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HOUSE OF LORDS

HOUSE OF COMMONS

MINUTES OF EVIDENCE

TAKEN BEFORE

THE JOINT COMMITTEE ON THE

DRAFT DEFAMATION BILL

MONDAY 18 JULY 2011

Edward Garnier QC MP

Paul Dacre and Matthew Parris

Evidence heard in Public Questions 725 - 795

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Members present

Lord Mawhinney (Chairman)
Sir Peter Bottomley MP
Chris Evans MP
David Lammy MP
Stephen Phillips MP
Lord Bew
Lord Grade of Yarmouth
Baroness Hayter of Kentish Town
Lord Marks of Henley-on-Thames

Examination of Witness

Witness: **Edward Garnier QC MP**, Solicitor-General

Q725 The Chairman: Solicitor-General, we are extremely pleased to have you with us and we thank you for coming. As you know, we have agreed with your office that we will take only half an hour of your time. However, there are a few questions on which we would like to pick your brains, if we may. First, I alert you to the fact that we are being broadcast. Secondly, I alert you to the fact that we may have to adjourn briefly if there is a vote in the Lords. Thirdly, I ask you whether there is anything that as a senior government Law Officer you would particularly like to say to us before we start.

Edward Garnier: No, I do not think so, other than to say that I am delighted to be here—at least, I think I am—and to remind you of the obvious, which is that this is a Ministry of Justice Bill and not an Attorney-General's Office Bill.

Q726 The Chairman: Thank you for that. We are aware of it. Indeed, it is quite a good introduction to my first question, which you are perfectly entitled to say falls to

the Ministry of Justice rather than to the Law Officers, although, given your historic professional background and the role that you play, we think that you might have a view, which we would be interested to hear. One of the big surprises to us of our inquiry has been that nobody mentioned rules and procedures when we started, but they have now assumed fairly significant importance in our thinking and in the evidence that we have taken. Would you have a view or a concern if we were to recommend, and the Government were to accept, that defamation could be handled more effectively and more quickly simply by persuading the courts to adopt different rules and procedures, some of which may exist in theory but do not appear to us to be very operational?

Edward Garnier: I do not think that I would have a problem with that. You would just have to ask yourself, "What is the question that you are trying to answer?" If you are trying to change the substantive law, probably you need to do that through legislation. If you are simply trying to change the procedure, you would look to the rules committees that are relevant to this aspect of law and apply your minds to that.

Q727 The Chairman: Given that we have been asked to reflect on a draft Bill and issues that were too tricky for the Government to put in a draft Bill, you would have no problem if part of our recommendations was focused on giving advice to the Government on rules and procedures.

Edward Garnier: No. You and your colleagues must decide what you think it is appropriate to make recommendations about. If you want to make recommendations about the substantive law, no doubt you will do it in relation to the draft Bill. If you

want to make recommendations about how defamation actions or complaints are handled by the courts and that leads you to make recommendations outside the Bill, no doubt you will do so and address yourself to what you consider to be the deficiencies in the current procedures.

Q728 The Chairman: From your experience, do you think that amending the way in which rules and procedures are actually applied could help to speed and thereby reduce the costs of defamation?

Edward Garnier: I have seen it happen in the past. It used to be the case 20 or so years ago that it took about 18 months between setting down a case that was ready for trial and its actually appearing in court before a jury. The then Master of the Rolls—I think that it was Lord Donaldson—invited the judge in charge of the jury list to greatly reduce that gap and he did so procedurally; he simply said that people must comply with the timetabling rules and that if they did not there would be cost implications. Within a very short space of time—six to 12 months, as I recall—you could be in the warn list very quickly after a case had been set down. If there is a will, if there is sufficient judicial management and if the rules are clear, it can be done.

Q729 Mr Lammy: We have had varying views on cost in this area of law. That cuts in two ways. One is obviously in relation to jury trials and their costs, although we have had quite a bit of evidence that there has been a downturn in jury trials for the last couple of years. There is also some concern that by legislating we will see quite a lot of challenges to find out where the law is in the coming years. I wondered what your views were on costs.

Edward Garnier: When you ask what my views are on costs, what aspect are you thinking of?

Mr Lammy: Is this an area where you, as Solicitor-General, are concerned that costs are not proportionate or are not what you would like them to be, particularly in a time of fiscal constraint?

Edward Garnier: In one sense, since there is no public funding for defamation cases, it does not touch on the Exchequer, other than that it takes judge time and court time to house the trial or application. There is a degree of misconception about the cost of libel actions, simply because historically there has never been any public funding for them. The costs of other forms of civil action where there has in the past been public funding have been hidden. I am afraid that there is no such thing as a free piece of litigation. It has to be paid for by someone. I am probably not answering your question, because I am not entirely sure where you are intending me to go.

Q730 Mr Lammy: There is a second question, on which I hope you would have a strong view. It is about justice and equity. How easy is it for Joe Bloggs or Joe Public to seek to defend their reputation in this country? The Committee has heard a lot about celebrities and famous people, but I think that the mood of the Committee is that we are very concerned about how the ordinary shopkeeper in Grimsby who feels defamed is able to seek justice and whether the costs are disproportionate to their doing that.

Edward Garnier: Again, I do not want to be unhelpful, but I think that it very much depends on the circumstances of each case and who the person is from whom you

are seeking redress. If you are a small business or an individual without private means, access to a trade union or other financial help, yes of course it is difficult to do that, unless you can enter into a conditional fee arrangement, which has to some extent made access to justice in this area of the law easier. But one of the things that a litigant has to take into account, whether you are a defendant or a claimant, is whether you can afford it. That is just a function of non-publicly funded litigation. There was a time when the print media were economically far stronger and when, I suspect, they would use their financial might to cause financial strain to claimants. The print media are not as economically strong as they used to be and they now have to keep a much closer eye on the cost of defending litigation. But cost in any aspect of law, as you will know from your own experience as a member of the Bar, is something that litigants have to bear in mind.

Q731 Stephen Phillips: I think that you put your finger on it, Solicitor-General, when you used the words "access to justice". The concern of the Committee may be that the costs presently associated with libel actions mean that there is no access to justice for the ordinary man or woman in this country. What we are really asking in the first instance is whether or not you can see that and whether or not you agree that that is the case.

Edward Garnier: I agree that for a person without private means and without assistance to legal aid or to trade union or other forms of financial support, bringing or considering the bringing of a defamation action is hugely expensive and hugely risky. I cannot take it much beyond that; it is almost a statement of the obvious.

Q732 Stephen Phillips: But as a result of that, to tie it back into the Lord Chairman's opening question, it may be that, if that is one of the Committee's major concerns, the most important reforms that we can suggest are those to the procedural rules dealing with defamation actions in order to bring the costs down and to bring access to justice within the reach of everybody in this country. Do you agree with that?

Edward Garnier: That is a noble aim, yes.

Q733 Stephen Phillips: Just to follow up, do you agree—you may not have a view; I do not know whether you were ever a defamation practitioner—that the procedures associated with defamation cases at the moment do not lend themselves to reducing costs? I give you this example. We heard evidence from those who sit in the jury list that, because there is the potential for a jury at the end of a case, the judge is far less prepared to grapple at an early stage with issues that may end up going to the jury in due course.

Edward Garnier: If you are to have a jury action, the judge must hold himself back from making findings that are properly those for a jury. I do not think that there has been a libel jury action for a year or so. Obviously the number of libel actions that fight is relatively small compared with the number of proceedings that are begun, but if you have a judge-alone action, judges can intervene in a way that may persuade the litigants to go and settle. If they are not prepared to do that, he or she may be able to reach conclusions about aspects in a case that, if left to a jury, would not be resolved until much later. To answer a question that you have not asked me, getting rid of juries or making juries not so central to libel actions would of itself reduce costs

anyhow, because actions would be quicker and shorter, but it would also allow the judge in charge of the particular case to resolve issues far earlier.

Q734 Lord Bew: Mr Garnier, I wonder whether I might take you back in time slightly to November 2008, I think, and the debate in Westminster Hall on this issue to which you contributed. I want to take up an issue in your remarks about libel tourism. It seems to me that you accepted in your remarks that this is a real problem. You referred to people suing in London on the basis of publications of which there might have been only five or six copies available in London. I know that you are well aware that it is not widely accepted in the senior judiciary that libel tourism is a real problem, so I just wondered whether you could give the Committee your considered view on that matter.

