PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DEFAMATION BILL

First Sitting

Tuesday 19 June 2012

(Morning)

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Saturday 23 June 2012

STRICT ADHERENCE TO THIS ARRANGEMENT WILL GREATLY FACILITATE THE PROMPT PUBLICATION OF THE BOUND VOLUMES OF PROCEEDINGS IN GENERAL COMMITTEES

The Committee consisted of the following Members:

Chairs: Mr Christopher Chope, † Mr Dai Havard

† Brake, Tom *(Carshalton and Wallington)* (LD)
† Djanogly, Mr Jonathan *(Parliamentary Under-Secretary of State for Justice)*
† Farrelly, Paul *(Newcastle-under-Lyme)* (Lab)
† Flello, Robert *(Stoke-on-Trent South)* (Lab)
† Fovargue, Yvonne *(Makerfield)* (Lab)
† Goodman, Helen *(Bishop Auckland)* (Lab)
† Grant, Mrs Helen *(Maidstone and The Weald)* (Con)
† Gummer, Ben *(Ipswich)* (Con)
† Heaton-Harris, Chris *(Daventry)* (Con)
† Hughes, Simon *(Bermondsey and Old Southwark)* (LD)
† Kwarteng, Kwasi *(Spelthorne)* (Con)
† MacShane, Mr Denis *(Rotherham)* (Lab)
† Morris, David *(Morecambe and Lunesdale)* (Con)
Paisley, Ian *(North Antrim)* (DUP)
† Pincher, Christopher *(Tamworth)* (Con)
† Slaughter, Mr Andy *(Hammersmith)* (Lab)
† Soubry, Anna *(Broxtowe)* (Con)
† Turner, Karl *(Kingston upon Hull East)* (Lab)
† Vara, Mr Shailesh *(North West Cambridgeshire)* (Con)

Sarah Thatcher, Eliot Barrass, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 19 June 2012

(Morning)

[Mr Dai Havard *in the Chair*]

Defamation Bill

10.30 am

The Chair: Before we begin, I have a few announcements. First, if Members wish to take jackets off, please do. You are brave—it is not even vest-off day in Wales. Make yourselves comfortable. Please put all your toys away. It would be appreciated if you could switch off phones and anything that rings or makes a noise, or put them on silent.

As a general rule, my co-Chair, Mr Chope, and I have decided not to call starred amendments unless they have been tabled with adequate notice. The required notice is three working days, so amendments tabled for consideration on Thursday should have been tabled yesterday. If you did not do it yesterday, hard luck. If you wish to table amendments for the following Tuesday, they have to be in by Thursday.

Members, however, will note that amendments 27, 26, 28, 29 and 30 have been selected for today's debate, as they were tabled in time. They should have been unstarred for today; that was a clerical error, and we will discuss them. A reminder about procedure: the Committee will first be asked to consider the programme motion on the amendment paper. A debate on that is allowed for half an hour. We will then proceed to a motion to report written evidence, which is a formal part of our process. Having done all that, we will discuss the Bill clause by clause.

Ordered,

That—

(1) the Committee shall (in addition to its first meeting at 10.30 am on Tuesday 19 June) meet—

(a) at 4.00 pm on Tuesday 19 June;

(b) at 9.00 am and 1.00 pm on Thursday 21 June;

(c) at 10.30 am and 4.00 pm on Tuesday 26 June;

(2) the proceedings shall (so far as not previously concluded) be brought to a conclusion at 7.00 pm on Tuesday 26 June.—*(Mr Djanogly.)*

Resolved,

That, subject to the discretion of the Chair, any written evidence received by the Committee shall be reported to the House for publication. —*(Mr Djanogly.)*

The Chair: Copies of the memorandums that have been received are available to Members. You have the explanatory notes to the Bill and, no doubt, lots of pieces of paper from outside organisations.

Clause 1

Serious harm

Robert Flello (Stoke-on-Trent South) (Lab): I beg to move amendment 6, in clause 1, page 1, line 3, after 'unless', insert 'the extent of'.

I hope, Mr Havard, that you will allow me just a moment to put on record my brief thanks and comments before I dive into amendment 6. It is a pleasure to serve under your chairmanship, and I look forward to the Committee sittings over the next week or so. I hope that they will continue in the collegiate manner in which the Bill has been tackled to date. I certainly would not dream of even trying to repeat any of the Second Reading observations, even if you allowed me to, Mr Havard, which I know you will not.

It is important that we recognise the work of the Joint Committee on the draft Bill and of everyone involved in the working groups and campaign groups that have brought us to this point. I look forward to expanding on our views during the clause stand part debate.

We begin with a simple, one-sentence clause, which contains one of the fundamental pillars of the Bill: the issue of serious harm. The explanatory notes set out how the clause builds on case law, particularly with regard to the threshold of seriousness. In the Joint Committee report, the original proposal for a substantial harm test was replaced by a serious and substantial harm test. Whatever the test is called, its purpose is the same: to raise the bar before defamation cases may be heard.

I am aware that the Law Society is concerned that the measure could create an unreasonably high threshold to overcome and cause costly pre-action work. I hope that when the Minister responds to the debate, he will explain the types of cases that he considers cause harm but not serious harm, and how a judge might go about making that distinction. Certainly, he and his officials will be aware of previous cases where there was harm. Will he clarify which of those might have failed the higher test? The Libel Reform Campaign, while sharing the Law Society's concerns about the frontloading of costs, wants the first test to ensure that trivial cases do not proceed. It also makes the point that the clause merely restates the case law position following Thornton. The amendment will provide an additional hurdle, and ensure that only claims that should be brought in England and Wales are brought. It is designed to serve as a probing amendment and I hope that the Minister will offer some vital clarity in his response.

It is worth advising the Committee that I have tabled other measures that look at the ability of the court to strike out trivial cases at an earlier stage. Amendment 6 inserts the words "the extent of" into clause 1 so that the statement on serious harm would read: "A statement is not defamatory unless the extent of its publication has caused or is likely to cause serious harm to the reputation of the claimant." As it is a probing amendment, tabled in the spirit of trying to encourage the Minister to give some clarification on the nature of serious harm and when serious harm is different from harm, and to expand on current case law, I will leave it at that. I forward to the Minister's response in due course.

Helen Goodman (Bishop Auckland) (Lab): It is a pleasure to serve under your chairmanship this morning, Mr Havard.

I would like to speak in support of the amendment tabled by my hon. Friend the Member for Stoke-on-Trent South. Free speech and free expression are things that

all members of the Committee support. They are enshrined in the Human Rights Act 1998 and the European convention on human rights, and they are essential to the efficient functioning of an open, democratic society. However, free speech is a qualified right, and one of the qualifications is morality. A question of truthfulness is essentially a question of morality. When people are exercising their right to free speech it is essential that they do not trample over the reputation or dignity of others.

There is a lot of work going on across the House that is relevant to our discussions: there have been Select Committee inquiries as well as an inquiry by the Joint Committee on the draft Bill, which was mentioned by my hon. Friend. The Joint Committee on Privacy and Injunctions also looks at the matter. We need to draw on that work and, of course, on the work of Lord Justice Leveson and the evidence that he has heard at the other end of town.

Lord Harries of Pentregarth told the Joint Committee on Privacy and Injunctions that the dignity of the individual was essential in a free society, and was as important as free speech, which is why we are trying to elicit from the Minister a clearer view of what he means by "serious harm". The framework for law and regulation in this area is quite complex. It is twofold: there is the law, which we are discussing today and which clearly needs updating, and the Press Complaints Commission, which is being examined by Lord Justice Leveson. The two interrelate, so what we decide with respect to defamation in the Bill will read across to the code and the way in which it is drafted and redrafted.

That is why I wished to take part in this Bill Committee. My position is slightly unusual as I am normally a spokesman on the team shadowing the Department for Culture, Media and Sport, but the Opposition believe that this is a subject where there is great crossover and we want to take a coherent approach. I hope the Government are going to take a similarly coherent approach in what they present to us.

As my hon. Friend asked, what is serious harm? It is central to our understanding of the Bill. The objective of the clause is to raise the bar and reduce the number of trivial cases, but the Government need to be clearer. Serious harm to reputation is different for different people and in different circumstances. I am sure that a Member of Parliament can put up with many more negative things being said to and about them than an ordinary person.

I want to give the example of a constituent of mine and ask the Minister whether that instance would fall within his serious harm test. In my constituency, a 12-year-old boy was in trouble with the law, and an antisocial behaviour order was imposed on him. A red-top newspaper published a double-page spread that described him, quite wrongly, as causing "a reign of terror". He was undoubtedly a naughty child and broke the law, and his behaviour needed to be addressed, but to describe his behaviour as "a reign of terror" in my constituency was totally absurd. It was a defamatory statement.

Nothing was done about that—the child did not take the matter up—and his rights as a minor were ignored. The impact on his need for rehabilitation was also ignored, as was the fact that such statements published all over the newspaper would do serious harm to the boy. *[Interruption.]* I wish the Minister would attend to what I am saying and not talk to his colleague, because he will not be able to answer my questions if he does not listen to what I am saying.

The Parliamentary Under-Secretary of State for Justice (Mr Jonathan Djanogly): I was conferring with my Private Parliamentary Secretary about the extent to which the hon. Lady's point has anything to do with the amendment.

The Chair: Order. The Minister is concerned that the debate is wide-ranging. My intention is to allow some broad discussion at the start so that we can set the scene. However, Members have to speak to the amendment under consideration. I was giving a little bit of latitude at the start, so that we get the right atmosphere and clear one or two bits of the brushwork out of the way, but I would ask Members to address the amendment.

Paul Farrelly (Newcastle-under-Lyme) (Lab): On a point of order, Mr Havard. I have a series of questions for the Minister. I hope that a wide-ranging discussion can happen as part of a stand part debate.

The Chair: Yes.

Helen Goodman: My question is whether that case, in which the child's rehabilitation was damaged by the report which caused, in my estimation, serious harm, would be caught by the definition that the Minister has included in the clause. His intervention suggests that he is utterly dismissive of the point that I am making, which is worrying, even before we have embarked on the debate.

My other worry is that the Minister is setting the bar so high that someone in a situation like the one I have described would not be able to say that the stories written about them were untrue and created serious harm. I therefore emphasise the point made by my hon. Friend the Member for Stoke-on-Trent South: we must have greater clarity from the Minister on clause 1.

Mr Denis MacShane (Rotherham) (Lab): I declare an interest: I was president of the National Union of Journalists some years ago and have taken a lifelong interest in defamation. I have both sued and been sued and have some modest experience. The debate on Second Reading was generalised and wide ranging, and anyone who is a journalist or who has dealt with any aspect of libel knows that the devil lies entirely in the detail, and I hope that the Committee can get things right.

We have only had, I think, three Defamation Bills in a couple of centuries, so this is a golden opportunity to try to move things forward. I would almost rather have the Committee sitting in a hemicycle, than our being arranged for and against, because I do not think there are any partisan or party differences between us. However, there may be substantial differences on how we should set matters right, based on different views within the Committee and later when we go back to the House. Unfortunately, the Bill is being discussed in parallel with the Leveson inquiry and it worries me that we shall either partly pre-empt, or not segue into, what Leveson

[Mr Denis MacShane]

will finally come out with, which will set both journalism, and the public's right to have decent and honest journalism, on a much fairer path.

