PARLIAMENTARY DEBATES

HOUSE OF COMMONS
OFFICIAL REPORT
GENERAL COMMITTEES

Public Bill Committee

DEFAMATION BILL

Second Sitting

Tuesday 19 June 2012

(Afternoon)

CONTENTS

PUBLISHED BY AUTHORITY OF THE HOUSE OF COMMONS
LONDON – THE STATIONERY OFFICE LIMITED

£5·00

PBC (Bill 005) 2012 - 2013

Members who wish to have copies of the Official Report of Proceedings in General Committees sent to them are requested to give notice to that effect at the Vote Office.

No proofs can be supplied. Corrigenda slips may be published with Bound Volume editions. Corrigenda that Members suggest should be clearly marked in a copy of the report—not telephoned—and must be received in the Editor's Room, House of Commons,

not later than

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

(Afternoon)

[Mr Dai Havard *in the Chair*]

Defamation Bill

Clause 3

Honest opinion

Amendment moved (this day): 14, in clause 3, page 2, line 27, at end insert—

'(e) a defence under common law qualified privilege.'.—*(Robert Flello.)*

4 pm

Robert Flello (Stoke-on-Trent South) (Lab): We had reached my final run at the amendment, although I am sure that the Committee, the *Official Report* or, not least, you, Mr Havard, will soon correct me if I start repeating what I have already said.

The amendment corrects an omission, because common law qualified privilege has always been considered. The various tests in the Bill, in paragraphs (a) to (d), already set out the different forms of what makes a privileged statement, so perhaps the Government are choosing to list only the statutory forms of qualified privilege deliberately, without meaning to exclude common law privilege. If so, why are they doing that? The Government run the risk of confusing the courts as to their intention.

I hope that, as with my reasoning for moving amendment 13, there might have been a genuine error in the failure to include the defence under common law qualified privilege in the list in subsection (7), but the explanatory notes have little information. I looked for an explanation as to why it might have been excluded, but in fact the explanatory notes jump straight from subsection (6) to subsection (8). Despite my best endeavours, therefore, I have been unable to locate an explanation. However, I am sure that the forensic eye of the Minister will have spotted it if it is in the notes or, failing that, that his officials will be soon passing him the appropriate information.

The notes state that

"a statement is a 'privileged statement' if…the defence of absolute privilege under section 14 of the 1996 Act; the defence of qualified privilege under section 15 of that Act; and the defences in clauses 4 and 6 of the Bill relating to responsible publication on a matter of public interest and peer-reviewed statements in a scientific or academic journal."

It therefore seems strange that while those four defences are mentioned specifically, common law qualified privilege is not. I think it is another oversight, so I hope that the Minister will get to his feet in a moment and give an excellent explanation of why it has been deliberately left out or, if an oversight, when he will ensure that it is corrected, in Committee, on Report or in another place.

Paul Farrelly (Newcastle-under-Lyme) (Lab): I should like to make a brief contribution. My hon. Friend's suggestion is entirely sensible, and there is such a defence at common law. Indeed, until I saw my hon. Friend's amendment, I was going to table a similar one myself, drafted only a little differently—"a defence of qualified privilege at qualified law"—but I will leave it to the Minister to consider which is the better drafting.

Mr Denis MacShane (Rotherham) (Lab): I hope that the Minister will accept the amendment tabled by my hon. Friend the Member for Stoke-on-Trent South, because it would clarify in the Bill the high importance of common law qualified privilege. If it is not in the legislation, when judges come to interpret the meaning of what Parliament decided, they might find that they do not have sufficient guidance.

The Defamation Act 1996 lists a lot of statements of absolute qualified privilege. For example:

"A fair and accurate report of proceedings in public of a legislature anywhere in the world...A fair and accurate report of proceedings in public before a court anywhere in the world."

We sometimes think that the only absolute privileges are based on what is said in a court or indeed in the House of Commons. There has been discussion in recent years about whether even the privilege that we all thought we had as Members of Parliament to say anything in the Chamber may now be challenged, but that is perhaps a subject for another debate. However, it is important for people and journalists to understand that provided the report is accurate and reasonably contemporaneous, they have considerable protection. For example, we have qualified privilege for a

"fair and accurate copy of or extract from a notice or other matter issued for the information of the public by or on behalf of…a legislature in any member State or the European Parliament…the government of any member State, or any authority performing governmental functions in any member State or part of a member State, or the European Commission."