Edward Garnier: Until you reminded me, I had forgotten that I had taken part in that debate in Westminster Hall in 2008, but now that you have reminded me I seem to remember that it was Mr Denis MacShane—a journalist who is a Member of Parliament—who initiated that debate.

Lord Bew: That is correct.

Edward Garnier: He was supported by a number of other Members of Parliament, Michael Gove being one—another journalist—who were saying that libel tourism was a problem. If I remember correctly, I do not think that I shared their view. Indeed, I rather share the view of the judges who may have come in front of you—I am particularly thinking of Mr Justice Tugendhat, who I think has appeared in front of you—and of other current and former judges who have dealt with defamation cases.

My impression is that the number of cases that could be described as being brought by libel tourists is quite small and that this is not a problem that the judiciary sees in quite the same way as others perhaps may. I rather share their view.

Q735 Lord Bew: Could I come back on that? In my reading of your remarks, I accept that you were more sympathetic to the judiciary than to the journalists in that debate—there is no question of that—but I think that you made a reference to the possibility of vexatious libel tourism cases. Do I interpret you correctly to mean that, either in the case of Reynolds or in the case of libel tourism, the real requirement is for the law to be made clearer rather than to criticise the judiciary for correctly interpreting the law as it currently stands? Particularly when you moved on to the case of Reynolds, that seemed to be what you were saying—that if people are uncertain about these matters, it is a question for Parliament to clarify and sort out rather than for an endless ragging of the judiciary.

Edward Garnier: I certainly do not approve of an endless ragging of the judiciary; I do not think that that is helpful at all. I simply cannot remember precisely what I said in the debate in Westminster Hall in 2008, so I cannot really help you; I cannot comment on what I may or may not have said, unless you read it out.

Lord Bew: I am merely asking you what your view is on these questions now.

Edward Garnier: Well, there is an argument about whether you need to codify or whether you do not need to codify any aspect of the law, be it the criminal law or the civil law and, if it is the civil law, be it the law of defamation. That is a matter on which the Ministry of Justice will have to reach a conclusion, no doubt armed with your

advice. There are arguments both ways and you are familiar with them. To leave the Reynolds common law defence in the common law brings with it the advantages of flexibility and the advantage that the law does not become sclerotic and can adapt to particular facts and particular cases within a wider framework. The advantage, I suppose, of the codified system is that it is there in black and white and practitioners, journalists and others who may be affected by the law of defamation can see what it is without having to look at Reynolds or any of the subsequent cases that have developed Reynolds. It is evenly balanced, I suspect, but I think that you need to identify what you think is the problem caused by the current situation and whether anything new would assist.

Q736 The Chairman: We have had evidence that says that libel tourism is a problem. We have had evidence that says that it is so small that it is not really a problem; it is an irritant. Which do you favour?

Edward Garnier: As I said in response to a question from Mr Phillips, I think, I rather incline to the view that the number of so-called libel tourism cases is very small and that the courts' ability to police inappropriate cases brought by people with very little connection with this jurisdiction is there and is used. I accept that Clause 7 of the Bill is not what we are talking about—it talks about something rather different—but if you are talking about actions brought in this country by potential foreign claimants with little connection with this country, the evidence that I have seen suggests that the courts have a pretty good handle on it and do not permit cases that have no connection to be brought or continued.

Q737 The Chairman: Can we move to our last question for you, Solicitor-General? The Attorney-General has stated that the rule of law should be upheld on the internet. That is reasonably straightforward in the context of contributions on the internet that are sourced or identified. Do you think that it is realistic for those that are not sourced or identified or for those that cannot be sourced and identified after investigation with ISPs? If so, how do you hope we might go about offering advice to the Government on making that aspiration of the Attorney-General into a reality?

Edward Garnier: The first thing to draw to your attention is that the Attorney, when he made those remarks, was speaking in the context of the law of contempt and the interference with particular cases by people who were perhaps operating on the blogosphere or tweeting or whatever it might be. He was not directing his mind to what I think you are directing your mind to, which is the law of defamation. None the less, I dare say that there are some principles that are similar. The courts can only have jurisdiction over and enforce orders against people within the jurisdiction, unless there are treaties or other protocols that permit the orders of our courts to be enforced elsewhere. It seems to me that, if you cannot tell and there is no evidence about who is liable for the publication which is complained of or about which there is concern, there is not much you can do about it; you cannot do much unless you can fix liability on an identified person, be it an individual or a corporation. But there are in the publication of defamations sometimes a collection of people who will be jointly and severally liable. You may be able to fix liability on some but not on others. If you are asking me baldly whether there is anything that we can do about someone in

California defaming someone in this country by means of some internet publication beamed, if you like, from California to here, the answer is probably not.

Q738 The Chairman: Thank you for that, although that was not actually what I was asking. That would mean that you knew somebody in California who was doing it, which raises other issues. I am interested in how you think that the Attorney-General's aspiration—I take your point that he was talking about contempt, but I also take your point that the principles of contempt and defamation in this particular context are probably pretty nearly identical—might be met for web contributions that are not, even after examination by ISPs, identified or sourced. Witnesses have referred to that as the Wild West, but the Attorney wants something done about the Wild West and I was wondering if you could give us some assistance.

Edward Garnier: I think that the distinction between what he was talking about and what you are talking about is greater than perhaps you and I were about to agree. He was talking about something that relates to a case that I did the other day. A woman who was a member of a jury used the internet—Facebook, as it happens—in order to communicate with a defendant in the case that she was trying. That is a form of publication on the internet that came to light only because the defendant in that case provided evidence that that was happening. So much of this depends on evidence. If you do not have evidence of who is doing it, it is very difficult.

The Chairman: I understand that, Solicitor-General, but in that case you knew who the person was.

Edward Garnier: As it happened, yes.

The Chairman: But my question is: how would you wish us to advise the Government on the aspiration of trying to close down the Wild West for the unsourced and unidentified contributions on the internet?

Edward Garnier: I would suggest that we should not behave like King Canute. You need to have a fairly firm understanding of what is possible, but you also perhaps need to look at the existing relationship between the law of defamation and internet service providers at the moment. You will be familiar with the European directive and the terms of Section 1 of the 1996 Act. You will also be familiar, I imagine, with some of the common law decisions of the judiciary in relation to whether an internet service provider is in certain circumstances a publisher under the law of defamation anyhow. You may have to think about adjusting some or all of those in order to bring the internet in from the Wild West, but it is not going to be easy.

Q739 The Chairman: If I was to float to you the idea that maybe over time we could make progress on this aspect by treating the internet and its contents more in the cultural context than simply the traditional context, where culturally you might attach more weight to that which was sourced and identified over that which was not sourced and identified, do you think that over time that might be a helpful suggestion, albeit that it would take time to work its way through because, as we both know, cultural change takes a long time?

Edward Garnier: If I understand what you are saying, I think that we need to remember that the courts deal with evidence and that they apply the evidence to the law. The law as interpreted through custom and usage can be helpful, but I am not

sure that the courts would say that there had been a cultural change and apply it in that way. I think that I would need to be a little clearer about the nitty-gritty of what you were suggesting.

Q740 The Chairman: I have one final question in this area and then I will on behalf of the Committee thank you for your time. Somebody defames a Minister in the present Government on the internet. What are the ministerial rules and procedures governing you—for the purposes purely of illustration, I hasten to add—if you are defamed on the internet? What does the rule book say about you as a Minister wanting to take out a defamation case against somebody like that? How do you have to proceed?

Edward Garnier: Under the *Ministerial Code*, which was republished by the Prime Minister in May of last year, Ministers have to inform the Law Officers that they are going to or are considering taking legal proceedings. That is because a Minister taking proceedings may affect the integrity of the Government, so we need to know about it. I do not think that we can prevent a Minister from taking action if he thinks that it is a sensible thing to do, and we do not take over the case, as it is a private suit. There are practical difficulties sometimes about remaining a Minister and continuing with a piece of legislation, but again that is a matter of fact, degree and judgment.

