look at the damages and costs that have been incurred and awarded in other, meritorious defamation actions and they think, "That could be me. I could incur those costs and damages, so I won't bother going ahead with the publication or participation." I think it needs to be looked at as a whole, across the board.

Q38 **Rob Butler:** We have had a reasonably wide-ranging conversation on whether you each think the Defamation Act in and of itself is fit for purpose, but if anyone would like to say anything more on that, please do. I also want to ask whether you feel that the burden of proof should move to the claimant. One or two of you have alluded to that, and I wonder how much support that would gain as a proposal—in other words, the burden of proof moves to the claimant to prove that the statement is not true.

Justin Rushbrooke QC: That is a chestnut that has been visited before and in other jurisdictions as well, including Australia, where they introduced universal libel reform on a statutory basis 10 or 20 years ago. I don't think it should be reversed, partly because I don't think it actually makes a difference. As one of the leading Australian judges said at the time, few if any cases turn on the burden of proof. In this country, a

claimant will always be saying in his witness statement, "This is untrue, and it upset me." It is not as if the claimant is always entitled to cower behind the burden of proof resting on the defendant or the presumption of falsity. In reality, that does not happen.

Also, from a social point of view, it is not a desirable state of affairs to have the state making serious allegations—or indeed any allegation—of criminality against a citizen. It is for the state to prove that. I would not be comfortable living in a society where a powerful media organisation could make very serious allegations and not have to prove them, particularly when they have—as I have said many times before ad nauseam—a section 4 public interest defence, which is what all journalists should be relying on.

Michelle Stanistreet: We feel that the burden of proof, as it stands, does place huge pressure on individuals and publishers. Newspapers often receive very little information and detail from claimants. I take on board the concerns that have just been expressed. The law needs to change and there need to be different elements to the processes to change the whole structure of it and have a swifter, accelerated procedure. That is why the sanctions are an important part of that process and should be introduced. They will also act as a deterrent and delegitimise that kind of behaviour, going forward. We see it more as a package of change that is required.

Q39 **Rob Butler:** Ms Evans, should we change the burden of proof, or is it not that significant?

Catrin Evans QC: I am inclined to think that it is not that significant when it comes to the truth defence, because whatever happens, if the claimant brings in evidence of falsity, the defendant is going to try to find evidence that rebuts it. You would have the same relationship as you do now, though it may not feel like that from the defendant's point of view. What it does segue into is the question that always comes up when these reform debates happen: is there a good argument for introducing finally a requirement of actual malice on the part of the journalist—the defendant? In other words, the claimant in a public interest case has to prove that the journalist did not believe in the truth of what he or she was publishing or was reckless about it—such as is the law in the US.

Q40 **Rob Butler:** I was just looking for where that was the case. It is in the US—thank you for reminding me.

Catrin Evans QC: Effectively, in the US it applies in the context of cases brought by what are described as public figures, which is a term that has expanded over the years. It now includes in some applications there even celebrities, as it does under the European Convention jurisprudence. It does seem to be a natural corollary to discussing whether these are a special kind of public interest case to also consider whether you would impose a malice burden on the defendant. It would not be an easy thing to determine as a summary assessment, though.

Rupert Cowper-Coles: I think I agree with the other comments. There is an argument for, in certain circumstances, if you have an early evaluation

and a case looks like a SLAPP, reversing the burden of proof at that point. In terms of advising clients, it is remarkable that, where there is a detailed newspaper or media article making very specific allegations and you get a letter of claim which just does not explain the claimant's position on them, in breach of the pre-action protocol, the claim is issued. The particulars of a claim do not need to, again, particularise why the allegation is false. It is only if you plead a truth defence, which costs tens of thousands of pounds, and that truth defence is not struck out, which is often a tactic or attack because you have to point to the actual conduct of the claimant—only if you survive all those preliminary skirmishes, with perhaps £300,000 in litigation, that you get the reply where you get the claimant's position.