We have qualified privilege for a

"fair and accurate report of proceedings at any public meeting or sitting in the United Kingdom of...a local authority, or local authority committee."

That is of very high importance, because often in the smaller committees of local authorities things are said that are of deep importance, perhaps on planning issues, or, in an area of great public concern at the moment, how we look after children in care. Local papers must have the privilege to report so that the local public—local citizens—are aware of what the people they elect or who are placed in positions of legal and state authority over others, such as social service workers and the police, are up to.

Again, it is important to understand that qualified privilege extends to the publication or extract

"from any document circulated to members of a UK public company...by or with the authority of the board of directors of the company...by the auditors of the company, or...by any member of the company in pursuance of a right conferred by any statutory provision."

Of course it might now extend to e-mails. In some recent public inquiries and court cases, we see that e-mails are now fully in the public domain and have to be submitted to authorities when legal proceedings start, and whatever is in those e-mails—however embarrassing and however difficult—is protected by

qualified privilege when reported by the media in the newspaper or on the BBC or whatever. That is why I think that adding the line on protection that my hon. Friend has proposed is important.

Most of the qualified privilege protections are defined by statute, but there are common law ones, the most famous one being the Reynolds case. The classic case of a common law qualified privilege would be that of a lecturer writing a reference for a student. He would have a duty to tell the truth about the student even if that truth were per se defamatory, but there would be protection of qualified privilege as long as the reference was written without malice and the necessary steps had been taken to make sure that it was factually accurate. There are quite a lot of circumstances in civil life when people have to make defamatory statements. In fact, they have a duty to do so, because it is wrong to give a reference or to issue a report, say, on the quality of someone in their charge—a student in the case of a lecturer, or perhaps a work colleague—and then send them on elsewhere with a reference that is factually inaccurate. Qualified privilege, provided that the report is made without malice and is factually accurate, extends to that case.

Helen Goodman (Bishop Auckland) (Lab): My right hon. Friend is right. One is bound to give truthful references to other employers. Sometimes that may involve imparting negative information, but surely that is not being defamatory, because although the statements are negative they are true. Is my right hon. Friend saying that the statements must be protected from claims for the same reason that we want to avoid other trivial claims?

Mr MacShane: I really wish we could expunge the notion of trivial claims. I may be a trivial person, but if something that is said about me is defamatory and lowers my reputation in the eyes of ordinary people, it does not matter how trivial I am, or that the statement was made in a parish magazine; it is still defamatory, and people must understand that. Qualified privilege is about the person who cannot accept that a judgment has been made about his or her character that has been necessarily circulated and then reported, but without malice, on the basis of evidence and facts. It is necessary to read into our record that that is protected under common law qualified privilege. That is why I urge the Minister to accept the amendment of my hon. Friend the Member for Stoke-on-Trent South.

Another more obvious example is that one doctor might say to another that a named person had a certain disease, which might carry with it negative social connotations. Again, that could be defamatory per se, and might indeed be slander, but if it is true and was said without malice, and if in the course of an investigation the information was made available to a journalist, that journalist would have the right under common law qualified privilege to publish it, provided that its publication was on the basis of public interest.

I could cite other examples, but I do not want to take up too much of the Committee's time, although I am tempted to read as many examples of common law qualified privilege as possible into the record. Believe me, I have been there, and sat in front of judges who have asked what Parliament meant by something. We all generally agree that in the Bill we are tidying up lots of bad aspects of libel law, so we are saying, "Let's get it over and done with fairly quickly." But we should take a little time, and read stuff into our record that may be of some use in 10, 20 or 30 years, so that judges will understand that we did not seek to limit journalism, certainly on the basis of existing practice. Qualified privilege is not just about what we say in the House of Commons or what a judge says; we all know what can be reported. There is absolute privilege in the House of Commons, but qualified privilege is a very important defence of accurate reporting in the public interest.

Robert Flello: I am thoroughly enjoying my right hon. Friend's contribution, which is extremely important. When he spoke about Parliament's absolute privilege, I wondered whether one of his examples would be the duty interest when a Member of Parliament corresponds with a constituent or a local authority, and whether he would put on the record the common law privilege around that.

Mr MacShane: That remains to be tested. I am sometimes concerned about the extraordinary nature of confidential information that I receive, and I am sure that that is true of all right hon. and hon. Members. We must look after it carefully, shred it, or classify it in case our offices are ever raided, and material is removed, or in case someone breaks in and steals old correspondence from the bins. Some of the material that we receive is stronger than anything that a lawyer, a doctor or a priest in the confessional hears.