10.45 am

In supporting my hon. Friend's amendment, I would say that I am very nervous of any Bill in which the first clause has an indefinable adjective set down in law. If any member of the Committee can tell me what "serious" is, I would be very happy. All hon. Members are serious people, some perhaps more serious than others, but seriousness lies in the eye of the beholder and the speaker. That is a substantial conceptual flaw in the Bill.

In other examples of damages litigation, there is a tariff. If someone loses a leg in an industrial or motor car accident, it is worth £100,000; if they lose two legs, it is worth £200,000. If someone plays for England and fails to score a goal, their legs are even more expensive. The point is to define what the damage is, but there is no definition here.

What worries me fundamentally is this: were I Rupert Murdoch or the editors of the *Daily Mail* or any other rich and powerful paper, this would be my dream clause, together with aspects of the Bill that we shall come on to, particularly the removal of libel insurance, which is one of the biggest safeguards for the ordinary citizen and allows the ordinary citizen to take on the most powerful and mightiest media moguls in our land. We shall discuss that point later, so I do not want to emphasise it right now.

The Bill began with a noble campaign, which many of us were involved in on a completely all-party basis, about abuses of the libel law—about Dr Simon Singh and others. Many of those problems are covered in later clauses. The fundamental issue—again I refer to my previous trade as a journalist and a journalistic trade unionist—is that defamation happens regularly in a continued relationship between our newspapers and the citizens of this land. The many cases that we have dealt with, such as libel tourism, and the problem of Dr Singh and others, are actually important exceptions and hopefully they will be addressed under the Bill.

There are endless examples of people whose lives have been substantially damaged. My hon. Friend the Member for Bishop Auckland said that politicians can look after themselves; that is perfectly true, but our children cannot. I am sure many Members in all parties have been attacked unfairly and dishonestly in newspapers and have not been given any chance for redress or correction or the opportunity to make a protest, and then found it was their children who were spat at and treated abominably in playgrounds. Perhaps hon. Members here have all been lucky enough never to have experienced that kind of defamatory attack in newspapers and their children have not suffered, but I certainly have and I do not think we should say it is not a problem for elected representatives.

Helen Goodman: I was not trying to suggest that Members of Parliament or other public figures have no human rights. I was trying to say that for different people, different thresholds of endurance might reasonably be expected, and that for vulnerable people the threshold might be lower than for the rich and powerful.

The Chair: Mr MacShane, may I draw your attention to the fact that we are talking about the extent of publication, so while it is important to set the context could you bear that in mind?

Mr MacShane: Very simply, Mr Havard. That is exactly my point. I do not think it matters much if a parish bulletin says something nasty about me, although it might matter to the other members of that parish council. Extent of publication is of the most vital importance, because there is a multiplier effect. When circulation is 2 million, 3 million, 4 million, 5 million or 6 million, the damage is infinitely more serious. We need to tease that out by definition. This is a very poorly worded first clause. That is the point I am trying to get into before we go on to the other clauses, where I think there might be more agreement.

Mr Andy Slaughter (Hammersmith) (Lab): I suspect the clause is not designed to be poorly worded. I suspect it is designed to be simply worded, but does that not risk setting a platform for endless satellite litigation over the next decade to define what the clause actually means?

Mr MacShane: I fear my hon. Friend is right. Were a paper to say something nasty about any one of our fellow citizens, he would go to his lawyers and say, "How do I get an apology? How do I get a quick correction?" We know the PCC is useless, and we know the NUJ code of conduct is unenforceable. We shall see whether Leveson comes up with anything. In many other countries, one could go to a small claims court, which would quickly enforce adjudication and an apology, with very modest damages and a low level of lawyers' fees.

The provision is an absolute gold mine for our honourable and learned friends who are specialists in libel law. I can see conferences going on, junior counsel being involved, silks being hired, and counsel opinions being drawn upon and given on both sides, in an endless debate about whether there is serious harm. Then it will depend entirely on a single judge. Later in the Bill, the inference is that jury trial for libel cases is to be removed, despite the fact that some of the most famous libel cases in British history, which have upheld both press freedom and the right of individuals not to be defamed, have been decided by ordinary men and women, not judges. Judges come from a particular part of the establishment, and our class relationships, and have their own particular views. I am very concerned that in the Bill we are handing over to one individual the right to work out his own mental interpretation of what is serious, and we are not in any way defining that.

I have a lot of respect for the Minister and do not mean this in any discourteous way. It is not a partisan point. Believe me, I would have thought that many colleagues in both the Conservative and Liberal Democrat parties would be making similar points. The first clause really has to be right. It needs to be much more thoroughly examined. The view may be that we can glide over it and get into the more technical stuff, where we might come to more generalised agreement, but there is a fundamental flaw in the Bill. We must get that adjective out of it, or, if we do not want to, we must define it and elaborate it much more seriously. Our job should be to give the small person the right not to be defamed, and to protect

the ordinary citizen from the bullies of the giant media, with their endless legal resources, and their bottomless purse to fight cases that bankrupt people. I could go into personal anecdotes, but I do not want to.

We should not underestimate the extent to which this is a Murdoch and *Daily Mail* clause 1, which will strengthen their hands against people who are defamed in our country. I know that the Bill has been written with good intentions, but there is an iron law of unintended consequences in much legislation. If we get the provision wrong now, we will pay the price in very expensive cases. People will feel that they are broken on the back of legal fees because they cannot challenge the powerful media proprietors. In substantial cases, there could be endless opportunities for judicial review.

The Committee must look at the matter in much more detail. I politely suggest to the Government that we do not have to make haste; there is not a clamour for the Bill to become law in the next two months, or even in the next year. We must work solidly and consistently, now that we have the language in front of us, which was not the case when the draft Bill was discussed and debated in the Joint Committee, although its proceedings were worth while. Many specialist organisations, campaigning groups and libel reform campaigners who have been helping us over the past two or three years have other points to be dealt with later in the Bill, but the first clause, believe me—well, people do not have to believe me, but I have been a practitioner in the trade—tilts the balance of power against the individual citizen who has no resources and towards the bullies, defamers and people who have endless legal resources to call upon.

Several hon. Members *rose—*

The Chair: Order. I shall call Mr Turner, but let us be clear: the amendment is about extent. It does not challenge "serious harm" or the definition of what that does to reputation; it is not a redefinition of those issues, which have now been ventilated clearly. I am sure the Minister will address them in his reply and will doubtless come up with whatever he wants about how further iterations may take place as the Bill proceeds through the House. Mr Turner, I ask you to address your remarks to the amendment, which is about extent of publication.

Karl Turner (Kingston upon Hull East) (Lab): I am very grateful, Mr Havard. I hope to stay within the confines of that warning.

I rise to speak to amendment 6, tabled by my hon. Friend the Member for Stoke-on-Trent South. It is fair to say from the outset that as far as I am concerned, the amendment is a probing one. I have some slight reservations, and I seek clarification from the Minister.

I have an interest. I was a criminal lawyer before my election to the House. I was not a highly paid libel lawyer, so I have to confess that my expertise in that area is extremely limited. I was a publicly funded criminal hack, and I am proud of that fact.

I think we all agree with the underlying principle of the clause. As I have said, I am searching for clarity in the face of some possible confusion. Clause 1 aims to introduce a hurdle for pursuing claims through imposing a serious harm test, meaning that a published statement can be defamatory only if it has caused or is likely to cause serious harm. That is, in my respectful submission, a sensible move. The current situation may allow trivial claims to continue at huge expense and has resulted in a contraction in freedom of speech, a point that is generally accepted.

The decision to apply such a hurdle will allow judges to strike out trivial claims—if they can be properly called that—early on, and reduce the expense and time taken by needless and vexatious litigants. Any legal practitioner will say that for a law to achieve its purpose, it should be free of unnecessary ambiguity. That is where my concern lies.

11 am

My hon. Friend would like a clearer statement of what is meant by "serious harm", specifically how it differs from harm. There must be a clear indication of the intended meaning of serious harm, otherwise the clause is likely to fail in its principal aim, which is, as I have said already, to prevent vexatious claims.

The explanatory notes outline that the clause raises the bar for bringing a claim, but the lack of understanding regarding the true meaning of "serious harm" means that we do not know how high the bar is being raised. This is a concern not only for the lawyers and judges who will be required to interpret the law once it is passed, but also for the House, which has to scrutinise the legislation now. Unless we are clear about how high the bar has been set, we shall be unable to understand fully whether the Bill strikes the correct balance between freedom of expression and the protection of reputation, which I think we all agree is what the measure seeks to achieve. It would thus be helpful if the Minister could place on record some examples of what he considers "serious harm".

Scratching away at the surface exposes the definition of "serious harm" to further ambiguity. The original text placed before the Joint Committee stated that defamation would only occur when there was "substantial harm". The Joint Committee's final report recommended that a stricter test should be applied, one that required proof of "serious and substantial harm". In the Bill now before the Committee, the Government have chosen simply to use the term "serious harm". As the Bill has progressed through the legislative process, its ambiguity has increased; we have moved from "substantial harm" to "substantial and serious harm" to "serious harm", which is the current position.

The Government have made clear why they chose to reject the Committee's recommendations for a test of both substantial and serious harm. As they stated in their response to the Joint Committee, they felt that

"the use of two separate terms alongside each other would be likely to cause uncertainty and litigation over what difference may exist between the two terms, which would add to disputes and costs."

However, the Government have not been forthcoming in providing a detailed explanation of the practical difference between substantial and serious harm.

Helen Goodman: Does my hon. Friend agree that there is a relationship between the level of harm and the extent of publication?

Karl Turner: I agree with the sentiments of my hon. Friend. It is the issue that concerns hon. Members on both sides of this House, and indeed the other place.

[Karl Turner]

My chief concern is that when the Bill leaves the Committee, we can safely say that we collectively ensured it was in the best possible state. When the Minister responds, could he clarify a number of issues and provide us with a clear statement on the meaning of "serious harm"? Before he attempts to do that, I admit it is potentially a very difficult task. It is probably something that most learned practitioners and judges will struggle with in future, but that is the point I seek to make.

Could the Minister explain how the definition of "serious harm" differs from just "harm"; why he decided to include a test of serious harm but not substantial harm; and the difference between "serious" and "substantial" harm? If I tried hard I could probably come up with an array of explanations, but is the Minister prepared to put on record his interpretation of "serious harm"? What does he feel is the difference between serious harm and substantial harm? Will he place some examples on the record? That is what I am keen to get.

As I have already said, we have an opportunity to assist each other to ensure that the legislation leaves this place in a better state.

The Chair: It might be sensible, given the mood of the Committee, to have the stand part debate now, so that we can put all these things in context. It would be better to do it that way. If Members wish to raise issues, and if they have extra questions about the definition of serious harm—the Hippocratic oath test of "do no harm"—it is probably better to do that now, so that we will not need to do it later. We could handle it that way, if it is agreeable.

Paul Farrelly: On a point of order, Mr Havard. Is it your plan, after having a stand part debate now, to move on to amendments 4 and 5 separately, and then return to a decision on clause stand part?

The Chair: Yes. We will take it formally when we get to it in the order that we originally agreed at the start of the day.