One possible solution is: make it mandatory for the claimant to set out what their position is, and if the allegation is very broad and non-specific—such as if you were just calling somebody corrupt and not explaining why—then the claimant would not have to be specific, pre-action. But if a claimant is bringing a claim without explaining what their position is, there should be cost protection for the defendant. You should not have to go right through hundreds of thousands of pounds into the case to understand what the claimant's carefully pleaded position is.

Q41 **Rob Butler:** Mr Rushbrooke, do you want to come back on that?

Justin Rushbrooke QC: Yes, I'm baffled to hear this. Again, I would like to see the evidence for it. The pre-action protocol is absolutely clear. It imposes a duty on claimants to set out in the letter of complaint the "factual inaccuracies or unsupportable comment within the statement complained of; the Claimant should give a sufficient explanation to enable the Defendant to appreciate why the statement is inaccurate or unsupportable". If a defendant has got expert legal advice, such as from Mr Cowper-Coles, you can be absolutely sure that they will be writing back in response to the letter of complaint and saying, "What exactly is the unsupportable comment or the inaccurate facts?" In an extreme case, they could go to the judge and say, "This claim should be stayed until the claimant has complied with the protocol." Frequently we hear complaints about failures to comply with the pre-action protocol, but in my experience it is the defendants that usually are the biggest non-compliers in that respect.

Catrin Evans QC: May I say something about that? Having recently talked to some of the in-house newspaper lawyers about their experience of having to give the right of reply, which the good newspapers all do, and of course are required to do as part of their ability to take advantage of the section 4 defence, one of the frustrations they have when they are dealing with what they would characterise as SLAPP claimants—claimants who are coming in very heavy-handed and well-resourced, often in relation to corruption-type allegations—is that those claimants' lawyers, on behalf of those claimants, evade answering the questions before publication. So it is not easy for the newspaper to do what Mr Rushbrooke is laying down as a counsel of perfection, which is to discern all the information that the claimant is willing to volunteer, because the claimant is not going to volunteer that information before publication in these sorts

of situations. Very often it leads to articles being spiked, no doubt, because the newspaper cannot get sufficient confidence that it has carried out the act of trying to verify the contents.

Chair: That is an interesting range of views.

Q42 **Maria Eagle:** We have talked about some potential reforms of the Defamation Act, although not everybody agrees that there should be any, which I do not understand; but I wonder whether there are any that have not been mentioned already that the panellists here might think would be helpful in dealing with these cases.

Rupert Cowper-Coles: It is an issue with defamation law. It sounds a little niche, but there is something called the rule in Dingle, which means that when you are looking at serious harm the courts are precluded from looking at other publications that have said the same thing. To give a slightly facetious example, if you were the President of Russia and you threatened a claim over someone on Twitter with 100 followers publishing a serious allegation, such as, "You're a war criminal", the English courts under the rule in Dingle—maybe this is taking it to the extreme—would ordinarily be precluded from looking at the hundreds of thousands of other people who have said the same thing.

The rule in Dingle was brought in to achieve fairness. I think Dingle itself states that if you have three different newspapers on your breakfast table—*The Times, The Telegraph and* the *Daily Mail—The Times* should not be able to escape liability because *The Telegraph* and the *Mail* wrote the same thing. In this internet age, where you want the court to be looking at the actual impact of and necessity for legal action, I do not think the rule in Dingle sits very comfortably without precluding the judges from looking at, "Has this person got a reputation?" If you are sanctioned around the world, or you are fleeing from justice, do you really need to bring an action in England and Wales against limited publication? The rule in Dingle is a bit of an obstacle to that. That is something that often gets left aside, but if I was fixing defamation law it would be something that I would look at carefully.

Q43 **Maria Eagle:** Thank you. Does anybody else have any niche points or any other points?

Catrin Evans QC: Just a quick point; I have made it already and it relates to the other consultation. One reform that would make things much clearer for practitioners—Mr Rushbrooke won't like it but others will—would be either to the Defamation Act or in another piece of legislation to make clear that if you want to claim damages for damage to reputation, you can do so only through libel, not through privacy or data protection. That is very complicated legally, so we will leave it to you to disentangle.