I do not know whether the point has ever been tested in law, but it is important. I know that anything held in the House is protected under privilege. We had a problem when the police raided the offices of the hon. Member for Ashford (Damian Green) who is now the Minister for Immigration. I wrote at the time saying how outrageous it was that anyone had given technical permission for the police thus to do.

4.15 pm

To return to the substantial point, the Bill will be the defining legislation on libel, slander and defamation for perhaps a generation or more, so it is extremely important to underline common law qualified privilege. There is a duty to say unwelcome things about people perhaps philosophically in our country, because on the whole we like to be nice to each other, and at times we forget that solemn duty to tell the truth, however painful and difficult it may be, so that we can make proper judgments about what course of action to take. That is not only at the high level of Minister or the honourable duty that we must all try to discharge as Members of Parliament, but goes right down to teachers, public sector employers, and public health authorities that at times have to say hard and difficult things to their local citizens in order to ensure that public health is protected.

In conclusion, I invite the Minister, even this afternoon, to accept the amendment tabled by my hon. Friend the Member for Stoke-on-Trent South. I know what it is like to be in government when civil servants have worked jolly hard and think that they have prepared an absolutely watertight case. They sincerely believe that and I do not disparage them. I know that all civil servants in this Committee Room are in the upper tier and are not those whom the Minister for the Cabinet Office and

Paymaster General (Mr Maude), who is making a statement downstairs in the Chamber, proposes to eliminate from the civil service. We have the crème de la crème and we are very lucky, and they have an excellent Minister to convey their words to the public.

I know and have great confidence in the Minister's ability. I have skied with him; he is a fast, swerving skier and he is capable at times of saying to his civil servants, "Thank you for your brilliance. I am just going to be a more humble person, and I think that writing common law qualified privilege permanently into the Bill would be a good thing." I hope that he will accept my hon. Friend's amendment without any more reference to his left.

The Parliamentary Under-Secretary of State for Justice (Mr Jonathan Djanogly): I should just say, particularly in response to the previous valuable contribution, that we will come on to the issue of privilege under clause 7.

Turning to the amendment, the Joint Committee recommended that the Bill define a "privileged statement" for the purposes of subsection (4). Although I take point made by the hon. Member for Stoke-on-Trent South that the explanatory notes are slightly on the light side, we believe that subsection (7) does that by listing the defence of absolute privilege under section 14 of the Defamation Act 1996, the defence of qualified privilege under section 15 of that Act, and the defences in clauses 4 and 6 of the Bill that relate to responsible publication on a matter of public interest and peer-reviewed statements in a scientific or academic journal.

Amendment 14 would add to that list

"a defence under common law…privilege",

and would mean that a defendant could rely on any common law privilege to support a defence of honest opinion. There are two main categories of common law privilege: common law reporting privilege, which attaches to the fair and accurate reporting of various types of public proceedings or notices; and common law duty and interest privilege, which attaches to statements in private communications where the publisher and recipient have a reciprocal duty and interest in making and receiving the statement. Even within those categories, however, there is a wide range of particular circumstances in which privilege arises.

The Joint Committee took the view that the definition of privilege should be confined to the absolute or qualified privilege that presently attaches at common law or by statute to the fair and accurate reporting of various types of public proceedings or notices. It was concerned that a broader definition would protect opinions on statements contained in private communications where the publisher and recipient have a common law defence of privilege based on a reciprocal duty and interest, and that that could result in protection being given to comments expressed on wholly false statements contained in private communications. We share the Joint Committee's concerns, and that is reflected in subsection (7) as drafted.

Common law reporting privilege has, effectively, been superseded by the statutory provisions in the Defamation Act 1996. On that basis, I hope that the hon. Member for Stoke-on-Trent South will agree to withdraw his amendment.

Robert Flello: Here we are again. The Minister has talked about the two strands of common law privilege and has mentioned in particular duty and interest, which my right hon. Friend the Member for Rotherham and I raised. It is all very well to say that the Joint Committee had a view and the Minister will therefore follow it, but as we heard this morning and I am sure we will hear over the course of the next few sittings, the Joint Committee's views on other points have been disregarded. Some members of the Joint Committee are also members of this Committee and I am not sure how they feel about the Government picking and choosing from the report.