Tom Brake (Carshalton and Wallington) (LD): It is a pleasure to serve under your chairmanship, Mr Havard. Thank you for clarifying that we can have a stand part debate now, given that the debate on amendment 6 has been fairly wide-ranging.

I seek the views of the Minister and the Government on the Libel Reform Campaign's concerns about the clause, particularly what it sees as the need for an early strike-out clause. It would be driven by two things: extent of publication—a subject of the debate on the amendment—both here and abroad, and how here and abroad interrelate; and an early assessment of the actual serious harm to reputation. That is the only point that I wanted to make. I understand that the LRC considers that it is possible to achieve that through changes to the civil procedure rules, which I believe are set out in the pre-action protocol for defamation.

I would like some clarity from the Minister on, first, the Government's view of the LRC's proposals for an earlier strike-out clause and, secondly, whether, if the Government support that, it needs to be achieved through a change to the Bill, or whether it could be achieved through a change to the civil procedure rules.

Paul Farrelly: I have a short series of questions for the Minister. Where there is judicial discretion, and the intent, by and large, is to codify the law, it is important in our debates that Parliament's intent is made clear.

The clause will introduce a threshold to deter trivial claims. That will be effective, as colleagues have said, only if trivial claims are struck out; they can be brought for a multitude of purposes. Libel cases often go on for much too long, racking up costs. I am sad to say that a small number of judges have allowed that to happen.

Given that the intent is to codify the law, I ask the Minister this basic question: which definition of defamation does he prefer? What definition of "defamatory" are the Government seeking to codify in this Bill? Thornton is mentioned in the guidance notes. Does he prefer the definition advanced by Mr Justice Tugendhat in the Thornton case?

My second question relates to "serious harm" and individuals. I would be very grateful if the Minister told the Committee why the Government have now settled on the term "serious". Lord Lester, in his private Member's Bill, had "material"; the draft had "substantial"; the Bill has "serious"; and the Libel Reform Campaign would like "serious and substantial". To the Minister's mind, what is the advantage of using the term "serious" to the exclusion of everything else?

My third point relates to the Government's intention in relation to the test of serious harm as it affects corporates and incorporated bodies. Is the intention to incorporate serious financial harm and not just a fall in the share price, for example? My fourth question is about why the Government have settled on the term "is likely to", when in Thornton, Mr Justice Tugendhat uses the words

"has a tendency to do".

My fifth question is the one raised by the Law Society about the fact that the test, although it has a serious point, has a potential to front-load costs, as before trial people go through lengthy processes to demonstrate serious harm or what is likely to cause it. How do the Government propose to meet that point and avoid that situation?

That brings me to my sixth question. What use do the Government envisage the courts making of their existing strike-out provisions? My seventh point is about what use the Government envisage the courts making of early trials to decide meaning or whether matters are fact or comment.

That leads me to my final question—number eight, if I have kept track. When do the Government intend to bring forward the amendment to the civil procedure rules, as recommended by the draft Defamation Bill Committee, so that we and the legal profession can examine them to make sure that those amendments of court procedure give full effect to the intentions behind clause 1?

The Chair: I intend to call Mr Flello as part of the stand part debate, after which the Minister can respond. Then Mr Flello will come back to his original amendment, which we began discussing at the start of the day.

Robert Flello: Thank you, Mr Havard. You have thrown me slightly with this different course of things, but I appreciate your understanding on these matters.

We on these Benches welcome the introduction of a clause intended to ensure that trivial and vexatious claims are not allowed to proceed. At the moment, cases in which very little harm has been caused can be pursued at huge expense, chilling free expression as defendants back down, remove content or publish clarifications rather than face huge potential costs and lengthy proceedings, even when the claim has no merit.

An early hurdle, at which judges can strike out claims before costs mount, should reduce that chill effect. The Libel Reform Campaign has also welcomed the clause. As the Secretary of State stated on Second Reading,

"The hurdle is raised a little"—[*Official Report*, 12 June 2012; Vol. 546, c. 181.]

The LRC goes on to observe:

"However, Clause 1 does not in itself represent an early hurdle that weeds out trivial cases. The shift in the threshold of harm from substantial to serious may mean that at trial some cases that were previously lost by the defence are won, and by extension some out of court settlements predicated on a fear of losing a lengthy case which were previously conceded, are not. But Clause 1 is not in itself a way of ensuring that trivial and vexatious claims are not allowed to proceed in the first place."

Other Ministers, and indeed officials, have made it clear that the intention of this clause is to raise that bar. However, that needs to be restated in Committee debates and clearly stated in the explanatory notes, too, to ensure that the intention of Parliament is beyond doubt. That should assist judges in deciding early cases that come before the courts.

11.15 am

Clause 1 is drafted in a manner consistent with the position set out by Lord Justice Tugendhat in the recent case of Thornton *v.* Telegraph Media Group Ltd, in which he referred to the threshold as the seriousness of the defamatory statement. However, the courts have generally taken a dual approach when looking at whether a case should proceed, considering both the seriousness of the harm to reputation of the defamatory imputation or imputations and the extent of publication in the jurisdiction. That approach was supported by the Joint Committee on the draft Bill. It seems reasonable to suggest that the approach that has been taken in case law should be adopted in statute for the sake of clarity.

The question of the extent of publication and a proportionality test were set out clearly in the well known Appeal Court judgment of Dow Jones and Co. Inc. *v.* Jameel. Judgments in recent cases, such as Davison *v.* Habeeb and Ors, and Tamiz *v.* Google Inc. and Anor, have considered both the serious harm threshold and the extent of publication.

One of the items set out by the Joint Committee on the draft Bill, with which I agree wholeheartedly, is that there should be core principles. One of those principles is about reducing cost. The Committee states that

"the reduction in the extremely high costs of defamation proceedings is essential to limiting the chilling effect and making access to legal redress a possibility for the ordinary citizen. Early resolution of disputes is not only key to achieving this, but is desirable in its own right—in ensuring that unlawful injury to reputation is remedied as soon as possible and that claims do not succeed or fail merely on account of the prohibitive cost of legal action. Courts should be the last rather than the first resort".

Clause 1 in itself is acceptable, but it does not address the issue of the early hurdle, which is why I hope later to visit new clauses that might strengthen that point. I would like the Minister to stand up, in this debate on clause stand part and amendment 6, to put on the record why the Bill includes the word "serious"; why the Government feel that "serious harm" raises that hurdle; and why he feels that having "serious harm" in the opening part of the Bill will stop vexatious cases. Will he also give courts a clear steer as to what the Government mean by "serious harm"?

The Chair: I call the Minister. We are dealing with both clause stand part and amendment 6.

Mr Djanogly: I welcome you, Mr Havard, and Mr Chope to the Chair for the next few days; we look forward to you steering us through. I agree with the hon. Member for Stoke-on-Trent South that a high degree of consensus was shown on Second Reading, which I hope we can emulate in this Committee.

We start with clause 1, which introduces the test of serious harm. With the direction of the Chair, I shall speak not only to amendment 6, but to the wider stand part debate.

Amendment 6 would amend the serious harm test so that it reads:

"A statement is not defamatory unless the extent of its publication has caused or is likely to cause serious harm to the reputation of the claimant."

That would narrow the effect of the clause by focusing on one aspect of the publication, namely its extent. What that would mean, however, is not clear. Clause 1 takes existing case law, which sets out what is sufficient to establish that a statement is defamatory, and raises the bar to a modest extent by requiring that the harm to reputation must be serious; I will return to that in the stand part debate. The clause will permit the court to consider all the relevant circumstances. That, in the Government's view, is what is required.

To focus solely on the extent of the publication, as the amendment seeks, would make the law less clear and could open the way to a lengthy argument about what is meant by "extent". Does it mean, for instance, method of publication or is it a reference to jurisdiction? That is entirely unclear. What is certain, however, is that the amendment would have the effect of preventing the court from considering any other aspect of the publication that may be relevant, such as the impact or likely impact of the statement itself on the claimant's reputation.

It is important that the court should be able to consider all the relevant circumstances when deciding whether a statement has caused, or is likely to cause, serious harm to the claimant's reputation. I am concerned that the amendment would narrow the scope of the court's considerations in an unhelpful way. For that reason, I hope that the hon. Gentleman, who I appreciate put this forward as a probing amendment, will agree to withdraw it.

I move on to the definition of defamation, which was raised by the hon. Member for Newcastle-under-Lyme. Defamation is

"the collective term for libel and slander, the torts which protect a person's reputation. Defamation occurs when a person communicates material to a third party, in words or any other form, containing

[Mr Djanogly]

an imputation against the reputation of the claimant. Material is libellous where it is communicated in a permanent form, or broadcast, or forms part of a theatrical performance. If the material is spoken or takes some other transient form, then it is classed as slander. Whether material is defamatory is a matter for the courts to determine."

The introduction of a serious harm test in clause 1 of the Bill reflects the Government's view that there is merit in legislating to ensure that trivial and unfounded actions do not succeed. To fulfil that aim, the draft Bill sought views on the test of substantial harm, which was intended to reflect the current law as articulated by the courts in a series of cases—and I shall come back to that further soon. However, in light of the views of the Joint Committee on the draft Bill and the balance of opinions received on consultation, we have decided that there is a need to raise the bar for bringing a claim. Clause 1, therefore, provides that for a statement to be defamatory it must have

"caused or is likely to cause serious harm to the reputation of the claimant".

The provision extends to situations where publication is likely to cause serious harm in order to cover situations where the harm has not yet occurred at the time when the action for defamation is commenced.

The question of whether a particular publication has caused or is likely to cause serious harm will, of course, be a matter for the courts to determine in light of the individual circumstances of the case. However, in general terms we believe the test represents a higher hurdle than that which currently applies and it will nudge the threshold up, to a modest extent. I can confirm to the hon. Member for Newcastle-under-Lyme that that will help to discourage trivial claims, but it is not unduly restrictive on claimants' rights and will still enable them to take effective action to protect their reputation when it is seriously harmed.

Simon Hughes (Bermondsey and Old Southwark) (LD): The Joint Committee recommended "serious and substantial", as I recollect it. Could the Minister put on the record the Government's view as to why "serious" is the better choice and what the Government's understanding is of the difference between "serious" and "substantial"?

Mr Djanogly: I shall come back to that later in my remarks.

The hon. Members for Bishop Auckland, Kingston upon Hull East and Stoke-on-Trent South asked the wider question of how we get to the meaning of "serious harm" and how that is justifiable in the context of previous case history. In a series of cases over the past century, the courts have considered the question of what is sufficient to establish that a statement is defamatory. A recent example that has been mentioned is Thornton *v*. Telegraph Media Group Ltd, in which an earlier House of Lords decision in Sim *v*. Stretch was indentified as authority for the existence of a "threshold of seriousness" in what is defamatory. There is also potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake. In Jameel *v*. Dow Jones and Co., it was established that there needs to be a real and substantial wrong. In Jameel, the Court of Appeal identified that a form of abuse of process exists when it can be demonstrated that the benefit attainable by the claimant in an action is of such limited value that the gain is not worth the candle and the cost of the litigation would be out of all proportion to the benefit to be achieved.