Maria Eagle: It is a simple point, but hard to—

Catrin Evans QC: It would be reversing the direction of travel of the last 20 years. However, if the Bill of Rights is a serious proposition, then maybe it is the time to do it.

Michelle Stanistreet: There is a lot of good work happening from the Government at the moment through the National Committee for the Safety of Journalists, monitoring and implementing an action plan to tackle the rising rates of abuse and harassment. We think it would be a good idea to extend the remit of that committee's work to also encompass the legal intimidation and threats that impact on journalists and journalism in the UK. That would enable us to create better mechanisms for monitoring, tracking and reporting on cases and incident rates as well. That is something we think would add to the level of knowledge and understanding on those issues and their prevalence.

Dr Coe: I have nothing else to add.

Justin Rushbrooke QC: I would like to come back on a couple of points and ensure we get the law absolutely right. I respectfully disagree with Mr Cowper-Coles about the rule in Dingle. In fact, in Karpov *v.* Browder, which is one of the cases that is cited as a SLAPP—again, inaccurately—and was decided nine years ago, the judge did exactly what he should have done and said, "One of the reasons I am going to get rid of this claim as an abuse of the process is precisely because your reputation has been damaged elsewhere in many significant publications." The vindication the claimant would be able to get by being able to pursue the claim here, over a very small circulation, would be completely overwhelmed by the "torrent of prejudice", as the defendant's advocate eloquently described it, that is currently out there. It is legally wrong to say that the court does not take that into account.

On the more important question of serious harm, where these arguments happen all the time, a claimant is not allowed to pray in aid damage done by other newspaper articles in order to get himself or herself over the line on serious harm. They have to show that a limited publication in this country caused serious harm just through that publication. Defendants are very good at saying, "Well, look at all the other things that were published." The judge will say, "Yes, I accept that, but you haven't satisfied me that you have suffered serious harm as a result of this particular publication you are suing on." That is the state of the law.

As far as damages for loss of reputation for privacy are concerned, I am not sure why Ms Evans says what she does. It doesn't really matter whether I like it or not. Again, it is an open question as to whether or not you even can recover damages for damage to reputation in a privacy claim. What is certainly correct as a matter of law is that a defendant can say, "We may have breached your privacy and you may be entitled to damages for that, but in so far as you are claiming damage to your reputation as part of that damages claim, we say that you do not deserve that reputation because you are in fact guilty of the underlying conduct." As far as I am aware, the law certainly does not prevent a defendant from doing that.

In terms of illegitimate tactics by claimants, I think if there was any need for reform on that, it would be useful to have a record of defendants behaving badly as well. I am afraid that I have known cases of

newspapers saying, "If you make this claim, we will bankrupt you", and, "You picked the wrong fight with the wrong newspaper over the wrong article". All manner of improper threats are made—still now in respect of phone hacking claimants it goes on.

Q44 **Maria Eagle:** Thank you. I wonder whether the Government's proposals to reform the Human Rights Act might have an impact on the regulation of SLAPPs. I know I have just introduced that as a rather new point and we might start getting a bit fed up because it may keep us going for some time, but would anybody like to comment? We often have interaction with Government plans and it would be good to consider that.

Justin Rushbrooke QC: It is a very important question. I think it is one of the problems with the very absolutist position that Catrin was referring to in North America. North American libel law, because of the first amendment, privileges irresponsible journalism over truth and the right to reputation. That is not a balancing act I would like to see in this country. Many people do not support it—and rightly so. If one were to create a statutory bar on a libel claim brought by a public figure, which is now extremely widely categorised, that would almost certainly run into problems with the convention jurisprudence, because it would be unfairly restricting the article 8 right to reputation. I think we would effectively have to wave goodbye to the convention if we were going to go down that road. As I say, it is not something I would be in favour of. Even if we brought into this country the Ontario SLAPP statute from Canada, it would be a breach of our obligations under the convention, because, as I say, it sets up a statutory bar, which prevents a claimant from suing unless they can show that there is no defence. That is an incredibly difficult test to overcome under the English law.