Q741 The Chairman: But would it fall inside what may still be—it used to be—known as collective responsibility?

Edward Garnier: No, not quite. Let us say that I am the Minister for Drawing Pins and I have been defamed privately in some aspect of my life that is outside my ministerial work. I am perfectly entitled to seek advice and to take proceedings for defamation, but if I wanted to do that I would have to tell the Law Officers. The Law Officers may or may not say, "That's up to you." They may say, "If you do this, it has the following consequences, but it is entirely a matter for you." The Prime Minister is entitled to say, "If you want to do that, you can't remain a member of my Government." Again, there is no hard and fast rule about that.

Q742 The Chairman: Are the Law Officers required to offer advice to the Prime Minister just as you would be offering advice to the Minister? In other words, if you said to a Minister, "It would be our considered view that you should not do this," are you under an obligation to tell the Prime Minister that that is the opinion that you have given to one of his Ministers?

Edward Garnier: No, because I would not be giving a political consideration. I would simply be receiving information, going back to that Minister and saying, "Well, have you considered the following?" It may be that I would be required to have a discussion with the Prime Minister, the Cabinet Secretary or whomever, but I am not suggesting that there is a template of things that have to be done.

Q743 The Chairman: Solicitor-General, we are extremely grateful to you not only for your time but for the preparation that you have obviously put in. We thank you for both very much. We will adjourn for a few minutes to wait for the next witnesses.

Examination of Witnesses

Witnesses: **Paul Dacre,** Editor-in-Chief, Associated Newspapers, and **Matthew Parris**, Journalist, *The Times*.

Q744 The Chairman: Mr Dacre and Mr Parris, on behalf of the Committee I thank you very much for coming. For the record, we are particularly grateful because in both cases we ran into complicated diary procedures. I know that, in both cases, you have adjusted your lives to accommodate this, which is our last public witness session. We are extremely grateful to you for doing that and thank you. Secondly, we are being broadcast. Thirdly, it is very likely that there will be a short adjournment during our session, because there is likely to be a vote in the Lords and we shall have to go down to vote. However, we are pretty good at getting back within five minutes or so of adjourning. It will not be a long adjournment.

I have two further opening remarks. First, if one of you says something that the other agrees with, it is not necessary—unless you wish to—for the other to say the same thing. We will take assent. However, if somebody says something that the other does not agree with, you must say so. In that way we streamline our procedures and cover a little more territory. Finally, I invite either or both of you to say in advance anything to the Committee that you wish to say before we start the questions.

Paul Dacre: Thank you. The first thing to say is that we broadly welcome many of the recommendations in the proposed Bill. The only observation that I should like to

make—you may have heard this frequently before, but it needs saying loud and clear—is that everything that I want to say needs to be set in the context of the parlousness of the financial state of the newspaper industry as a whole. Much of the debate at the moment possibly ignores that fact. To describe the condition of the provincial press as almost terminal is probably not an overstatement. It is fighting for its very existence. By and large, it is not a lot better for national newspapers. Several papers are losing eye-watering amounts of money. We need to remember that. In my comments, I shall focus on costs because these are crucial to the survival of our industry.

Matthew Parris: First, no doubt your Committee is aware that I am an unremunerated member of the board of the Index on Censorship. I know that it has made a submission to you, which I have read. As far as I can understand it, it seems right, although I am speaking for myself, not for the Index on Censorship.

I once studied law and once understood it but I do not any more. However, from my broad understanding of jurisprudence and from life, I have reached the conclusion that of all the different ways that human beings can hurt each other, doing so through impugning each other's reputations by the printed or spoken word is peculiarly unsusceptible to being efficiently dealt with in a court of law, with squads of lawyers on all sides. Therefore, any changes that you can make—these changes seem to move in this direction—to settle cases more easily and quickly, even before they go to court, seem in principle to be a good idea.

From my experience as a journalist, always having had a huge corporation on my side and knowing that it could back me if I were sued, I have enjoyed a sort of freedom. However, I am well aware that journalists working for small publications, or even people who these days publish on their account, do not have that. The chilling effect of the law on small publications, including individuals and NGOs, can be considerable.

Finally, we are in a very transitional phase with the internet. Who knows how it will all look in five, 10 or 15 years' time? Anything that we say or that is legislated for will probably soon be out of date. It strikes me that just as the law sometimes takes a different view of defamation by the spoken word from defamation by the printed word, the internet is a sphere of its own. It has to be treated as being quite different from the printed word. It has to be regarded as a lot of very small voices, some of which have no recourse to legal advice at all and could be very easily silenced. On the positive side, it is a sphere in which it is possible immediately to correct a mistake that you may have made by giving it as much prominence as the original mistake and by immediately apologising with as much prominence. On the internet, there seems to be enormous scope for dealing with things, short of courts of law. That is all.

Q745 The Chairman: Thank you. I start by asking a couple of questions to get us going. You have seen the draft Bill and the questions for consultation on matters which I rather naughtily assume were too difficult for the Government to find ways of putting in legislation, so they left them as questions. What is your sense of the balance between reputation and free speech, bearing in mind that the US has an

amendment to protect free speech? Do you think we are maybe a little precious about reputation?

Matthew Parris: Yes. I am, after all, the kind of journalist who has traded throughout his career in being rude and impertinent about people. I am well aware that, certainly in politics, insult—which is not usually defamatory, I know—can seriously damage a reputation. Look at all the insults that Neil Kinnock had to endure—"Welsh windbag" and all the rest. None of them, I imagine, was defamatory but they did a great deal to undermine his reputation in the end. I think we have to be broad-shouldered about it. I have, on the whole, found Members of both Houses of Parliament to be very broad-shouldered. In my whole career I have been threatened with legal action only once. There was no doubt that I had, in a small way, defamed the MP concerned. *The Times* paid him £2,000 and that was that. However, I have spent nearly 30 years impugning the reputations of those whom I write about, and they have taken it with broad shoulders. It would be a good thing if we could encourage that attitude a degree more widely outside Parliament.

Paul Dacre: I echo much of what Matthew said. We are far too prim and slightly prissy about reputation. I come from a sector of the media in which robust cut and thrust, tail-pulling and mickey-taking are part of a long tradition—the robust tradition of popular newspapers in Britain. I hope our politicians are mature enough to accept that. Something would certainly be lost from British life if we detracted from that. I should like to talk later about confusing reputation with privacy, and how

libel is merging into privacy. I presume that that will come up later but I can talk about it now if you wish.

Q746 The Chairman: We will come back to that—I will if none of my colleagues do. I have one further general question to start with. You will have seen that the Bill proposes "substantial harm" as the test. Lord Mackay, a very distinguished former Lord Chancellor, told us that he did not think that that was sufficient and that it would be better to use "serious and substantial harm", which would effectively raise the bar. It would thereby deem trivial a lot of cases that might get in under the bar if it was set just at "substantial". Do you think "substantial" is okay, or would you favour raising the bar to "serious and substantial"?

Matthew Parris: I would take the ordinary meaning of "substantial" as including "serious". If, in law, substantial does not mean serious, we had better put "serious" in as well.

Q747 The Chairman: I think that that is the nub of it. In law it perhaps means something different from what it means in colloquial language.

Paul Dacre: In that case, incorporate it. Yes, I welcome "substantial" and, on balance, "serious", and anything that can be done to preclude the growing incidence of trivial complaints against newspapers. Believe me, we now have to accept that we must correct the most minor and trivial thing because contesting it is so expensive that it is not worth the candle.

Q748 Lord Grade of Yarmouth: On juries, you will be reassured to know that in pretty well every session the issue of costs and how to reduce them—and speed up

trials—has been a strong theme running through. Much of the expert testimony that we have heard suggests that the way to cut through this is to remove, as the Bill suggests, the presumption that there should be trial by jury. Do you agree with that? If you do agree with that, in which circumstances would you prefer to have a jury if you were defending?

Paul Dacre: First, I very much welcome the recommendation for the end of an automatic right to jury. Clearly, that would play a huge role in reducing costs and enable judges to operate a more sensible system of capping costs, which I would plead for. It would be a constant theme in my case. At the same time, I should like to see access to a jury remain if both sides or one side wished it. What kind of case? That is a difficult one. I suspect that in, say, a privacy case, we as the defendant might think that a jury might be more sympathetic to the newspaper's arguments.