This clause aims to encapsulate the tests applied in these and other cases while raising the bar modestly by requiring actual or likely serious harm to be shown. In Mardas *v.* New York Times Company and another, the High Court allowed the claimant's appeal against the Master's decision striking out the claim, and noted that it would be only in rare cases that it would be appropriate to strike out an action as an abuse on the basis described in Jameel. The Master's decision in Mardas had been reached on the basis that there had been very limited publication here. This was estimated as approximately 177 hard copies of the *New York Times* article and approximately 31 hits on the online version of the article and a similar article in the *International Herald Tribune*. The claim related to matters that had happened some 40 years ago. The High Court considered that there was no basis for concluding that there was no real and substantial tort in this jurisdiction. It commented that,

"a few dozen is enough to found a cause of action here, although the damages would be likely to be modest".

Of course, in practice, as the right hon. Member for Rotherham pointed out, case law will develop on the clause. I do not think it as the role of this Committee to second-guess judicial decisions as to how the law will develop, or indeed be applied in the constituency case example cited by the hon. Member for Bishop Auckland.

Helen Goodman: I am not familiar with all the case histories that the Minister describes, but he was talking about one in which someone was referring to an episode 40 years previously. Does the statute of limitations apply to defamation?

Mr Djanogly: The statute of limitations does apply, but in terms of making a claim, not previous case history.

The right hon. Member for Rotherham also asked whether a substantial amount of evidence would be required to show whether there was serious harm. In many cases, the existence of serious harm will not be a matter of dispute. When it is, there will be a need for some evidence to be provided, but we believe that it is better for this to be resolved at an early stage, and that only cases involving serious harm should proceed.

The right hon. Member for Carshalton and Wallington and the hon. Members for Kingston upon Hull East and for Newcastle-under-Lyme asked whether it should be easier for claims to be struck out when the serious harm test is not met. We do not consider that a provision for strike out is necessary. Our intention is that the normal rules, as set out in the civil procedure rules, will apply. It seemed preferable to rely on those rules than to create a new and unprecedented procedure for mandatory strike out. If the court decides that the serious harm test is not satisfied, it will be able to use its power under the CPR to strike out the claim.

Mr Slaughter: I am not sure that the Minister is engaging with some of the points made by Labour Members—we are already into déjà vu with the Legal Aid, Sentencing and Punishment of Offenders Bill.

There is agreement on what is good about clause 1, but we have raised the concern that there might be problems—satellite litigation or preliminary points—that involve costs. What will be done to address that? We want definitional points on what serious harm may mean, and it is not good enough for the Minister just to say that that is not the job of this Committee. If we are making such a substantial change to the law, we need to give some guidance. Otherwise, to take the point made by my right hon. Friend the Member for Rotherham, this will become a Murdoch and *Daily Mail* clause, because it will discourage even those with meritorious cases from going to court because they will not know whether they have any prospects.

Mr Djanogly: The hon. Gentleman's point is the same as that raised by the right hon. Member for Rotherham. As I said, the Government's position is that we acknowledge that clause 1 and other provisions of this Bill will lead to judges having to take decisions about how the law will be interpreted. I do not think I can add to that.

The hon. Member for Newcastle-under-Lyme asked why we could not refer to a tendency to cause harm. He also asked about the front-loading of costs. Our core aim through the clause is to discourage trivial claims. Using a more abstract term, such as whether the publication has the tendency to cause serious harm, rather than focusing on whether the publication is actually likely to cause harm, could make it more likely that doubtful claims would be able to proceed.

In Thornton *v.* Telegraph Media Group Ltd, Mr Justice Tugendhat, when discussing the meaning of defamation and the threshold of seriousness used in both terms, said:

"Definitions (3), (5), (6) and (7)…establish that a tendency or likelihood is sufficient."

We recognise that the introduction of a serious harm test may involve some front-loading of costs, but we believe that it is better to resolve that at an early stage so that only cases involving serious harm proceed.

Tom Brake: I should like to bring the Minister back to the matter of early strike-out. He did not feel that anything needed to be done in the Bill, because it would be covered by the normal civil procedure rules instead. Does that mean that the civil procedure rules will need changing, or will the existing rules suffice?

11.30 am

Mr Djanogly: The existing procedures will suffice, and an application for strike out would be made under rule 3.4 of the civil procedure rules.

The hon. Member for Newcastle-under-Lyme asked about procedural issues and whether there is a need for new mechanisms to resolve defamation cases cheaply and quickly. As I set out clearly on Second Reading, the answer is yes. The Government recognise that we must get that important issue right. Alongside the Bill, we intend to introduce proposals for a new procedure aimed at resolving key preliminary issues as early as possible to help to reduce the length and cost of defamation proceedings.

In addition, we will encourage the use of mediation and other forms of alternative dispute resolution in defamation cases, and support the strengthening of the defamation pre-action protocol, so that parties are more strongly encouraged to use mediation or early neutral evaluation, and so that those unreasonably refusing to do so are penalised if and when it comes to the awarding of costs. We will also give further consideration to how cases that reach the courts can be best dealt with.

Mr MacShane *rose—*

Paul Farrelly *rose—*

Mr Djanogly: I give way to the right hon. Member for Rotherham.

Mr MacShane: That must be slight seniority—I thank the Minister.

The Minister's last comments are a helpful move in the right direction, if there is definitional clarity and that is clear in law. When the Minister talks about trivial offences, we are all with him, but I am worried about what the powerful media oligarchs call trivial people, who do not have any strong rights. The Minister was getting into interesting territory in which we can perhaps find a lot more agreement. It has to be in law, however, that somebody who is defamed, and has a totally dishonest and untrue statement made about them—not a politician, but somebody in Rotherham or anywhere—can quickly go and get a correction. That is all; it is not about big costs or damages, but the truth finally being put on record. If we can achieve that through this law, in addition to all the other protective stuff arising from our wider concern that gave rise to the Bill, it will be very welcome.

Mr Djanogly: The right hon. Gentleman makes a fair point with which I do not disagree. What is trivial to one person might not be trivial to another. The court will have to look at individual circumstances to consider what is trivial in any particular case.

Paul Farrelly: I welcome the Minister's comments on introducing new procedures, but we then get into the question of when, and the definition of the word "alongside". What did he mean by that? When will the new procedures be produced?

Mr Djanogly: I can confirm that the procedure rules are being addressed as we speak. It is not something that will be starting; it is happening. We have to work in conjunction with the judiciary and those who set the court rules and so forth, but that work is happening.

Helen Goodman: How does the Minister envisage that changes to the civil procedure rules will interlink with reforms to the PCC?

Mr Djanogly: Obviously, the Leveson inquiry is ongoing, but so is passage of the Bill. It is unlikely that the Bill will receive its Second Reading in the upper House before the summer recess, so I hope that we will be able to take on board elements of Leveson. There will be an interaction, but the initial decision was taken that we should not delay the Bill until Leveson finalised, because we felt that the defamation element could be separated.

Mr Slaughter: Am I to understand that there will be some clarification on costs—either ways in which costs can be limited, or how provision can be made for claimants to bring meritorious actions when there is serious harm? Secondly, is the Minister completely set against giving any guidance on what is meant by clause 1? I compare it with clause 4, in which where there is a list of criteria. One element of guidance might be on extent, which is covered in amendment 6, while others might be timing and the characteristics of the claimant. Given that the Bill otherwise maps out defences in quite a detailed way, why is clause 1 alone left as a blank canvas?

Mr Djanogly: I hoped to fill in some of the canvas by giving the Committee a sense of the history of how we got to the concept of serious harm. Perhaps the hon. Gentleman would like to read the report in *Hansard*. If he then has further comments, I would be pleased to address them.

The hon. Gentleman asked why I had not addressed costs, but I do not believe that they have been mentioned before in this debate. That is an important point. As I said on Second Reading, the Government have committed to review that issue. On the question of the extent to which cost complements procedural change, there is a synergy. As the shadow Secretary of State, the right hon. Member for Tooting (Sadiq Khan), pointed out on Second Reading, if we can improve the procedures such that defamation claims go through the courts quicker, the net result should be lower costs. To that extent, the two points are interlinked, and I can confirm that the Government will look at the question of costs in that context.

Paul Farrelly: I mentioned costs in my questions, and this comes back to procedures. The ongoing work is welcome, but will the Minister give us some idea of the timing? Will the work be complete by Third Reading? Will it be complete when the Bill goes to the Lords? Will it be complete when the Bill perhaps shuttles back to the Commons from the Lords?

Mr Djanogly: We intend that the work will be complete and effected by the time the Bill comes into force.

My right hon. Friend the Member for Bermondsey and Old Southwark asked why we had not adopted the Joint Committee's recommendation on a test of seriousness and substantial harm. We are worried that the use of two terms alongside each other would be likely to cause uncertainty over and litigation on what difference may exist between them, which would add to disputes and cost while making little or no difference in practice to the outcome of cases. Substantial might, for example connote big, but relatively modest accusations may have serious impacts. We should use a common, well-understood word and rely on the good sense of the courts.

Simon Hughes: I am not at all against the conclusion that it is better to have one word than two. I know that this is difficult ahead of the courts making judgments, but it would be helpful if the Government could set out what they currently understand the definitions of the two words imply so that we can be clear what the test will be, if we pass the Bill as it is.

Mr Djanogly: I hear what my right hon. Friend says and we will take that on board.

The Chair: The debate has included a discussion of costs, which was not strictly relevant to the clause, but I have tried to provide a canvas so that we can clear some of the brush work. We can doubtless come back to such points as our consideration moves forward, but we will now return to amendment 6.

Robert Flello: We have had an interesting, wide-ranging discussion about amendment 6, to say the least. The Minister says that the meaning of "the extent of" is not clear, and that the amendment is therefore unclear, but I come back to the point that neither is there clarity about the definition of "serious harm". Despite everything the Minister said about clause 1, we are still none the wiser as to what "serious harm" means. He says that the Government's intention behind the clause is to discourage trivial cases but, again, without even a steer as to the meaning of seriousness, the clause moves us no further forward.

We have heard that the civil procedure rules will be changed and that mediation is something that the Government wish to push but, to quote a phrase, warm words butter no parsnips. Unless such changes are actually brought in at the same time as or before the Bill becomes an Act, this will be all meaningless.

We have heard extremely good contributions from both sides of the room, but I want to single out the point made by my right hon. Friend the Member for Rotherham about oligarchs thinking that there are "trivial people", because that encapsulates the situation well. Sadly, it is not just oligarchs who think that way, because a small number of people in the media also think that there are trivial people. It is incumbent on the Committee—and, indeed, on this House—to make sure that we stand up for those who people think are trivial people. The Minister said that a substantial and serious two-limb test would lead to more litigation, but we are going to get that anyway, because there will be litigation about what seriousness means.

I am disappointed that my probing amendment has not done what I hoped it would: draw the Minister to give the Committee an illustration of what "serious harm" might be and some rationale behind the approach. We have not heard anything to reassure me about clause 1 and although I will not press the amendment, I will have another go at persuading the Minister at a later stage.

Mrs Helen Grant (Maidstone and The Weald) (Con): Does not the hon. Gentleman accept that common law and precedent in the judicial system will quite quickly sort out the meaning of "serious harm"?