It is important that, under that that common law qualified privilege of duty and interest, private correspondence between two parties should have that protection. What if, as my right hon. Friend asked, a Member of Parliament's constituency office was broken into? Heaven forbid, but what if there was a fire at an office that resulted in papers being dispersed around the car park while the fire service were doing the sterling work of putting out the flames? What if an item of correspondence was picked up and subsequently published? That item is not one that should be in the public domain, so one would expect it to have a privileged nature. Is it so wrong that the person who produced it would be unable to rely on the defence that it was a private matter and should never have been in the public domain?

Not for the first time today, I am disappointed with the Minister's response. However, I hope that there will be other opportunities for me to continue to lobby him on this point. I hope that, between now and when the Bill goes to the other place to be considered, the Minister will see fit to correct that anomaly. On that basis, 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: We have had some interesting discussions about our proposed amendments. The Libel Reform Campaign broadly supports the clause. It believes that the intention behind the drafting is to clarify, simplify and widen the defence, The LRC believes that that has been achieved by, among other things, dropping the reference to public interest, which always had a different and wider meaning from a Reynolds-type public interest anyway, and by dropping the need for the person making a comment to know the fact on which it is based—that is, to have it at the front of their mind—as well as by various other elements. The LRC recognises that there will be fresh litigation attempting to set out what the effect of all that will be, but interestingly it believes that that is a price worth paying for the widening and clarification. It does not feel the same about other clauses—it is important to make that clear—but it supports the change in the title of the defence from "fair comment" to "honest opinion", as set out by the Court of Appeal case BCA *v.* Singh, as the "comment" was intended to mean a matter of opinion and did not have to be fair.

Clause 3 abolishes the defence of fair comment, replacing it with the new defence of honest opinion, and it accordingly repeals section 6 of the Defamation Act 1952. The new

defence will be available to a defendant if they are able to show that three main conditions were met. The first is that the statement complained of was the defendant's opinion—that is made clear in subsection (2). Subsection (3) lays out the second condition in a straightforward and helpful manner:

"The second condition is that the statement complained of indicated, whether in general or specific terms, the basis of the opinion."

It will be interesting to see in practice whether articles and matters for publication come forward where the basis of the opinion is clear in the statement that has been complained of. The third condition is that

"an honest person could have held the opinion"

on the basis of a fact that existed at the time of the statement's publication or anything asserted to be fact in a privileged statement prior to it. I will return to the interesting question of "honest person" in a moment, and I am disappointed that the qualifier "or" has not been included between subsection (4)(a) and (b).

The House of Commons Library research paper on the Bill explains that the first condition has been included to reflect current law, accepting the requirement previously established in case law that there should be a clear distinction between comment and imputation of fact. Condition two attempts to clarify an area of law that has become somewhat complicated, as explanation of how the law should apply has become ever more difficult and the extent to which the opinion should be fact-based has come under much debate. As with so much of the Bill, I am concerned that there is a degree of clarity missing from the subsection, especially given that such a complex area is being boiled down to a simple sentence. I have previously said that I would appreciate clarification from the Minister on a number of issues. I hope on this one he will able to inform me exactly how general these general terms have to be for a defendant to meet the conditions.

The third condition provides a test as to whether an honest person could have held the opinion stated based on facts that existed at the time. I remain concerned that the lack of any sort of clarifying word between subsection (4)(a) and (b) leaves room for an enterprising lawyer—someone equally adept at skiing between the trees and swerving—to take advantage from its absence. As a non-lawyer, I am sure there are plenty of lawyers around who would relish the opportunity to find a way of inserting an "and" rather than an "or" that seems to be imputed there. However, I do not want to revisit an area that we have already discussed, so I will simply urge the Minister once again to make that small but important amendment.

It is also worth mentioning the wording of subsection (4) whereby the condition is dependent on the sort of opinion that could be held by an honest person. That definition is open to interpretation. I know that "honest opinion" has a generally recognised meaning, but the Minister might want to say a word or two about that. It is not beyond the realms of possibility for an individual who was considered honest to be capable of being reckless with the truth or, for that matter, malicious—two further definitions which were briefly touched on this morning. It is reasonable to say that a person who is otherwise considered to be honest and upstanding might have the occasional lapse.