Q749 Lord Grade of Yarmouth: Some have suggested that a jury might be most welcome in cases where the claimant is some publicly appointed figure such as a Cabinet Minister, a local councillor or a policeman. Would you make that distinction?

Paul Dacre: I suspect so, but it is a very difficult question. Every case would be judged individually. But yes, a jury would be more likely to side with a newspaper if they thought that a member of the establishment was trying to exploit his position.

Q750 Lord Grade of Yarmouth: I am trying not to put words in your mouth, but would it be fair to say that it would not give you a problem if the presumption of trial by jury were removed, as the Bill proposes, and that you would be happy to leave it

to the judge to decide whether there should be a jury? Once there is the possibility of a jury trial, how would you like that to be resolved? Should it be left to the judge?

Paul Dacre: I suppose the answer to that is: after we had been given the freedom to make a case to him. Does that make sense?

Q751 Lord Grade of Yarmouth: Yes it does. What we have been searching for in these sessions are some criteria to suggest that in this case it would be sensible to have a jury. However, we cannot get a handle on what such cases might be.

Matthew Parris: I would be a little doubtful about not having a jury unless one side or the other really wanted one. Presumably the side that thinks it will benefit from having a jury will want one. I am not sure that juries are necessary in this area of the law. Anything that will simplify things, speed them up and make them cheaper is good. Perhaps it could be left to the discretion of a judge, if there were overwhelming reasons why a jury was necessary. However, I think it should be the exception.

Lord Grade of Yarmouth: From what I am hearing, it is hard to imagine circumstances in which it would be obvious that you must have a jury for a particular kind of case.

Q752 The Chairman: Could I clarify something for the benefit of our witnesses? When Mr Rusbridger was here, he said that he wished that the Jonathan Aitken case had been heard before a jury. He thought that that would have given the decision—I do not want to put words into his mouth—more credibility with the public. Are we hearing that you are not as enthusiastic about that idea as Mr Rusbridger was?

Matthew Parris: I do not think that is a legitimate concern. The jury system is not there in order the better to blacken the reputation of somebody whom a newspaper does not like.

Paul Dacre: I am very happy for the judge to be the final decision-maker in that process, as long as he is taking the case on its merits.

Q753 Baroness Hayter of Kentish Town: Several journalists or their representatives—I cannot now recall—have said that if they act responsibly on a matter of public interest, that should be a defence, even if they have defamed somebody. The question then arises about acting responsibly, maybe in line with a journalists' code or something like that. Such codes obviously cover hacking, blagging and so on. Have you ever countenanced such activities by journalists?

Paul Dacre: Have I ever countenanced hacking or blagging? No.

Q754 Baroness Hayter of Kentish Town: What about if, as a defence—this is where the interesting thing comes—something is said that is defamatory or appears to be, even though there is no evidence? Would there be a temptation to blag or hack to support that?

Paul Dacre: Would you ask that question again?

Baroness Hayter of Kentish Town: In other words, it may not be used in the article but, if it came to a case, would the temptation be to use material obtained in that way? Would that be beyond the pale?

Paul Dacre: Goodness me—these are deep waters. I have considerable sympathy with the view, which was, I think, advanced in *The Sunday Times* this weekend, that if

there is a great public interest and you are revealing wrongdoing, those questionable methods can be justified. Whether you can then use that material to defend yourself in a defamation case goes into the area of Reynolds, doesn't it? If you believed at that time that you were acting in the public interest, I suppose the answer is yes.

Matthew Parris: If I were being perverse, I could argue that it is because we set the bar so high that journalists sometimes resort to subterfuge. They feel that they must gather the information that they will need should they be sued. If we had more of a free-for-all in the press, people might not try so hard to tap people's telephones and find out what the truth is beforehand. Everything will revolve around the definition of "reasonably". To a degree, that is an unspoken defence in the common law. It certainly is not irrelevant whether the person acted reasonably or not.

Q755 Baroness Hayter of Kentish Town: My final question is: ought we, in this building, be less concerned with politicians than with the ordinary teacher, social worker and people like that, who are not from the school of hard knocks? Therefore, on the idea of something being in the public interest, does it make a difference if the journalist is acting responsibly or irresponsibly if the same amount of damage is done to somebody? I am interested in how far you think a responsible journalist makes a difference to the outcome and what harm is done.

Matthew Parris: I think you are conflating two different areas of journalistic responsibility. A journalist has a responsibility to behave in a decent manner, which means not tapping telephones or hacking phone messages and so on. Journalists

also have a responsibility to get the facts right. One might behave irresponsibly on the first count in order to behave responsibly on the second.

Paul Dacre: To clarify my earlier thoughts, you should never use hacking or blagging as a defence. Clearly, they are criminal charges. However, I am with Matthew on this. We are damned if we do and damned if we don't. If we get our facts wrong in an area of huge public interest, we cannot win. It is as simple as that.

Q756 The Chairman: To clarify something that is relevant to the Bill, at the moment there is a defence of fair comment. The Bill suggests honest opinion. Do you have an honest opinion on whether honest opinion is better than fair comment, or would you prefer fair comment?

Matthew Parris: I have one comment on that. From the lawyer's point of view—and that of professionals in the media—the meaning of terms is well known. I know that your proposals make it clear that honest opinion could not, for instance, just mean that you had heard something from somebody you thought was right and repeated it because you had heard it from them. In the ordinary usage of English, that might be an honest opinion. I have many honest opinions that have relied just on things that I have heard from other people. I would not publish them because I am not sure that I could back them up. There is a little danger with the term "honest opinion". Phrases such as "fair comment on a matter of public interest" enter the public mind.

The Chairman: Forgive me, Matthew, and make a note to yourself. With apologies, the Committee will adjourn for just a few minutes while some of us vote.

Committee adjourned for a Division in the House of Lords.

Q757 The Chairman: My apologies. We are back to being quorate, which is the good news. The bad news is that there may be another vote. Mr Parris, you were stemmed in mid-flow.

Matthew Parris: I was just saying that legal phrases enter common parlance and lodge in ordinary people's minds—in minds such as mine. Examples include "ignorance of the law is no excuse", "fair comment on a matter of public interest" and "driving without due care and attention". The danger with the phrase "honest opinion" is that people might think it means "honest opinion". It does not. It means "honest opinion responsibly held" or "honest opinion responsibly promulgated". That was my only comment.

Paul Dacre: Yes, I suppose "honest" is slightly better, although I prefer "free opinion" for the life of me. As long as it does not inflame a situation, is not racist and does not defame someone, the freer it is the better. Certainly, thinking about some of the things that Mr Littlejohn writes in my paper, I do not know whether they are honest but they certainly get people talking. The freer the better.

The Chairman: That is probably his Peterborough training.

Q758 Mr Lammy: Your paper could be described as robust.

Paul Dacre: I accept that. I plead guilty.

Mr Lammy: Can you give us a sense of the volume of action that your paper sees? How many people take action, feeling that they have been defamed?

Paul Dacre: I shall have to ask my legal director. There is not a day goes by when predatory lawyers such as Schillings and Carter-Ruck do not try it on, encouraged by the vast sums of money that can be made under the existing CFA, most of which goes to them. I think there are some every day. Very few come to action. That is the trouble; it encourages this terrible ambulance-chasing.

Mr Lammy: Has it got better or worse recently?

Paul Dacre: Undoubtedly, it has got exponentially worse over the past few years.

Q759 Mr Lammy: You talked about the pressures that the newspaper industry is experiencing. We all see that at a local level but there is a scramble at a national level as well. Do you link the increase to that problem?

Paul Dacre: I do not. I know what you are saying—that the more desperate circulation becomes, the more people are tempted to cut corners and get ever more sensational stories. However, one of the ironies is that, with the increased powers and strength of the PCC, which no one will admit to in this febrile climate, with the "no win, no fee" increase in defamation, with the back-door privacy law being introduced by judges and with the Data Protection Act and now the Bribery Act, newspapers are breaking fewer such stories.