11.45 am

Robert Flello: The Bill is designed to prevent the situation in which costs create a chilling effect. My worry is that somebody with very deep pockets will quite happily go off to court to test the meaning of serious harm, but the other party will not be able to sustain the cost of doing that and will therefore cave in. That was why I hoped that the Minister would give the Committee—and therefore courts and parties to possible

actions—an early indication of what the test is likely to be. We have not heard that today, but I will try to find another way of persuading the Minister.

Mr Slaughter: It is slightly worse than that. Libel is already the least predictable and most expensive form of litigation. We are starting with this two-word phrase "serious harm". The Minister has admitted that there may be front-loaded costs and litigation, which I do not think will be brief, to define what that is over time, which will involve various amounts of case law. We will therefore make the situation worse from the view of justice being done when costs are a barrier to that justice. That is why we need more definition and more clarity before we go ahead.

Robert Flello *rose—*

The Chair: Order. May I draw your attention, Mr Flello, to the extent to which you were trying to get a definition through the words "the extent of"?

Robert Flello: Point well taken, Mr Havard. I will not add to what my hon. Friend said, which was extremely meritorious. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

The Chair: We will now move to amendment 4, with which it will be convenient to consider amendment 5. Having completed that debate, we will return formally to the stand part vote that we will be required to undertake.

Paul Farrelly: On a point of order, Mr Havard. Before we move on to the amendments, I seek clarification from you regarding the stand part debate. The Minister said that he believed that he had answered all the questions. What steps can be taken if his belief is mistaken? I asked how the definition of serious harm applied to corporations, but that was not dealt with his reply.

The Chair: There will be discussions later about public interest and the extent to which the Bill may or may not apply and there will be other opportunities for the Minister to give whatever clarification he needs to give us in that regard.

Helen Goodman: I beg to move amendment 4, in clause 1, page 1, line 4, at end add 'or to the reputation of the claimant's close relative if that close relative died within the year prior to the defamatory statement being published'.

The Chair: With this it will be convenient to discuss amendment 5, in clause 1, page 1, line 4, at end add—

'(2) For the purposes of this section, "close relative" includes the claimant's—

(a) spouse or partner;

(b) son or daughter;

(c) brother or sister; and

(d) father or mother.'.

Helen Goodman: I hope that the amendments are self-explanatory. They would enable claims to be made by close relatives when statements that would be defamatory against someone if they were still alive are made shortly after they have died. I have included in amendment 4 a one-year time limit. I am not convinced that one year is the right period—I am open to its being two years—but it is important to include a time limit, because I do not intend to prevent or inhibit genuine historical inquiries into things that went on some time in the past. Clause 5 defines "close relative" for the purposes of amendment 4.

We raised this matter on Second Reading last Tuesday and it was taken up by the First Minister of Scotland during his evidence at the Leveson inquiry. When Committee members hear the examples that I shall provide, they will understand that they are not trivial. I am not talking about obituaries that are not quite as adulatory as people might like to read about their good friends. We need to deal with this matter. There was a moral convention in this country once upon a time that people did not speak ill of the dead. That general shared behaviour has collapsed to such a degree since the original law in the 19th century that we need to return to it.

I shall illustrate my remarks by mentioning three people to whom this defamation has happened. First, I was visited by a constituent whose son, a soldier, died overseas in unexplained circumstances. Several years down the track, the inquest still has not taken place, so it is true that the circumstances are unexplained. We know what happened—he shot himself—but not why or whether it was an accident or deliberate. Following his death, unkind and unsubstantiated speculation about his personal life and the reasons for his death, which were, and are, hurtful to his family, were published in a national newspaper. However, the family has no right of redress.

Secondly, the now notorious piece by Jan Moir following the death of Stephen Gately amounted to a homophobic attack. I will not read the whole article, because it would take far too long, but I want to read out a couple of things to demonstrate the seriousness of this piece:

"The news of Stephen Gately's death was deeply shocking … Fans know to expect the unexpected of their heroes, particularly if those idols live a life that is shadowed by dark appetites or fractured by private vice…Whatever the cause of death is, it is not, by any yardstick, a natural one…the circumstances surrounding his death are more than a little sleazy…For once again, under the carapace of glittering, hedonistic celebrity, the ooze of a very different and more dangerous lifestyle has seeped out for all to see.

It is an extremely unpleasant attack, and many readers protested about it. Everyone could see that this was totally unacceptable.

The third case—and, I feel, the saddest—is the evidence that the Watsons gave about, first, the murder of their daughter, and secondly, the suicide of their son. They gave this in evidence to Lord Justice Leveson:

"On 10 April 1991 our much loved and now sorely missed 16 year old daughter, Diane Watson, was stabbed to death … I cannot describe in this statement the shock and grief that my family and I felt following the tragic death of Diane. It was a harrowing and difficult time for us all. This was made worse by the way Diane's murder was portrayed in the press and in particular by certain joumalists. On 2 August 1991"—

[Helen Goodman]

so, a few months later, the Glasgow *Herald* gave

"a false account of the circumstances surrounding Diane's murder, and contained a number of huge inaccuracies."

The account

"did not match the evidence the court heard or the findings it made."

There was a trial of the murderer, and on

"26 June 1992 the Glasgow Herald published a second article by Mr McLean…The comparisons it made again gave a misleading picture of the situation…Then, later that year, in September 1992, a feature … about British children serving life sentences was published in Marie Claire magazine."

Again, the description was wholly false. The mother of Diane Watson said:

"While I recognise the importance of journalists being able to write freely about such issues, I strongly object to them publishing untrue and defamatory material about the victims of crime in the process."

The second or third article was based on

"contemporaneous press cuttings of the argument put forward by the defence at trial…The articles…had a devastating effect on our whole family at a time when we were struggling to come to terms with the murder of our daughter. It was extremely distressing and traumatic to read these misleading and defamatory accounts in the press. Tragically, it was all too much to bear for our dear son Alan and he took his own life on 5 December 1992. He was found holding copies of the articles referred to above. We are in no doubt that the way Diane's murder was misreported by Meg Henderson, Jack McLean and others contributed directly to his tragic death…As a family, we sought the advice of a solicitor, who explained that we could do nothing to hold the journalists or publishers to account given that Diane was deceased."

Alan, her son, also found this impossible to come to terms with. She continued:

"To make matters worse, on the day of Alan's funeral, 11 December 1992, a third article by Jack McLean was published in the Glasgow Herald. It made scathing reference to a House of Commons debate which had taken place shortly after Alan's death and during which our local MP, Michael Martin"—

known to many hon. Members—

"criticised Mr McLean about his insensitive articles. We never thought that he would sink to such a low and publish a further deeply offensive article at this time. It was an unethical and unforgivable intrusion into our grief…A full apology and retraction would have helped rectify the damage done to the good name and reputation of our dear daughter Diane and would have done something to ease the added trauma inflicted on our…son…While I fully endorse freedom of expression, it seems to me that journalists should have to behave responsibly when exercising this right, especially when they are intruding into the private grief of the families of victims of crime."

That final story is shocking. All hon. Members will agree that we need to look again at the freedom to write what would be defamatory statements if the person were alive when they are deceased. As is evident in the story, such articles can have serious consequences. The events show that vicious character assassination based on lies is often more damaging to someone after death than to a living person, because they cannot answer back. It adds to the grief and sense of injustice felt by close relatives. It is time Parliament addressed the issue.

The final case that I raised was a Scottish one, and the First Minister has said that he wants to make some changes to Scottish law. The Under-Secretary has tabled some amendments himself that will enable part or all of the Bill to apply to Scotland. I would like to know why Ministers have not dealt with the issue. In the Scottish Parliament, the Public Petitions Committee has looked into it and consulted on it. I do not know why the issue was not included in the Minister's consultation. The discussion on defamation has been going on for many months. Unless the Minister says that he is going to carry the matter forward, which I hope he will do, because I do not think party politics is involved—I am sure that all hon. Members are as shocked as I am after hearing about the terrible episodes—and unless we secure progress from the Minister, I shall push the amendment to a vote.

Ben Gummer (Ipswich) (Con): The hon. Member for Bishop Auckland has raised a fascinating and troubling series of cases. There are extra dimensions to the problems that she has identified—not just cases of defamation of the dead, but of gross intrusions of privacy of those who have died. It need not just be in the first year after someone's death, but for many years after, while their relatives are still living. The hon. Lady will know of many cases where articles have been written 20 or 30 years after someone's death that have caused enormous hurt and harm to other people.

The problem with the amendment is that it could introduce into English law, although I am no expert, one of the first instances in which action may be taken on behalf of someone who is dead. I wonder whether the correct forum for that is Lord Leveson's inquiry. Perhaps a proper submission could be made on issues of privacy and defamation and the practices of the press, especially when someone is unable to defend themselves because they are dead, and not introduce into English law a concept that I think will be difficult to sustain in this and in other fields, where action is brought on behalf of someone who is unable to testify because they are not living.

12 noon

Mr MacShane: I want to support what my hon. Friend the Member for Bishop Auckland said. The principle of "de mortuis nil nisi bonum" is a good one, but in my view, it does not extend through eternity. We say no ill of the dead immediately after they die, but after that, I am not sure that that can be extended. There are a few politicians about whom, perhaps when they die, people will have some hard things to say.

We have the odd case in Parliament of the late Gwyneth Dunwoody, the former hon. Member for Crewe. She was the daughter of Morgan Phillips, who was general secretary of the Labour party for many years after the war. Mr Phillips and Richard Crossman went on a Socialist International trip to Venice in the late 1950s and enjoyed the fine wine that Venice has to offer. A report in *The Spectator* hinted that that gathering of distinguished socialists from all over Europe was fluent and well oiled late into the night. Mr Phillips died shortly afterwards, and Mrs Dunwoody tried to sue *The Spectator* to restore the reputation of her dead father. Richard Crossman's diaries then came out, and he revealed that it was a stonking, 10-bottle evening and that they were well away, discussing socialism late into the night.

Many people felt that Mr Phillips's reputation as a great general secretary of the Labour party, a great international socialist and a great drinker had been well

and truly established and that perhaps Mrs Dunwoody, observing the filial duties that we all owe our father—I hope my three daughters owe those duties to me—was going a little beyond the grave in insisting that, somehow, that which was true should be declared not to have happened.

The amendment limits such claims to only one year, after which the sluice doors are opened. We are into the territory of journalists' behaviour and code of conduct. In that sense, the PCC has let us down grievously. The code of conduct for the National Union of Journalists is non-enforceable, so I would like it to be included in the Bill as a reference point for judges. That also touches on Leveson, on which, to some extent, I share the view of the hon. Member for Ipswich.

Paul Farrelly *rose—*

The Chair: Before you begin, Mr Farrelly, inevitably there will be references to the Leveson inquiry and everything else. I do not intend to try to do the Leveson inquiry here, you will be glad to hear. Discussions about Bollinger Bolsheviks are very entertaining, but the amendment seeks to set a time limit, so I appeal to Members so that, as we proceed, we address the technicalities, as well as the context.

Paul Farrelly: Thank you, Mr Havard. I do not intend to take a year to make my remarks, which will be short.

I sympathise greatly with the points made by my hon. Friend the Member for Bishop Auckland, but I also agree with the hon. Member for Ipswich and, to some extent, my right hon. Friend the Member for Rotherham that this is a question of press standards.