Q45 **Chair:** So it is disproportionate in terms of the ECHR?

Justin Rushbrooke QC: And it would impair the very essence of the right.

Catrin Evans QC: I have already said what I think about this. I agree that there is an incompatibility with our membership of the European convention in respect of article 8. I am not sure that it shouldn't be tested, however. As I understand it, that is part of the remit of the body looking at the Bill of Rights. I know they have received submissions to similar effect, but I do think, for what it's worth, that what you are looking at cannot be disentangled from what they are looking at, which is what you are identifying.

Article 8 is at the heart of all of these cases, as our law currently stands. The balance is too much in favour of article 8 as things stand, particularly because section 12(4) of the Human Rights Act, which is the one that says that there should be particular regard to freedom of expression, is effectively meaningless in the light of the case law, which says that you cannot prioritise one over the other. It is difficult to see how you can achieve anti-SLAPP reform without prioritising article 10 to some extent.

These are really complicated questions—ones which, happily, we do not have to resolve.

Chair: That is very helpful.

Q46 **Angela Crawley:** On regulatory reform, it has been suggested that the Solicitors Regulation Authority has not been as effective as it could be in protecting public interest principles and investigating intimidating and aggressive behaviour by law firms. Would anybody like to comment on that?

Supplementary to that, I have an additional question about whether the legal profession undertakes adequate due diligence in respect of their clients in potential SLAPP cases. Mr Cowper-Coles, you covered this briefly, in terms of anti-money laundering, but would anyone like to add anything on those questions?

Rupert Cowper-Coles: I know the SRA has recently at last identified SLAPPs as an issue, so it is thinking about it. Partly the issue is that once you are SLAPPed or threatened by abusive litigation, you are told to shut up and not repeat it to anyone, so the SRA doesn't have much evidence. It is a bit like the use of NDAs: it has become a lot more taboo post #MeToo and Harvey Weinstein.

Regulation and a more robust approach could help. If you have a law firm that has threatened or brought a defamation claim and has accepted a huge amount of dirty money to pursue it, and that comes out, there should be regulatory action. A lot of this litigation is about corruption and dirty money. As far as I can see, I don't think law firms fear any consequences to taking the prospective client's word that they are being defamed, without any due diligence, and that the allegations are untrue—perhaps not even digging into the actual facts—and writing that first letter of claim or bringing those proceedings. A more robust regulatory framework could help.

Q47 **Angela Crawley:** Ms Evans, do you have anything that you wish to add?

Catrin Evans QC: It is not really my field, in the way that it is Mr Cowper-Coles's. I don't recognise this problem with evil law firms—not in this field—so I think that is a bit of a red herring, in the sense that they are entitled to act for clients they regard as being legitimate clients. Certainly, from the barrister's point of view, we are obliged to take on cases that we may not agree with. That is a fundamental tenet of the rule of law. Having said that, I can see that there are delicate parts to this question, with regard to the financing of claims and obligations on solicitors' firms to inquire into money laundering and all that, but I can't say that I know anything more about it than that.

Q48 **Chair:** One assumes, Mr Cowper-Coles, that if the solicitors' firm is acting properly, it doesn't matter what the claim is about if it is dirty money. They shouldn't be taking the money; the nature of the litigation doesn't matter.

Rupert Cowper-Coles: Yes, that's the point. We have been in a piece of litigation where we have produced in the course of litigation direct evidence that the client is receiving dirty money, and it doesn't seem to prevent them from continuing to act.

Q49 **Chair:** That would be the same if it were a conveyancing dispute, wouldn't it?

Rupert Cowper-Coles: Exactly.

Q50 **Chair:** Can I make one other point on this regulatory point? We are nearly finished. You have talked about regulation of the lawyers, but is there another elephant in the room? Ms Evans referred to the recent phenomenon of law firms working on behalf of clients, which clients are entitled to have, with the introduction of public relations firms and investigators. That is an area that is essentially unregulated. Is that a gap in the system—the lack of regulation of the public relations firms and consultants? "Reputational consultants" is a phrase that is sometimes used about them. Is that a matter of concern?