Matthew Parris: Just to endorse what Mr Dacre says, I link it particularly to no win, no fee. I know you are looking at some proposals for what is, I think, called uplift. I think it is outrageous that lawyers are allowed, effectively, to double their fees on the basis that there is a 50% chance that they might not win, while the unlucky defendant who loses his case finds himself liable for what is really an actuarial calculation by the

lawyer. It is absolutely outrageous. Until I saw these proposals I was unaware that lawyers were allowed to do that.

Q760 Mr Lammy: You mentioned the newspaper industry, no win, no fee and privacy concerns.

Paul Dacre: Privacy is the biggest motor there at the moment.

Mr Lammy: Those are applying pressure to the system. Do you understand—I am asking you because you are in a position to answer—why journalists in that environment might move to breaking the law to get what might be stories that they should not have, but might nevertheless be truthful?

Paul Dacre: No. I am arguing exactly the opposite. The law is becoming more onerous and journalists are having to become more respectful. By and large, I think they are. It is having a chilling effect, rather than encouraging them to try to break the law.

Q761 Mr Lammy: Under what circumstances would you see yourself entering into a system that better arbitrated before litigation?

Paul Dacre: Clearly, I am a great advocate of the PCC, as you know. I have been a commissioner for it for many years. It is a great unsung and unrecognised success story in this area. Every year it mediates in hundreds of cases. It adjudicates and provides satisfaction for many claimants. I should like to think that in different times—who knows what will happen in the next few months—the PCC could be used more as a court of first instance. Any system that encourages an earlier court hearing and resolves this in a cheap and sensible way is to be encouraged.

Q762 The Chairman: Can I clarify something? We have worked hard here to avoid trickery. My question is not meant to be trickery. When the editor of the *Guardian*, the deputy editor of the *Telegraph* and the former legal adviser to *The Times* group were here, they postulated a mediation arrangement in which they would want to play an active part, even to the point of providing some of the resources to pay for it. However, they were pretty robust in saying that it had to fall outside the PCC and that they would not have as much confidence if it was within the PCC. It seemed that you were arguing the opposite. I wanted to be clear that that is what you were arguing.

Paul Dacre: I was arguing that I have great faith in the PCC system as it has been working to operate a free and quick service of resolving complaints and adjudicating between a claimant and a defendant to bring some form of vindication and justice. I know you have been looking into mediation. I have to tell you that our experiences have left us somewhat sceptical about it. It depends on whether both sides go into it absolutely determined to be constructive. In all our cases—we have had three recently—the claimant's side has been utterly intransigent and unreasonable. The costs have soared anyway. Because all such proceedings are held in camera—in secret—the unreasonableness of the other side never emerges. I am afraid we are slightly sceptical about mediation. When we discuss self-regulation in the inquiries, I hope we can argue more passionately for a stronger role for the PCC in this area.

Matthew Parris: The work of the PCC is often of much more merit than is recognised. I am afraid that the constitution of the PCC—looking as though it were in the pockets of the newspaper industry, which is not a fair description but is what

people think—has probably doomed it. Something like the PCC, but not the PCC, will have to be created but will probably need to start again. I am a huge believer in mediation. I served for five years on the Broadcasting Standards Council and was very much struck, first, by how reluctant any broadcaster is either to apologise, ever, or to correct anything, and, secondly, by how satisfied most complainants are if they can simply persuade somebody to apologise for or correct what they have written or published. I am sure that, to the extent that this proposed legislation moves things in the direction of mediation, it has to be an advantage.

The Chairman: We are not here to offer you encouragement but let me offer you some encouragement. That has been the broad thrust of the evidence that has come to us.

Q763 Mr Lammy: Is broadcasting not far more regulated than the newspaper industry?

Matthew Parris: Yes it is, but there are still many people who feel offended on their own behalf or that of some group. They want some means of putting that right. If they can be persuaded that a body of people has looked hard, reached a conclusion and, when their complaint is upheld, upheld it in a fairly public way, that is mostly all that they want; they do not want money.

Paul Dacre: To question that slightly—I may have this around my neck—the BBC has very light-touch regulation. It almost regulates itself.

Q764 Lord Grade of Yarmouth: See me afterwards. What underpins broadcasting regulation is something that is completely irrelevant to newspapers, namely impartiality.

Paul Dacre: Looking into complaints against the BBC—

Lord Grade of Yarmouth: It is an absolute nightmare.

Paul Dacre: Arguably, the PCC is slightly more rigorous than the BBC system.

Lord Grade of Yarmouth: It took Primark three years to get the BBC to admit that it had faked some filming on "Panorama".

Paul Dacre: I just wanted to correct that.

Q765 Stephen Phillips: Can I take us back to mediation? I think Mr Dacre raised a perfectly legitimate concern about mediation, which is twofold. First, an intransigent party can go to mediation and refuse to settle. Secondly, there is the related problem that a party with significant means can simply use mediation to push up costs.

Paul Dacre: Precisely.

Stephen Phillips: One of the things that the Committee might consider recommending to the Government is a scheme of compulsory mediation. In that context, would it deal with the issues that you have raised if the mediator was able to report back to the court on any unreasonable conduct, behaviour or position adopted by one or other party?

Paul Dacre: Off the top of my head, that sounds like an eminently constructive suggestion.

Stephen Phillips: Would you particularly agree with this if the intransigent party was then punished in costs in some way?

Paul Dacre: I would wholeheartedly endorse that.

Q766 Stephen Phillips: One of the things that Mr Parris said earlier, which must be correct, is that a journalist has a responsibility to get the facts right. Although we are not dealing with the issues that have loomed large over the past couple of weeks, we cannot deal with defamation in a complete vacuum. I was interested in one of the answers that Mr Dacre gave earlier in relation to obtaining material unlawfully—by phone hacking and so on. You told the Committee that you have never countenanced it. I entirely accept that. However, under your editorship, has the *Daily Mail* ever published a story that you knew at the time, or subsequently came to know, was based on a hacked message or any other source of material that had been obtained unlawfully?

Paul Dacre: Absolutely not.

Stephen Phillips: I am grateful; I just wanted to clarify what you had said. The answer is that you have never published a story that you knew was based on a hacked message.

Paul Dacre: Absolutely not.

Q767 Stephen Phillips: You said at the start that we would come back to the crossover between libel and privacy, so I shall now do so. Privacy is a growing area. As matters presently stand, in privacy people come to learn that you are writing a story and get an injunction to stop you publishing that story. In defamation, the story is

published and then people sue, if they want to, to try to protect their reputation. One consequence of that is that there is, in English law, essentially a right to defame, subject to the payment of damages. Do you think that is an acceptable position, or ought the remedy of injunction be available to those who are about to be defamed in the same way that it is in the law of privacy?

Paul Dacre: That would be a hugely retrograde step for press freedom. To recapitulate what you have said, as we know, increasingly, defamation claims are going under privacy claims. At present, you cannot have injunctions under defamation. If you have injunctions under defamation, the rich and powerful will reach for their phones on a Friday night and get through to Schillings. The probability is that an ex parte injunction will be immediately granted. To give you an example from our own newspaper, we had to appeal an injunction that was granted to Lord Browne. It took £900,000 and four months of deliberation, during which he sadly lied to the court, to resolve that. Injunctions under defamation will not bring down costs or increase justice. I repeat: it would be a terribly bad day for press freedom if that were to happen.

Q768 Stephen Phillips: I am assuming, unless you want to add anything, Mr Parris, that you agree with Mr Dacre.

Matthew Parris: I completely agree with Mr Dacre. On mediation, you have a submission somewhere before you suggesting that in internet cases it might be made a requirement that one had to notify in some formal way the person—or the internet service provider or site—against whom one was making the complaint. Perhaps a

clerk to the court could ask for a set form to be completed. I think you have had reported to you an experiment that might now be called blagging or subterfuge, I imagine. Somebody tried publishing Thomas Paine's *Rights of Man* on an internet site. Someone else, impersonating a lawyer, got in touch with the operator of the site, said it was defamatory and asked for it to be taken down. I think eight out of 10 or 12 took it down without an argument. Anything that causes those who want to make a complaint to jump through a small hoop before they get any further with it and, again, encourages mediation is worth consideration.