Subsection (5) states that a defence is defeated if it can be shown that the defendant did not hold the opinion. I believe that the Government should consider whether this condition would be better expressed using the wording suggested in my amendment. The Minister may wish to rebrand it and bring it forward at a later date. The right hon. Member for Rotherham raised a third option: a defence could be defeated if it was proven that the defendant either acted out of malice or did not hold the opinion. I hope that the Minister might be more willing to consider the addition of that particular "or".

4.30 pm

Subsection (6) clarifies the fact that subsection (5) does not apply in a case in which the statement in question was published by the defendant, but was in fact made by a third party. I am pleased to see that particular clarification, as it ensures that a publisher is required to bear in mind its responsibilities. For example, a particular newspaper group decides to publish something, and the author does not have that opinion. Somebody decides to sue the newspaper group rather than the author, and obviously a whole different clarification is added if that claimant can show that the newspaper group, in this case, knew or ought to have known that the author did not hold the opinion.

Finally, subsection (7) provides the exact circumstances in which a statement is considered to be a "privileged statement", that is, the defence of absolute privilege under section 14 of the Defamation Act 1996, the defence of qualified privilege under section 15 of the 1996 Act, and the defences, which we will discuss later, in clauses 4 and 6 of the Bill. For clarity, those circumstances are responsible publication on a matter of public interest and peer-reviewed statements in a scientific or academic journal.

I urge the Minister to consider the proposal in amendment 14 before it was withdrawn. Again, perhaps a little rebranding exercise would be fine, if the improvement could be made to the Bill in another place. I will not go over old ground once more, and I am sure, Mr Havard, that you would rightly stop me from doing so anyway. I feel however that it is a notable omission that raises questions that we may simply end up debating again in future legislation. We may well simply confuse the courts as to the intention of that particular part of the legislation.

It is important to point out that, broadly speaking, we welcome the abolition of the defence of fair comment and its replacement with the defence of honest opinion. There are numerous examples of where the current defence of fair comment has failed to protect individuals expressing an honestly held opinion. For example, the Owlstalk case is often spoken about. Exacerbated by the amount of money often involved in such proceedings now, the defence of fair comment, as it stands, leaves a lot of room for interpretation. I will be grateful if the Minister talks a little about how he feels the possible widening of the interpretation is not the case.

A defence of honest opinion is fundamentally fairer than one of fair comment, if only because it moves the focus from what is considered a reasonable thing for an individual to say to the individual's motivation for saying it. That should, if we get the legislation correct, remove a grey area, which has increasingly been used to

weaken our defamation laws, and replace it with a far more reasonable consideration that will hopefully make it less onerous for defendants.

I am also pleased that the requirement for the opinion to be on a matter of public interest has been removed from the defence. It is a definite improvement, and I am glad that the Government acted on the recommendation of the Joint Committee on that issue, citing the clear trend towards courts interpreting the public interest extremely broadly in recent years. It would also clearly have been incompatible with other aspects of the Bill as it stands today.

I am glad that the Minister responded to some concerns that I have with the clause. As I previously stated, although there has been some clarification of the points in the clause that were unclear, there is still much more that needs to be done. I hope that he will take on board the concerns and address them as appropriate. We remain wholly committed to ensuring that the much-needed reform to our defamation legislation is passed, but only in such a way as to ensure that we do not have to revisit it to close loopholes and tidy the legislation.

As has already been said many times at this early stage of the Bill, such Bills do not come around every day, week, year or decade. We have to look back quite a long way to find the previous Defamation Acts of 1996 and 1952. It is important that we get the Bill right; that we do not allow it to leave this Committee, the House of Commons or the other place until it is as right as it can possibly be, no matter how seemingly small the flaw might be.

I hope that my observations and comments on the clause have been taken on board by the Minister. I hope that he will consider them and allow an opportunity before the Bill moves to the next stage to see what can be done about taking on board the simple amendments to tidy and correct some apparent anomalies. In order to ensure that we move forward on the Bill, with the strong reservations I have highlighted, I will conclude my remarks. I look forward to hearing what the Minister has to say and hope that clause 3 will be much tidier by the time it is incorporated in a Defamation Act.

Helen Goodman: I should like to ask some questions about subsection (5) and subsection (6). Subsection (5) says,

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

I want the Minister to explore the question of who is the defendant. Subsection (6) goes on to spell that out in more detail. The explanatory notes say:

"Subsection (6) makes provision for situations where the defendant is not the author of the statement (for example where an action is brought against a newspaper editor in respect of a comment piece rather than against the person who wrote it). In these circumstances the defence is defeated if the claimant can show that the defendant knew or ought to have known that the author did not hold the opinion."