Dr Coe: As I said earlier, I don't have any evidence from the UK, but I have had conversations with colleagues at the Council of Europe and it seems to be a big problem in other jurisdictions in Europe that more and more reputational management firms are involved in advising on these sorts of strategies—using SLAPPs in this way—and of course they are outside regulation. Regardless of what the SRA does in the UK, it is not necessarily going to be able to deal with the companies, organisations and individuals that are advising on SLAPPs.

Q51 **Chair:** Is it perhaps too difficult to regulate these types of organisations, as opposed to us lawyers, for want of a better word?

Rupert Cowper-Coles: I would take a slightly more moderate tone. On public relations firms, I think that since the collapse of Bell Pottinger, the public relations industry has improved its self-regulation, but most importantly, that was a case where reputation management lawyers were working alongside PR firms acting for a well-known family very close to the President of South Africa. It is much less frequent that we see smears from English-based PR firms. Last year, Global Witness started getting smeared the day before they launched a report. You do get it, but I think it is more outside the jurisdiction now.

Q52 **Chair:** Any views or observations, Mr Rushbrooke and Ms Evans?

Justin Rushbrooke QC: The short answer is that I agree it is not a problem, and if it is, it is certainly not a problem that that can be fixed in any simple way. The PR industry, in so far as it is involved with litigation, is very much an ancillary wing.

Catrin Evans QC: All I would add is that if there were any obvious problem or nefariousness in the conduct of a PR agent, the solicitor ought to pick up on that. That is what one would hope.

Q53 **Chair:** Fair enough. Ms Stanistreet?

Michelle Stanistreet: The Anti-SLAPP Coalition is keen for there to be another look at that, particularly in the area of private intelligence firms and the lack of regulation that governs their activities and their use. I think you are right: it would be worth collating more evidence about improper behaviour in that regard and different types of cases. They are also proposing the introduction of model litigant principles in terms of the conduct of litigation and the provision of legal services, and for the NUJ's part we cannot see a downside to that. Things that prioritise high ethical standards can only be a good thing from our perspective.

Q54 **Chair:** I suppose it is a question about the extent to which there is evidence that it is a problem in this jurisdiction, as has been said, and where that would sit in the priorities. Is there any evidence on that, one way or the other?

Michelle Stanistreet: I can come back to you on that. I do not know. I know of cases that have involved private intelligence firms, but not where they are situated.

Q55 **Chair:** Well, if there is evidence, we are always happy to have a note sent to us thereafter.

Thank you very much, all of you, for your time and your evidence today. It has been most helpful—fascinating, at times—and we have had a very robust range of views, which is very helpful to us. We will now take this away, and there is still a bit of time before the Government's consultation concludes, isn't there?

Justin Rushbrooke QC: Could I just ask this? There will be, I hope, submissions coming in from a number of barristers before the deadline next week, and I would ask you to pay particular attention to those that act on both sides of the claimant-defendant divide, as I do.

Chair: It is the Ministry of Justice that does the consultation, rather than us, but we will obviously want to reflect on how we can help that consultation with the evidence that we and others have had. Your point about a balance of evidence is, I am sure, something that is important and that we can make to the Ministry.

Justin Rushbrooke QC: Sorry—there is one more question I was going to ask. Have you been able to approach any of the judges, either serving or recently serving? Again, that is a source of views and evidence that may well be worth taking, and I do not know whether the—

Chair: It is a helpful point, though again, Mr Rushbrooke, you will understand that, particularly with the serving judiciary, there are constraints on what they can say under the convention that exists between us and the Judicial Office. But the point about the views of the judiciary, which we have been able to take in other cases, is well made.

Justin Rushbrooke QC: I think there is a precedent for a serving judge giving evidence. It happened with the Joint Select Committee on defamation last time around, and I think as long as the Lord Chief Justice or the president is content with it, it is something that can be done.

Chair: That is very helpful. Thank you all very much for your time and your evidence. The session is concluded.