Q769 Stephen Phillips: We have received a lot of evidence that—this may eventually be the Committee's view—the real problem with the existing law of defamation is cost. There are costs from the perspective of a defendant, which therefore have a chilling effect, and costs from the perspective of claimants, who may be defamed but simply do not have the resources to sue. We have already heard a little evidence about juries. One other recommendation that the Committee might make is for a very early determination of meaning. This tends to take a long time to decide, partly because judges, where there is the possibility of a jury, are reluctant to decide questions early. They leave those questions to the jury, which they know will be empanelled in due course. Would you, first, favour an early judge-led resolution of meaning? Secondly, can you think of any other ways in which we might reduce, through procedural or other means, the costs associated with libel actions?

Paul Dacre: The answer to the first question is yes. In answer to the second question—I know this is impractical and not going to happen—it would be a

wonderful solution if we could have a system of specialist county courts, with specialist lawyers and judges, to deal with these matters without the huge, unnecessary, though understandable, encumbrances of the High Court. I realise that it is probably not going to happen.

Q770 Lord Bew: We have already talked about, or made glancing reference to, privacy issues. Several witnesses have come to us and said, "Whatever you do, keep this discussion of defamation separate from the privacy issues". I have a sense from what you have said this afternoon that you do not think that that is possible. However, I should like a clear account from you.

Paul Dacre: I do not think I can add anything to what I have said. More and more, the Schillings of this world seek defamation under a privacy claim. I have argued for why that is wrong. Where there is blurring, it is between privacy and reputation. More and more footballers or whoever have huge investments in their name and their brand. They seek damages under privacy when the last thing on their mind is their family. It is their huge earning potential that concerns them. That is an area that worries us in the press.

Matthew Parris: I think the two are separable. At the centre of the law on defamation is the question of truth. I realise that it is not quite as simple as that but it comes down to whether what was said was true. At the centre of the law on privacy is the question of appropriateness. They are two completely different questions. Like Mr Dacre, I think the creeping law on privacy is probably a greater threat to press freedom than the existing law on defamation.

Q771 The Chairman: Can I ask a clarification question? We have heard evidence that suggests that newspapers may be guilty of writing what they think interests the public, rather than what is in the public interest, and that this may be contributing to ramping up the privacy realm. In some cases, what is written—you mentioned footballers and I guess I know a little about it—is not so much in the public interest as what interests the public. Is there, in the head of either of you, a sense of observing a mild confusion between these two in your industry? If so, is that contributing to your concerns about privacy?

Matthew Parris: I hope we are interested in what interests the public. If, as a journalist, you do not care about what interests your readers, you will not get very far. Indeed, you will not get any readers reading about what is in the public interest; you will not get any readers. An absolutely central concern with what interests your readers is a perfectly proper thing for a journalist.

Paul Dacre: I could not agree more. With the greatest respect—I know it is a great debating point and a bit of an old chestnut—what interests you and what interests the man in the Dog and Ferret is totally different. I passionately believe that newspapers should be free to interest the public and not necessarily act in the public interest. I know that is a slightly controversial statement. Who is to decide what is in the public interest? I would prefer parliamentarians to do that than judges, who, despite their undoubted intelligence and integrity, in my considerable experience have rather a narrow view of the world. Hardly any of them have ever read a tabloid newspaper. If they have, they probably have rather an enduring animus against that

area of the media. At the risk of being a little too topical, I would cite the *News of the World*. I think many people in this room would not think that it is in the public interest that such a newspaper exists. I personally would not have it in the house but I would die in a ditch to defend its right to publish. The *News of the World* had many very prurient stories, but it also published serious political news. Its death last week diminished democracy in this country. Five million people were buying it and, in that process, were engaged in governance and democracy in this country. My guess is that at least a third of those people will never buy a newspaper again.

Q772 Lord Bew: You were involved in the committee that reviewed the 30-year rule with Professor David Cannadine and Sir Joe Pilling. Did you consider the implications of that for libel law? Ultimately your suggestion that we move to a 20-year rule for the release of records—as I strongly believe we should—is bound to lead to a lot of records coming out. It is bound to lead to unflattering judgments on politicians still living and active. One of the features of the draft Bill, in Clause 5, is the Government's attempt at least to strengthen academic freedom. It may be helpful to historians who will look at the material that will be available in how they present interpretations of it. Were you aware of that when you were doing it? Were you aware that this would open up a whole new era? Was your attitude, "Let the chips fall where they may"?

Paul Dacre: Yes, I think we were aware of it on the margins. I would not say that it was one of the central issues. Over many months we saw many papers from the National Archives that had not yet been released. My impression is that defamation was not a primary worry. To answer your question, under freedom of information

virtually any of that stuff can come out now anyway. No one quite realised this. It is slightly more insidious. Under the patchwork effect of freedom of information, we get only specific information without what is either side of it. It could be seen to be more defamatory than something that is set in context. Also, do not forget that these papers will be redacted. If I may be so bold, parliamentarians are pretty successful at libelling each other through their leaks to newspapers while they are currently in Parliament. Nor do they seem to pull their punches in their memoirs. Is that an answer?

Q773 Lord Bew: It is. My follow-up question is simply this: while I accept your point about redaction and so on, none the less you can be certain that it will create problems for historians. Clause 5 is an attempt by the Government to offer a degree of protection. I am just assuming that in such a context you would be sympathetic to the thinking behind Clause 5. I just want to get that on the record.

Paul Dacre: Yes.

Q774 Chris Evans: I am interested in the internet and should like to come back to your comments on that. I watched an item on Sky News about something that you have already alluded to—the falling off of newspaper sales. iPads will probably come down in price in the next 10 years from £400 to, say, £100. The *Daily Mail* has a very good website; I find it easy to negotiate. Do you feel that you have adequate protection when somebody posts a defamatory comment at the bottom of an article?

Paul Dacre: I think Matthew said that this is a whole new cosmos—a new frontier. Just to layer the argument, the Mail Online is a very successful site. It is about to

become the world's most popular news site. We legal it as far as we can but you have to understand that it throws up a huge amount of material. It changes every minute of the day and there is far more than goes into any newspaper. Stuff that goes into a newspaper is very carefully invigilated; it goes through subs and lawyers et cetera. We do a pretty good job there. As for the rest of the stuff, we have what I think has now been recognised by the industry as the only way forward. We have a pretty strong self-policing system. The moment anybody has cause to post a complaint about something, we have a panel of adjudicators, which moves very quickly to remove an offending item. We also seed the computer with dangerous words, such as BNP and so on. They flash up and we can make a judgment. However, things will slip through and who should be responsible for defamation on the blogs and so on is a matter for huge debate—one that will evolve over the next few years.

Q775 Chris Evans: In your personal opinion, who is responsible? Is it the person who posted or the Mail site that is hosting the post at that time?

Paul Dacre: I do not think the Mail site can be. I do not want to go back to the start but the site makes no money. It costs an awful lot of money. That is why it has to be self-policing. Maybe the search engine has to bear responsibility—I do not know. This is part of the debate and I welcome taking part in it. Ultimately, if a blogger wants to say something defamatory on our site, I suppose that blogger should be responsible.

Q776 Chris Evans: I notice—and think it is sensible—that where there is an ongoing legal case you do not take comments at all. Have you had any difficulties where

someone has posted a comment and you have received a solicitor's letters a few days later or something like that?

Paul Dacre: By and large, we do not get many solicitors' letters, but their number is growing. The legal ambulance-chasers are watching. I do not remember who said this earlier, but remember that we can correct these mistakes—in cases of defamation—very quickly, almost within minutes. We can even move to correct them. At that stage, they will not have been seen by many people. It is very different from newspapers. The system of adjudication or legislation will have to be much more forgiving in that sense than it is with newspapers.

Q777 Chris Evans: In your view, what is the difference between a newspaper article and a contribution to, say, a web chat or a blog under libel law? Should they be treated differently? In libel, should an article that is written online be treated differently from a blog or somebody's opinion? Do you think they are treated differently at the moment?