One of the unfortunate consequences of our libel law's restrictiveness is that quite often the truth only comes out when a person is dead. I invite the Committee to think about what may or may not have been reported after Robert Maxwell's death. Had the amendment been in force, the full truth might not have come out for another year. Although I sympathise with my hon. Friend the Member for Bishop Auckland, I encourage her not to press the amendment, because doing so would make the Committee and Parliament appear not to sympathise with the cases she has brought to our attention.

Robert Flello: If my hon. Friend the Member for Bishop Auckland decides to press the amendment, Opposition Members should support her simply to put on record the importance of the issue. I suspect that the Minister would not join us, but we shall not imply any criticism of the Government for not supporting the amendment. I fully understand why he would not do so, but we will press the amendment to put down a marker that this is an important issue that needs to be addressed.

Mr Djanogly: Amendments 4 and 5 would allow certain categories of close relatives to bring defamation actions in respect of statements made about a deceased person up to a year after that person's death. A long-established principle of common law is that a deceased person cannot be defamed because reputation is personal. A defamatory statement about a deceased person accordingly does not give rise to a civil action for defamation on behalf of his or her estate. Relatives of the deceased also have no right of action, unless the words used reflect on their own reputations. That reflects the central principle in civil proceedings generally, which is that a claim for damages can be brought only by the person who has suffered the injury, loss or, in this case, damage to his or her reputation as a result of the act or omission of another person.

The Government believe that there would be significant difficulties with attempting to allow relatives to bring defamation actions on behalf of deceased persons, even to the limited extent proposed in the amendments. As I have indicated, it would go against the long-standing and fundamental principle of the law that reputation is personal. That could create a precedent for further extensions to the law that would have a broader impact on the media and publishing industries, and create difficulties for those involved in historical analysis and debate.

In addition, practical difficulties would arise. For instance, it would be unfair to bar the defendant from using the defences that exist for a defamation action, and that could result in arguments over the truth of allegations about the deceased's character, which would inevitably be distressing for the family. My hon. Friend the Member for Ipswich, the right hon. Member for Rotherham and the hon. Member for Newcastle-under-Lyme suggest that this is more an issue for Leveson and a matter of privacy, and I believe that that is a good observation. I understand that Mr and Mrs Watson have given evidence to the Leveson inquiry.

Although restricting claims to situations where the alleged defamatory statement is made within a year of the deceased's death would mitigate the broader impacts and mean that only a limited number of claims could be brought, it would not in itself prevent potentially defamatory articles about the deceased person from being published and could have the effect of simply delaying publication until the one-year period had expired. In light of those difficulties, I hope that the hon. Member for Bishop Auckland will agree to withdraw her amendment.

Helen Goodman: I thought that the drafting of amendment 4 made it absolutely clear that the claimant is not the deceased person but their close relative, so I feel that the point raised by the hon. Member for Ipswich has been dealt with.

Some hon. Members have said that there could be a problem if someone waits for 12 months and then the articles appear, but I suggest that a pause and a period of time for checking the facts would probably make a substantial difference to the sorts of articles that are written. In some cases, it is quite clear that articles have been written within an incredibly short time and before the person's funeral has been held, and that the stories have not been properly checked.

The Maxwell case was raised and the point was made that had we had these laws, we would not have found out the truth—but that is the whole point. The point about the stories that were written about ordinary people who did not have a lot of money or clever lawyers is that they were untrue, and it is because they were untrue that there is a problem.

It is all very well to say that the issue is about press standards and we are not concerned with that, but the whole Bill is about press standards and a set of legal rules that will impact on how the media operate. That is

[Helen Goodman]

why a large number of people in the media have been begging us to bring forward parts of this Bill. It is simply absurd to say that press standards are one thing and the law is another.

Ben Gummer: May I clarify my point because I feel that the hon. Lady did not understand what I was driving at and I did not make it entirely clear? Although the claimant is the relative, the claim is on behalf of the reputation of someone who has died. The point of the Bill is to protect someone's reputation so that the defamation that has taken place will not impinge on their future life. The person who has been defamed has died, so there is no reputation to protect; that is the point of the common law being such. What the hon. Lady proposes would mean that no one would be there to testify in court and the truth of the evidence could not be tested.

The hon. Lady is entirely correct to raise those cases; there might well have been some great travesties. But people who have brought libel cases have often been found to be untruthful themselves. It would not be possible to test that in court if they were dead; it would be possible only to hear from those who knew them. The amendment would fundamentally unbalance justice.

Helen Goodman: I am sorry, but I do not think the hon. Gentleman is right about that. If he were, there would be no point in having inquests to find out why people had died—but we do have a system of inquests and they do inquire into precisely the kind of issues that the articles, which have so hurt families and relatives, are about.

I agree with the hon. Gentleman that privacy is also an issue—I shall say something about that when we get to another clause—but it is really not good enough for the Committee to shuffle the matter off, as with so many other problems, on to Lord Justice Leveson and say that he can deal with it. As I pointed out during the earlier debate, there will then be an argument that goes, "Oh, so we have got to have standards that relate to behaviours where there is no legal framework", and the whole thing will sort of float around, not rooted in anything. That is why I wish to press amendment 4 to the vote.

Question put, That the amendment be made.

The Committee divided: Ayes 5, Noes 11.

Division No. 1]

AYES

Flello, Robert	Slaughter, Mr Andy
Fovargue, Yvonne	
Goodman, Helen	Turner, Karl

NOES

Brake, rh Tom	Kwarteng, Kwasi
Djanogly, Mr Jonathan	Morris, David
Grant, Mrs Helen	Pincher, Christopher
Gummer, Ben	Soubry, Anna
Heaton-Harris, Chris	Vara, Mr Shailesh
Hughes, rh Simon	

Question accordingly negatived.

The Chair: We now move to stand part for clause 1, as we discussed earlier.

Robert Flello: I may have misheard the Minister; I think he said a moment ago that on Second Reading he set out the history of how the Government had reached their current position on "serious harm"—

The Chair: Is this a point of order, Mr Flello?

Robert Flello: It may well become one if you feel that that would be more appropriate, Mr Havard.

The Chair: Well, if it is not a point of order, I will have to ask you to sit down.

Robert Flello: On a point of order, Mr Havard. I may have misheard, but I thought I heard the Minister say that on Second Reading he set out the history of how the Government had got to the current position. I will check the *Hansard* for this morning later, but I cannot see in the *Hansard* from last Tuesday any such explanation in the Minister's closing speech. Perhaps he will write to the Committee before Thursday, setting out the history that he thinks he mentioned on Second Reading.

The Chair: Thank you, Mr Flello. I am sure that the Minister has heard what you have said and will provide adequate clarification at a later date.

Clause 1 ordered to stand part of the Bill.

Clause 2

TRUTH

12.15 pm

Robert Flello: I beg to move amendment 12, in clause 2, page 1, line 14, at end insert—

'(3A) The defence under this section does not fail on the basis that one or more of the imputations is not shown to be substantially true, if that imputation would not materially injure the claimant's reputation in the light of what the defendant has otherwise shown to be substantially true.'.

I will try not to detain the Committee long on clause 2. As I am sure you will be delighted to hear, Mr Havard, I will not be reading the amendment out, because it is as it appears on the amendment paper.

Subsection (3) covers the position in which there is more than one defamatory allegation. For example, saying someone is a liar is a lesser allegation than saying that someone is a thief, which is a higher allegation. Obviously, if it was shown to be true that the claimant was a thief, it would not matter that the defendant could not prove the lesser allegation. The effect of subsection (3) is that if the claimant proves the lower meaning, then even if he cannot prove the higher meaning, it is open to the court to decide that there has been no serious harm to reputation.

My amendment, which would insert proposed new subsection (3A), is best considered in relation to a case in which there is only one defamatory allegation. In fact, it would be better if it referred to a single imputation. For any defamatory allegation, there has evolved in case law a ranking stemming from a series of cases—most

specifically, Chase *v.* News Group Newspapers. In the judgment in that case, at paragraph 45, Lord Justice Brooke said:

"The sting of a libel may be capable of meaning that a claimant has in fact committed some serious act, such as murder. Alternatively it may be suggested that the words mean that there are reasonable grounds to suspect that he/she has committed such an act. A third possibility is that they may mean that there are grounds for investigating whether he/she has been responsible for such an act."

He went on to say that that distinction was first made, in 1964, by Lord Devlin in his speech in Lewis *v.* Daily Telegraph at page 282, when he said:

"I do not mean that ingenuity should be expended in devising and setting out different shades of meaning. Distinct meanings are what should be pleaded; and a reasonable test of distinctness would be whether the justification would be substantially different. In the present case, for example, there could have been three different categories of justification—proof of the fact of an inquiry, proof of reasonable grounds for it, and proof of guilt".

I understand that those levels of meaning have come to be known as Chase level 1—allegation of commission—Chase level 2, for an allegation of reasonable grounds to suspect, and Chase level 3, for an allegation that there were grounds for investigation. It is also recognised that there could be distinct levels between those—for example, Chase level 1.5, for "cogent grounds to suspect".

The court has to decide what the single meaning for each imputation is—that is, the meaning that would be understood by the average reader of the words—and that is what the defendant has to justify. That is the "single meaning" rule. The amendment would not change the "single meaning" rule or the Chase categorisation, but would allow the court to decide on a case-by-case basis that when the court fixes the single meaning as a higher one, such as Chase level 2, if a lower meaning, such as Chase level 3, were shown to be true, then in the circumstances of the case, no serious harm to reputation would be done, given that a lower meaning has been shown to be true. It would not mean that the defence would succeed in proving a lower meaning than that found by the court, but it would leave open that possibility on a case-by-case basis.

Those in favour of the amendment—Lord Lester's team, for example—believe that what matters is the facts of the case. Those who might oppose it prefer the rigidity of Chase level meanings, which the proponents regard as merely a useful but not determinative common law artifice.

The Libel Reform Campaign, for example, supports the amendment because it believes that all the facts and circumstances of the case—not artificial constructs consequent on the "single meaning" rule, which is itself artificial—should be decisive. I hope that the Minister is completely clear about that. I am sure he is, like the rest of the Committee.

I am trying to get from the Minister some examination of whether Lord Lester's proposal should be in the Bill.

Mr Djanogly: We move on to the defences to defamation. Clause 2 deals with the defence of truth. Under amendment 12, that defence would not fail where one or more of the imputations made against the defendant was not shown to be substantially true, provided that the imputation would not

"materially injure the claimant's reputation in the light of what the defendant has otherwise shown to be substantially true."

The amendment appears largely to reflect subsections (2) and (3) of clause 2. As the hon. Member for Stoke-on-Trent South said, the intention was to reflect a provision from Lord Lester's private Member's Bill. That related to cases in which a single imputation would have different shades of meaning, such as where there had been an accusation of money laundering and the defendant could not prove the substantial truth of that allegation, but could show that the claimant had been involved in fraud or large-scale tax evasion.

We have given careful consideration to whether a provision dealing with single allegations with different shades of meaning should be included in the Bill, and have decided that it would not be appropriate. We are concerned that allowing the defendant to succeed where he or she is unable to establish that the meaning of the allegation is substantially true would undermine the clarity of the defence and create uncertainty over what the defendant must prove to succeed.

Mr MacShane: Perhaps I am an obsessive, but whenever I see adverbs in legislation my nerves start to tingle. What does "substantially" mean? Something is either true or not true. Are you substantially a virgin? Are you substantially wet when it rains? What is the word doing in the clause?

The Chair: The Minister is not required to answer in detail.

Mr Djanogly: Thank you, Mr Havard, for giving me that latitude.

It is right that a defendant should be protected if he can prove the substantial truth of what he says. If, however, he cannot, he should not succeed in his defence. What he has proved may affect damages awarded against him, and may well mean in some cases that no award is appropriate. That, however, is another matter. That, in the Government's view, is the right balance. If the defendant cannot prove the substantial truth of what he has said, he should not succeed in the defence.

The provision could also undermine the effectiveness of new measures in and alongside the Bill, designed to enable the court to resolve key issues, such as the meaning of the words complained of, early in the proceedings. It could mean that the meaning would remain in doubt until trial, because, despite the court's having determined what meaning applied, it would continue to be uncertain exactly what the defendant would have to prove to succeed in the defence.

On that basis, I hope that the hon. Gentleman will agree to withdraw the amendment.

Robert Flello: I am not sure that I entirely agree with the Minister, but in a spirit of trying to move forward with the Bill and on to clause stand part, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Question proposed, That the clause stand part of the Bill.

Robert Flello: Truth is indeed, as was said earlier, the oldest defence in defamation, as stating the truth ought to be a justification even if it damages an individual's

[Robert Flello]

reputation. Current case law has established that the defendant must show that what he or she published is substantially true, as opposed to each and every word being true. In Chase *v.* News Group Newspapers Ltd, the Court of Appeal said that

"the defendant does not have to prove that every word he or she published was true. He or she has to establish the 'essential' or 'substantial' truth of the sting of the libel".

Statute should reflect that; if not, there is a risk of confusion about whether previous case law should be followed.

I can do no better than to refer to what the Joint Committee said about the issue of truth and protecting the truth:

"In defining one of our Report's core principles as the protection of freedom of speech we emphasised that the law should encourage this right to be exercised responsibly. Having respect for the truth is fundamental to what we mean by this. From the perspective of free speech, any person who publicly states a matter that is substantially true should never be liable to pay damages for defamation, irrespective of the harm or embarrassment that may be caused. The courts have for many years recognised the common law defence of 'justification' which protects publications that are substantially true. Where multiple allegations are made, the 1952 Defamation Act ensures that a claimant will fail if, having regard to those allegations proved to be substantially true, the claimant's reputation is not materially injured by those allegations that are not. This is a fundamental defence in this area of law."

The Committee also recommended that

"the name of the 'truth' defence be changed to 'substantial truth' which better describes the nature of the test".

I go along with that, although I understand that it is not possible to change clause titles.

Obviously, I would have preferred my proposed new subsection (3A) to be in the clause, but I have withdrawn my amendment. In many respects, clause 2 does the job and it is an important clause.

Simon Hughes: I have a couple of brief points. First, on the question of substantial truth and following the comments of the right hon. Member for Rotherham, there is an argument for having a defence called "substantial truth", meaning that there is a real element of truth, even though everything may not be entirely true. That is what that means and that is where the law has got to, as the hon. Member for Stoke-on-Trent South has just said. If that is so, the case made by the shadow Minister and the Joint Committee—that that should be the technical name for the defence—is the right place to arrive at.

At the moment, the clause title is "Truth" and the defence is the truth defence, but someone's defence would succeed even if the statement was not entirely truthful. If it was mainly truthful, that would get them home with their defence. It seems to me that, in the interests of clarity, it would be better to reflect the offence, as it will be defined, in the clause title.

Mr MacShane: The right hon. Gentleman has been involved in many vexatious and disputatious political statements during his career, as we all have—he perhaps more than most. What happened to the old statement that "The greater the truth, the greater the libel"?

Simon Hughes: That is almost a philosophical or rhetorical question. The honest answer is that I do not think that that works. Like the right hon. Gentleman, I have occasionally been involved in libel cases, both at the receiving end and the giving end. People's experience is that if what they say is pretty accurate and can be backed up, it is not a libel, but if it conveys a message that cannot be backed up, they are in trouble. We have all understood the parameters, so that is not a philosophical question but a very real practical one.

The hon. Member for Bishop Auckland mentioned some examples. We all have constituency examples of when, bluntly, a statement has been made that was proved to be not generally true. It is much more important for our constituents than for us, but whoever that involves, they expect—we are not there yet—a bigger statement to be made in the same place stating that the original was not true. At the moment, that is not done and we need to pursue that through the Leveson inquiry and other routes.

12.30 pm

The second point is more general. I speak as a lawyer who has tried, in all my time here, to ensure that Bills are as well drafted as possible. I understand that it is slightly complicated, but will the Minister reflect after Committee stage whether we can draft the clause better with the help of parliamentary draftspeople? It starts by stating that the defence is that

"the imputation…complained of is substantially true."

"Imputation" is not the only word that we could use—it is not a terribly user-friendly one, but we may have to stay with it. Then we get into the explanation of imputation, and subsection (3) will lose anyone who is not a lawyer pretty easily. I have not written a redraft, but I cannot believe it would be impossible to do so in a more user-friendly way.

I see the shape of the Bill, which gives the definition of defamation and then goes through the different defences. That structure is fine, but the truth defence, which I hope will be changed to the "substantial" truth defence, might be set out and qualified differently. It could be redrafted to make it easier for ordinary people who are not lawyers so that they do not have to take legal advice to understand it.

Tom Brake: Does my right hon. Friend agree that the word "allegation" might be more suitable than "imputation"?

Simon Hughes: The Minister has the benefit of the advice of civil servants and others. I am just keen that we look at this particular defence and its wording. First, I want us to use words that are more commonly used in the English language, and my right hon. Friend makes a good suggestion. Secondly, we should look at the structure, because when we get into qualifications and exceptions, it becomes very difficult for lay people to follow.

We are trying to make the law clear. We are taking it from judge-made law to statute law and putting it all in one place. We therefore want the Bill to be one that people can read, so that even if they do not get all the answers, they will at least know where to start.

Paul Farrelly: Broadly, the clause is welcomed by people to whom I have talked in the media world and the legal sphere, but I want to pose three questions to the Minister that have arisen from those discussions.

The first goes back to the point that has been made regarding the word "imputation", which is hardly plain English. What consideration have the Minister and his team given to other words? For example, the Lester Bill uses the term "allegation", and other people have suggested that the word "meaning" be inserted. I should be grateful if the Minister would be clearer on the choice of words.

Secondly, why is section 2(3), in conjunction with section 2(2), to be preferred to section 5(4) of the Lester Bill, which we could amend by excluding "materially injure" and replacing it with "seriously harm"? Does the Minister intend any difference in effect between the two types of drafting?

My third question goes back to procedure. We retreated from the word "alongside" to "procedures will be enforced when the Bill completes its passage", which is against the recommendation of the Joint Committee on the draft Bill, which recommended that the House have time to consider those procedures. How does the Minister envisage the courts operating to have early discussions on the meaning of an article—what is the sting?—so that defendants know what they have to prove or disprove, the truth of which they will have to establish or otherwise?

Helen Goodman: The clause raises philosophical questions. What is truth? As I am sure the Minister knows, "beauty is truth, truth beauty", but I suspect that he is taking a more Cartesian approach to the measure. He is obviously looking for a direct correspondence between what is written and the facts. I am unclear whether he is trying to make a distinction between true beliefs and knowledge. Is he saying that people can write things that they believe to be the case, which turn out to be true on subsequent examination, or—this is perhaps what clause 4 is driving at—is he saying that they must show that they have acquired the view that they have written through a method that can be relied upon to produce knowledge? I think it is the latter, but he needs to be clearer about what he is aiming at.

I want to return to the issue of privacy, as raised by the hon. Member for Ipswich, and ask the Minister how the defence of truth relates to arguments about privacy. For example, how will a case be handled where the claimant and defendant both agree that the statements made are harmful, where the claimant says that they are not true, and where the defendant proves that what has been said is true, but it is a truth that may have breached the defendant's privacy? Will the person simply lose their defamation case and be regarded as foolish for having brought it, or will there be some way of addressing the fact that, in writing something that was true, the author breached the person's privacy? This is all quite tricky, and I wonder whether the Minister has given any thought to the inter-relationships between the different things.

Ben Gummer: I feel that we have slightly over-complicated things. It is difficult to draft the proposal in a simpler way, but an example may help. An allegation that someone visited a prostitute on a Monday being shown to be true in that he visited a prostitute, but on a Tuesday, shows the nature of the substantial truth that we are dealing with. Given the fact that the date was found to be wrong, I believe the clause to be saying that the substantial truth still holds and that the defence, if it is found to be true, still stands. We need an anecdote to be made available to lawyers for them to explain the measure to clients. I am not quite sure how the language could be simplified, but the Minister may be more fluent than I.

Mr MacShane: The hon. Gentleman cites a good example. The person visited a prostitute on a Monday, which is true, but it is only important and defamatory if he did something with the prostitute. *[Interruption.]* No, no. The hon. Member for Spelthorne explodes, but the point is that a newspaper can publish something that is technically true—the person was seen going into a massage parlour or whatever—but unless it can actually show that an act with a trafficked girl or something took place, the publication of a statement that is technically true can actually be defamatory unless it can be shown that a crime or something that is defamatory took place.

Kwasi Kwarteng (Spelthorne) (Con) *rose—*

The Chair: Before the hon. Member for Ipswich continues, I remind hon. Members that they cannot intervene on interventions. If they want to speak, I am here and available to see them.

Ben Gummer: Whatever the nature of the defamatory comment, there is something that is defamatory and something that is not true could be contained within the statement, which is to say the date when the action took place.

Kwasi Kwarteng: Let me use another example. It is clear that there is a difference between truth and substantial truth. For example, if I were to accuse a gentleman of stealing a million pounds when he in fact stole £900,000, my initial statement would be false, but it could be interpreted as being substantially true in that he stole a lot of money. That would be considered comprehensible to a 10-year-old, and we are getting ourselves tied up into awful and needless complications by defining this particular distinction.

Ben Gummer: I am not sure that I can add anything more to my hon. Friend's comments.

The Chair: It is simple enough for lawyers to understand.

Mr Djanogly: Clause 2 replaces the common law defence of justification with a new statutory defence of truth. Essentially, this is intended to reflect the current law but make it simpler and clearer. It will be a defence to an action for defamation for the defendant to show that the imputation conveyed by the statement complained of is substantially true. This reflects recent case law and ensures that the defendant does not have to prove that every word he or she published was true. What the defendant has to do is establish the substantial truth of the sting of the libel. In any case in which the defence of truth is raised, the court will need to consider what imputation or imputations are actually conveyed by the statement complained of, and whether they are substantially true.

Subsections (2) and (3) deal with the situation where the statement complained of contains two or more distinct imputations. The defendant will not lose the

[Mr Djanogly]

defence if, looking at the imputations that are shown to be substantially true, those that are not shown to be substantially true do not seriously harm the claimant's reputation. These provisions replace section 5 of the Defamation Act 1952, which is repealed by subsection (4). The approach that is taken here reflects that taken in the 1952 Act, but is expressed in more modern terminology. Subsection (4) also formally abolishes the common law defence of justification as it would be unnecessary and confusing to retain it.