Paul Dacre: As I have just said, a lot of defamation and inaccuracies can be dealt with quickly. I suspect, although I should like to think about this a little more, that if a carefully written blog is defamatory but persists in keeping the material up despite complaints—bearing in mind that it can be taken down immediately—it should be treated in the same way as a newspaper. This reminds me of King Canute. I do not know what we will do. I do not know what the courts will do with sub judice. The Lord Chief Justice was fretting about this a few weeks ago. We are in whole new cosmos, as I say.

Matthew Parris: It is a different medium, in which different and more informal rules are slowly evolving. It is far too early to know what the result will be. Certainly, we have online comment after columns in my paper, *The Times*. A week does not go by without some online readers defaming me in their comment, in the sense that they impugn my honesty, my competence, my honour or my integrity. Neither Mr Dacre nor I would dream of suing just because somebody said online that we were monsters. I would not, anyway.

Paul Dacre: I certainly would not.

Q778 The Chairman: Could you sue the newspaper for not suing them?

Matthew Parris: Technically, perhaps. We have a mediator and it strikes me that the mediator lets almost everything through. If the mediator is not letting everything through, I should like to see the stuff that is not getting through.

Q779 Chris Evans: I liked your comments about the transitional phase, which you explained quite well. Perhaps I am misquoting you, but you said that a piece of legislation could quickly become out of date. We are looking at this draft Defamation Bill. What elements can we include to ensure that this piece of legislation does not become out of date 18 months, three years or five years down the line? Is there anything specific, particularly related to the internet?

Matthew Parris: I am no expert on the internet. I am an ageing columnist, struggling to get to grips with the new technology, so I cannot speak on it with any great authority. However, I can see where the problems are. I do not think that anything but time will be the solution.

Q780 Lord Marks of Henley-on-Thames: We have heard a great deal about the chilling effect on freedom of speech and about companies threatening defamation proceedings to stifle criticism of their techniques or whatever it may be. Do you think that the problem facing newspapers that are threatened by companies is more significant or no more significant than similar threats from individuals who may bring defamation proceedings?

Matthew Parris: I do not know.

Paul Dacre: Certainly, we do not feel that large corporations are a more significant threat to the kind of middle-market journalism that we produce.

Q781 Lord Marks of Henley-on-Thames: Do you notice such a chilling effect with other organisations, such as NGOs or scientific organisations?

Paul Dacre: We had a case recently involving a cosmetic gel—a boob job gel, if you will forgive my French—that was guaranteed to increase ladies' figures or statistics. We quoted quite an eminent researcher who said that this was absolute rubbish. He, rather than the *Daily Mail*, was subsequently sued by the pharmaceutical giant. In that sense, yes, we are concerned about it. It was a classic case of a corporation trying to use its muscle.

Matthew Parris: It is indicative that the plaintiff decided not to go to the newspaper but to find somebody smaller to pick on. That is where the problems with the internet are.

Paul Dacre: This was in the paper as well.

Q782 Lord Marks of Henley-on-Thames: It was your paper that published the story?

Paul Dacre: They did not sue us in this case. They went for the small guy. He was an academic whom we quoted. Some qualified privilege for academics is very desirable, if I may say so. It does not rear its head a lot for papers such as the *Daily Mail*, but I should have thought it was a problem for more specialist papers.

Q783 Lord Marks of Henley-on-Thames: From what you know, do you see any argument for restricting the right of corporations to sue for defamation?

Paul Dacre: I am not an expert but if they have suffered large financial damage, it affects the number of people they can employ, and if the defamation was not justified, they should have the same rights as an individual.

Q784 Lord Marks of Henley-on-Thames: Would you restrict it to those cases where they have suffered such damage?

Paul Dacre: I think so, yes. It would need to be carefully restricted.

Matthew Parris: I agree with that. The development of the law generally over the past 30 or 40 years has invested corporations with the kind of personality that can commit criminal and civil offences. It is in the public interest that the law should have developed in that way. I see no reason why defamation should be exempt from that, except that some of the elements of defamation—the hurt and psychological wounding that can come from having one's reputation impugned—cannot really be attached to a corporation in the way that it can to an individual. However, the courts are perfectly capable of taking that on board.

Q785 Sir Peter Bottomley: I take as the basis of our discussion that newspapers have the job, beside entertainment and listings, of producing things which are true—things which are news and which matter. In lay terms, I also take it as a basis that defamation becomes actionable if it can be shown to be untrue, not privileged and damaging. Sometimes we divide ourselves. There are scientists, such as the Association of British Science Writers, who will take up the case, as they did in the example of Dr Peter Wilmshurst, who raised genuine doubts about the efficacy of heart devices. Then we have, on the side of major newspapers, every now and then, the kind of revelation that, were it to be published, would transform what a corporation does. I use the example of Trafigura. If it had openly had to defend the dumping of waste in Africa, it would have stopped doing so earlier. The problem comes, in my view, when you can start a case but do not complete it. I understand that Peter Wilmshurst has been facing a case since 2007. Having discussed a case on the radio in 2009, he faces a writ served in 2011. That is four years afterwards, when the critical issue was whether the heart device was effective and whether it was right to raise the question in a professional conference. How do you think we should adjust the law to stop the obvious excessive uses of libel against someone who can clearly show that he is a responsible scientist and, whether on Trafigura or Dr Peter Wilmshurst, was justifiably reported in a major paper?

Paul Dacre: It is not an area in which I am an expert. This was very much the *Guardian*'s story. This brings us back into the territory of injunctions. An injunction was granted and it was only Parliament that brought the matter to light, as it did with

subsequent cases that upset the judiciary so much. However, at least the judiciary was upset. That matter would never have come to light if it was not for Parliament. Therefore, I suspect that Parliament should look at the granting of these injunctions rather more critically. After that, I am out of my pay grade. If I may say so, you have to find a way of giving qualified privilege to these people. Research, academia and scientific views must somehow be above issues of defamation, mustn't they? I leave it to the expertise here. It is not something that I know a lot about.

Q786 Sir Peter Bottomley: Chairman, can I rerun an example that I have used once or twice before? It concerns a big commercial company with a major financial interest. In 1950, two researchers, Richard Doll and Bradford Hill, who were trying to research the effect that tarmac might have on people, came up with two suggestions that they thought were correct. One was that smoking is bad for your heart and lungs; the second was that asbestos is critically bad for your lungs. I was speaking today to the widow of someone who died of mesothelioma aged 69 at around the time that this started. Any company could have said, "If this is reported in a mainstream paper, it will be very damaging to our business. People may smoke tobacco less often and may not use asbestos in building products or in ships." If that kind of researcher had been taken to court, what would have happened to science? What would happen to that kind of advance? Would the effect be as damaging as I fear it would be?

Paul Dacre: It is a matter of deep concern. Again, I would pass it back to the Committee. You need to address that. I add in parentheses here that in our

deliberations over the 30-year rule we came across the fact that the Government suppressed the fact that cigarettes kill people for many years. However, that is not helpful; it is a distraction.

Matthew Parris: Around 12 years ago, I wrote a column about the effect on me of the anti-malarial drug Lariam, which was quite like LSD. It was extraordinary. The lawyers for *The Times* could well have said that I could not prove this and it was just my own experience and view. Hoffmann-La Roche, or Roche products, who produced the stuff, could well have sued. However, because I work for a big newspaper that on the whole thinks, "They probably won't sue and if they do we can stand up to them", the column was printed. Everything that I said has subsequently turned out to be right. A smaller scientific journal just does not have those resources. I know that the Government's draft proposals look at that. Anything you can do to beef that up would seem right to me.

Paul Dacre: With great respect to Matthew's paper—it is a great paper—I am not sure his lawyers would have the courage to take that on today. It would be an action that could cost literally millions of pounds. It is no secret that *The Times* already loses an awful lot of money. I repeat: you have to find some way of giving privilege to this view and to responsible journalism. Some kind of defence must be given to that.

Q787 Sir Peter Bottomley: If Parliament, having considered whatever conclusions it and the Government come to, decides that it must make a choice between allowing people to say things that are likely to be defamatory and not actionable successfully

or at all, or having a law that will virtually guarantee that nothing defamatory is said and that virtually all defamation will be actionable, what would be your advice?

Matthew Parris: Could you repeat that?