Subsection (4) also repeals section 5 of the 1952 Act. That means where a defendant wishes to rely on the new statutory defence, the court would be required to apply the words used in the statute and not in the current case law. In cases where uncertainty arises, the current case law would constitute a helpful but not binding guide to interpreting how the new statutory defence should be applied.

In the wider context, I can say that in preparing a draft Bill, we reached the conclusion that it was preferable for reasons of clarity and certainty to replace the common law defence with a new statutory defence rather than simply to rename it. Two-thirds of the responses to the consultation on the draft Bill supported that approach.

The consultation paper also proposed formally to abolish the common law defence and a similar proportion of responses supported that. The rationale for it was that otherwise the common law defence would continue to exist and defendants would potentially be able to use it as a separate defence either instead of or in parallel with the new statutory defence. That would undermine our aim of simplifying and clarifying the law and would create a risk of uncertainty and confusion in practice and more lengthy court cases.

The effect of the approach taken in the Bill is that where a defendant wishes to rely on the new statutory defence, the court would be required to apply the words used in the statute and not the current case law. That does not mean that in reality the case law will have no future impact, and it will ultimately be for the courts to decide. In cases where uncertainty arises, the case law would constitute a helpful but not binding guide to interpreting how the new statutory defence would be applied.

My right hon. Friend the Member for Bermondsey and Old Southwark asked whether we should call the defence "substantial truth". I can say to him that we did not consider that it would be necessary to rename the defence as we believe that the substance of the clause already makes it sufficiently clear that the defence will succeed where the defendant can show that the imputation conveyed by the statement complained of is substantially true. We will look at his drafting points on the Bill, and I will write to him on the matter and on subsection (3), which was also of concern to the hon. Member for Newcastle-under-Lyme.

Question put and agreed to.

Clause 2 accordingly ordered to stand part of the Bill.

Clause 3

HONEST OPINION

Robert Flello: I beg to move amendment 13, in clause 3, page 2, line 8, at end insert 'or'.

Amendment 13 relates to what I suspect is simply an error in the wording of the Bill. It is important that the word "or" is inserted in the clause to ensure there is clarity about the circumstances in which there is a defence to an action for defamation. Subsection (4) states:

"The third condition is that an honest person could have held the opinion on the basis of—

(a) any fact which existed at the time the statement complained of was published;

(b) anything asserted to be a fact in a privileged statement published before the statement complained of",

and I would insert an "or" before paragraph (b), because in the absence of that word people might think that there was an imputed "and", and that someone would have to show both limbs—(a) and (b).

I hope that that is a simple drafting error, and that the Minister will be able to indicate whether that is the case. If it is such an error, I am sure that he will accept my amendment because, massive and extremely changing to the Bill that it is, it does have a substantial impact. If for some reason the Minister feels that it is not appropriate to have an "or" or an "and", or anything else for that matter, I am sure that he will enlighten the Committee as to why.

12.45 pm

Mr Djanogly: The amendment makes a small drafting change in subsection (4) of clause 3, which is on the new defence of honest opinion. Under the subsection, one of the conditions that must be satisfied for the defendant to succeed in a defence of honest opinion is that they must show that an honest person could have held the opinion either on the basis of any fact that existed at the time the statement complained of was published, or on the basis of anything asserted to be a fact in a privileged statement published before the statement complained of.

I can confirm that the defendant will succeed in the defence if they can show that either of the limbs is satisfied; they do not have to show that both are. That will be the effect of the subsection as drafted, and we do not therefore consider the amendment to be necessary. On that basis, I hope that the hon. Gentleman will agree to withdraw the amendment.

Robert Flello: I had a feeling that the Minister might say that, but I am disappointed, because the addition of "or" sets the matter beyond any doubt. Acceptance by the Minister of what is a slight amendment to clarify the Bill would have been a positive thing, but in the spirit with which I think we have conducted this morning's sitting, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Robert Flello: I beg to move amendment 7, in clause 3, page 2, line 11, leave out

'did not hold the opinion'

and insert 'acted out of malice'.

I have a feeling that, with all this speaking, I will be drinking a large amount of liquid at lunch time. The amendment seeks to clarify ambiguous wording that could produce a weakness in the Bill's implementation. The Joint Committee on the draft Defamation Bill expressed its concern that although it was happy to see the introduction of the defence of an honest opinion, a number of changes were required to make the law

clearer, simpler and fairer to the ordinary person. I am still not convinced that the Bill has satisfactorily done that in this provision, despite the changes made since the early draft Bill was published.

Mr MacShane: Does my hon. Friend accept that his "or" might come in at this stage, so that the text read: "did not hold the opinion or acted out of malice"? I wonder whether the Minister might consider that when he responds.

Robert Flello: My right hon. Friend makes a good point. It is always important to stick one's "or" in at every opportunity.

The issue here is about honest opinion and whether someone is acting out of malice or being reckless with the truth. The explanatory notes helpfully go through the clauses in a way that gives some guidance, but they are not strong enough in explaining what subsection (5) means. It states:

"The defence is defeated if the claimant shows that the defendant did not hold the opinion."

What does that mean? Does the claimant have to trawl through a huge amount of paperwork to find an article written by the defendant, saying that a contrary opinion was held? My amendment would sharpen the wording up and tries to show that the truth was being handled in a reckless way or with reckless disregard, or, as the amendment states, that the opinion was pushed more from a point of malice.

As the explanatory notes acknowledge, the existing law states that

"the defence of fair comment will fail if the claimant can show that the statement was actuated by malice."

Again, no explanation has been given about why it was considered necessary to make the change from the defendant being shown not to have held such an opinion. Naturally, that the defendant held the opinion is at the crux of that defence, but it is also crucial to consider the reasoning behind the statement's publication. Did the defendant wish generally to put their opinion out in a positive and measured way, or did they seek to do so in a manner that did their best to disguise a deliberately intended, malicious motive?

It is vital, as stated in the Joint Committee report, that a defendant is not simply allowed to dress up a personal attack as an expression of opinion and ride roughshod over the law. The Bill needs to be absolutely watertight in that area, or we might soon find ourselves legislating once more to close a loophole in the provisions.

As well as commenting on those points, will the Minister explain whether a reckless disregard to the truth, currently considered to be a lack of honest belief, would still defeat such a defence under the current drafting? I hope he will explain why he feels that simply stating that the defendant did not hold the opinion is sufficient when the rest of the clause relates to honesty and honest persons. Is my proposal to substitute the word "malice" not a better way of being clear about what the Government mean in subsection (5)?

I have tabled this probing amendment to try and get to a point where the Bill, when it leaves the Committee, is extremely strong and clear about what is meant. So far this morning, we have not had as much clarity through the Bill process as I would like, and I encourage the Minister to respond to the points I have raised. I look forward to hearing his comments.

Mr Djanogly: The amendment relates to circumstances in which the defence of honest opinion is defeated. It would change clause 3(5), which provides for the defence to be defeated if the claimant shows that the defendant

"did not hold the opinion",

instead providing for the defence to be defeated if the claimant shows that the defendant "acted out of malice".

The right hon. Member for Rotherham would be right about sticking in his "or"—I think that was where we got to—if I agreed with the amendment, but that is not the case. As the explanatory notes state, and as the hon. Member for Stoke-on-Trent South pointed out, the provision in subsection (5) is a subjective test that reflects the current law, whereby the defence of fair comment will fail if the claimant can show that the statement was actuated by malice. We consider that the drafting of the clause, in conjunction with the explanation provided by the explanatory notes, is sufficiently clear, and that the clause will be interpreted appropriately by the courts.

The courts have adopted different tests for what amounts to malice in the context of both honest opinion and qualified privilege. The term "malice" is used in clause 6(6), which extends qualified privilege to peer-reviewed material in scientific and academic journals, and use of the same term here could create confusion over the interpretation that should be applied. On that basis, I hope that the hon. Gentleman will withdraw his amendment.

Robert Flello: I fear that we are not getting the clarity in the Bill that we were hoping to see. It was welcomed across the House and on Second Reading it was looked at as being a positive step forward. Organisations and groupings such as the Libel Reform Campaign have welcomed the Bill and the Secretary of State's enthusiasm behind it, but I feel that we are not getting clarity from the Minister. I know that this morning's session is not too far from being drawn to a conclusion, and I hope that the Minister takes the opportunity over the next few hours to be able to come back to the Committee this afternoon with a renewed vigour and explain what is meant by some of the points in the Bill to ensure that we get that clarity.

This was intended as a probing amendment and I am disappointed that the Minister has not used the opportunity to expand on things in the way that I hoped he would. I will withdraw this amendment, but if we do not see more clarity from the Minister, I will be less inclined to withdraw later amendments as the Committee continues. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

The Chair: Before I call the hon. Member for Stoke-on-Trent South, we will finish at 1 o'clock and we will reconvene at 1600 hours—that is 4 o'clock, for those of you who work in 12-hour time.

Robert Flello: I beg to move amendment 14, in clause 3, page 2, line 27, at end insert—

'(e) a defence under common law qualified privilege.'.

[Robert Flello]

The amendment would insert a fifth point to the list of four points under subsection (7) of clause 3. That subsection clarifies what "a privileged statement" means under subsection (4), which provides one of the four conditions for an honest opinion defence.

Currently under the subsection, a privileged statement is a privileged statement if it has

"a defence under section 4 (responsible publication on matter of public interest)".

Fair enough; that seems quite reasonable. It includes

"a defence under section 6 (peer-reviewed statement in scientific or academic journal)",

which the Bill brings forward. Then at paragraph (c) we have

"a defence under section 14 of the Defamation Act 1996 (reports of court proceedings protected by absolute privilege)".

Again that is quite reasonable. At paragraph (d) we have

"a defence under section 15 of that Act (other reports protected by qualified privilege)."

The provision that jumps out is the one that relates to common law qualified privilege. Indeed, subsection (8) talks about the common law defence of fair comment being abolished and section 6 of the Defamation Act 1952, which relates to fair comment, being repealed, but there does not seem to be any mention that I can see—I am sure that the Minister, when he gets the opportunity, will leap to his feet to explain why it is in there—of the common law qualified privilege.

The amendment, which would put common law qualified privilege into the clause, would ensure that the defence is complete. In other words, the opinion could have been held on the basis of a statement made which was privileged, no matter how the privilege came about. That would be consistent with both current statute and case law. Common law qualified privilege exists to protect people acting in the public interest or out of a duty more generally or between those with a common interest, for example between professions.

It is obviously an omission, because honest opinion has always been allowed to be founded on a factual matter set out in common law. That is evidenced by the fact that the subsection includes a statutory Reynolds defence under paragraph (a), which covers a defence under responsible publication. That has always been a form of common law qualified privilege. It may be that the Government are choosing deliberately to only list the statutory forms of qualified privilege, without meaning to exclude common law privilege. If that is the line that the Minister intends, why are they doing that?

1 pm

The Chair adjourned the Committee without Question put (Standing Order No. 88).

Adjourned till this day at Four o'clock.