Sir Peter Bottomley: There are casualties. If the choice for Parliament, in making the law, is either to make it virtually impossible for anyone to be defamed or, if they are defamed, to be able to take action successfully, or to have a law that on several occasions will mean that someone who has been defamed will not be able to take action successfully because of privilege or cost control, which way do you think we should go?

Matthew Parris: I do not see them as being mutually exclusive. Give me an example of why you could not have some of one and some of the other.

The Chairman: I think Sir Peter has had his answer. That is helpful.

Q788 Baroness Hayter of Kentish Town: Taking up what was said earlier, we are looking at things that are not true, not privileged and damaging. Come over to our side: how can we stop you writing things that are not true, not privileged and damaging?

Matthew Parris: I am in a freer position that Mr Dacre on this. I do not think it is altogether a bad thing if journalists are occasionally able to write things that turn out not to be true, are not privileged and are damaging. A world in which everybody tiptoed around anything that might prove to be damaging or untrue would be a world in which many things that were true, though damaging, would never be printed. To the extent that we err, I would rather err on that side.

Q789 Baroness Hayter of Kentish Town: In that case, I shall really upset the Chair and ask what the remedy is for those people who are caught by that.

Matthew Parris: You have the remedy before you: the Government's draft proposals. They move modestly—perhaps slightly too modestly—in the direction of giving a little more freedom, which is good.

Paul Dacre: I agree and would add that I expect that the PCC in its present form will need to be radically reformed and reborn. I passionately believe in self-regulation and hope that it stays in this country. It has been emulated all around the world and I suspect that it is the least imperfect system known to man. I remind people that accuracy is the cornerstone of the existing PCC. I should just like to make a general observation, which is not fashionable these days. News does not grow on trees; it is jolly difficult to get. Perhaps he is not a good voice to quote but the original Lord Northcliffe said that the news is what someone else does not want printed. By and large, journalists have to jump through huge legislative and regulatory hoops to find and substantiate stories at the moment. I totally endorse what Matthew said. Anything that suppresses that hunger to be slightly dangerous and to investigate what should not, perhaps, be investigated—as long as it is within clearly defined laws—is to be applauded. There is a very great danger of throwing the baby out with the bathwater in this country as regards the freedom of the press. Perhaps it is a subject for another day, but that is how I feel.

Q790 The Chairman: In bringing this session to a conclusion, it falls to me to tidy up one or two things that we have not yet touched on. The first should not detain us

for too long. Mr Parris encouraged us to treat big corporations like individuals, yet the evidence we have heard is that when that sort of thing happens the chilling effect reaches a maximum. Earlier in the session, my sense was that you both recognised the chilling effect and were encouraging us to find some way of reducing it. Our evidence, including yours, seems to show that doing nothing about corporations means doing nothing about a large slice of the chilling effect. Is that a fair summary of what you have been saying?

Matthew Parris: I think you have quite reasonably put your finger on, if not an internal contradiction, at least a tension between two halves of what I was trying to say. As someone who was always interested in jurisprudence, I cannot see why, since a corporation is capable of inflicting harm and suffering harm, it should not be capable of either being taken to court or taking other people to court. You just have to find ways of limiting the extent to which it does that.

Q791 The Chairman: That is helpful. Secondly, we have heard quite a bit of evidence to do with when something goes wrong and a newspaper defames someone and it gets to court. We have quizzed witnesses as to whether newspapers should be required by the court to print apologies. The evidence, overwhelmingly, has been no—an apology requires a degree of sincerity and the court cannot impose sincerity if people do not believe they have done something wrong. However, something that has emerged as a sort of compromise position is that the judge should have the right to make newspapers print retractions, court statements or

whatever the form of the judgment might be in a location and of a size that is broadly comparable to the original source of difficulty. Do you have a view on that?

Paul Dacre: I apologise for harking back to this again but it is something that I have been devoted to for many years. The PCC already has the right to place a correction or adjudication in a paper. Where it goes in the paper has to be agreed by the director of the Press Complaints Commission. It is one of the great myths of our time that newspapers somehow bury these things at the back of the book, as 80% of the corrections carried by newspapers are either on the same page as the original offending article or before that page.

Secondly, it will not surprise you to hear me argue that this would be a usurpation of the editor's right to edit his paper. He has gone to court, argued his case and lost but still passionately believes that his newspaper was right. He has possibly paid exemplary damages. It is not up to any court then to order him to carry that statement. The PCC insists that the newspaper carries the result but not the statement. I suppose we are now leading to the ultimate sanction of a front-page apology. Again, I think that would be the court taking away the editor's right to edit and the thin end of all kinds of undesirable wedges. It is perhaps a technical point, but a newspaper's front page needs to sell itself. A newspaper has to be viable. If it does not sell itself, no one will read the correction inside. Finally—this is slightly contradictory—in truly heinous offences, a front page can and should be considered by the editor. There are quite a few precedents for that but I should not want the court to have the right to insist on it.

Matthew Parris: Here I must break ranks. Journalists and editors hate apologising. A fulsome apology can often settle something that could otherwise drag on at great expense. Whereas it would be a pity if a judge ever had to dictate the terms of an apology, that reserved right on the part of a judge might persuade people at an earlier stage of mediation to apologise appropriately. That is a change that newspapers ought, perhaps, to accept.

Q792 The Chairman: My last question gets us to the internet. I think I heard in Mr Parris's earlier comments a reflection of the idea that some bits of the internet are just "down at the pub" conversations. Some of these seem to take place at 3 am. I am not sure what it is about 3 am. Maybe we ought to cut some slack for this sort of activity. On the other hand, you are either defamed or not defamed, whether it is 3 am or 3 pm, and whether you have all your senses or only half of them. If you are the victim, you are defamed. Are you trying to encourage us away from that latter thought?

Matthew Parris: Yes, I am. You say that if you are defamed, you are defamed. To be defamed in a drunken bar-room conversation at 3 am is different from being defamed in a *Times* leading article on page 2 of that newspaper. That is to do not just with the size of the audience but with the context in which the defamation takes place and how seriously it will be taken. The courts and the law have always understood that context is important in applying the law on defamation. What we must learn to do with the internet is understand the many layers of context that are still developing within it.

Q793 The Chairman: So there is one law for newspapers and another for unsourced, unidentified defamation.

Matthew Parris: Yes, to a degree—or rather the law takes into account those differences. The law would probably take into account the difference between something printed in a scurrilous rag and something printed in the *Financial Times* or *The Times*. It would take a different view. You have to look at the context.

Paul Dacre: It is also a matter of pragmatism. You will not be able to legislate for the 3 am drunken conversation. We have to find, as Matthew said, a way of differentiating. There is an irony here. Newspapers should therefore be seen as much more responsible outlets for news and opinion, which I think they are. That is one of the strengths that needs to be recognised by the courts and everybody.

Q794 The Chairman: Would another way of putting that be that the cultural drift at the moment appears to be in the direction of the internet and that it might be a good idea if we all worked together to try, if not to reverse it, at least to stem that cultural drift?

Paul Dacre: I go back to King Canute. I do not know. When you say "stem the cultural change"—

Matthew Parris: No, there is nothing we can do about it, and nor should we. When a magazine called *Scallywag* printed an article saying that, as a Member of Parliament, I had given transvestite parties in the upstairs room of the nearest pub, wearing high-heeled shoes, with Dr Rhodes Boyson as my guest, wearing lipstick and asking to be called Ruby, neither Rhodes nor I thought it was worth dealing with. That was not

because a lot of people did not read *Scallywag* but because it was *Scallywag*. The difference in context within newspapers gives rise to the same argument, in principle, as the difference between papers and the internet, and between some parts of the internet and others. It is a jungle with different terrains.

Q795 The Chairman: Might it be helpful if we wound up in a situation—however we get there—where, if something is unsourced and unidentified on the internet, we create an environment in which nobody pays much attention to it?

Matthew Parris: It might be the case.

The Chairman: It falls to me on behalf of the Committee to say a very sincere thank you to both of you, not just for your time today but for the time that you obviously put into preparing to come here. We appreciate that and thank you for letting us pick your brains, experience and wisdom. We are very grateful. We will adjourn for two minutes while our guests leave and then the Committee will go into private session.