My concern is that comment and news are not so neatly and tidily distinguished in newspapers. They are all jumbled up. I would like to know the approach the Minister will take when there is conflict between journalists, editors and proprietors on what is written in newspapers.

To illustrate the problem, I want to refer to the evidence that Richard Peppiatt gave to the Leveson inquiry. He said,

"I have admitted that some stories I wrote at the *Daily Star* were wholly inaccurate, often written under pressure from superiors to distort the facts at hand….They couldn't care less what the PCC thinks, or about having to occasionally print a three-paragraph correction. The transaction between newspaper and reader has already occurred, and the effect of that story is rarely diminished by a retraction months later. Getting the occasional slap on the wrist was just a cost of doing business."

He goes on to say:

"Stories which sell well…had to be sourced on a daily basis whether there was a tale to tell or not. This naturally led to fabrication in order to fulfil an unrealistic quota. Much more insidious was when this same philosophy was applied to stories involving Muslims and immigrants, when yet again a top-down pressure to unearth stories which fitted within a certain narrative (immigrants are taking over, Muslims are a threat to security) led to casual and systemic distortions."

I think he meant "systematic".

"In short, ethical concerns were always subservient to financial ones."

He is describing a situation in which it is not clear whether the views expressed in the news stories are in fact the honest opinions of either editors or proprietors, but they are clearly not the honest opinions of the newspaper journalists. He goes on to say,

"Other stories still are concocted from PR content…in a highly competitive market in which agencies are competing…there is an obvious financial incentive in making your stories stand out from the crowd, and so the temptation to spin or embellish a story always exists. One obvious consequence of reporters cannibalising the work of other journalists is that the former is often wholly unaware of the veracity of their information. Sometimes the maxim that a story is 'too good to check' comes into play, and in this manner falsehoods can easily become propagated across the media… Another way stories appear in the Daily Star…are when they are simply made up, or based on such scant, dubious evidence as to essentially be untrue. I list in my resignation letter (attached) a number of stories that I wrote via this method, in the full knowledge, and on occasion request, of superiors."

He talks about—*[Interruption.]* The hon. Member for Broxtowe says that I do not understand, but will the Minister explain why that is a misunderstanding and why my concerns are not real? I believe that they are real concerns. Unless we have a system to ensure that papers have some integrity—I want to know what the Minister's system will be—it is not clear how such defences will be used or, indeed, challenged.

Richard Peppiatt goes on to say:

"Failing this, a story was often concocted off the back of flimsy evidence e.g. Katie Price appearing in public without her wedding ring meant her 'marriage was over'… Another ethically dubious technique used by the Daily Star…is the overplayed headlines that misrepresent the truth of the story beyond… Reporters, including myself, were often unhappy about some of the stories we were pressured to write. Certain executives would often overplay the strength of a story in editorial conference to please the editor, but would then lean on the reporter tasked with writing it to make the story fit what they'd pitched."

He describes instances of that and goes on to say:

"It seemed to me that reporters' employment contracts were structured specifically to limit the possibility of any ethical protest…The spectre of being 'let go' at any moment is a powerful deterrent against sticking your head above the trench if you disagree with something that is occurring. Even if someone was bold enough to complain, no channel existed for employees to raise concerns about ethical or journalistic practices… I recollect one day there being just myself and two other reporters to write the whole newspaper. We were forced to use pseudonyms just

to make it appear to readers there were more of us. Any fact checking etc goes out the window when you have such a heaving workload."

In such a situation, where the journalist is clearly not giving their honest opinion—the journalist has been directed to write something defamatory by the editor, the proprietor or senior executives in the organisation—how will the defences operate? Is the Minister saying, in effect, that he agrees with the proposal from the National Union of Journalists for a conscience clause?

Robert Flello: I am immensely enjoying my hon. Friend's contribution. I am sure that Government Members are also doing so, given that some concerns have been raised. Subsection (6) refers to the claimant having to show that the defendant, perhaps the newspaper in question,

"knew or ought to have known that the author did not hold the opinion."

I am curious to know her view about how, in the example she cited, the claimant could show that the defendant newspaper knew that.

Helen Goodman: My hon. Friend makes a good point because, in the absence of proper corporate governance and of the NUJ conscience clause, the claimant has no way of unearthing such facts. It is clear that, if that cannot be done, there will be crazy distortions and dishonesties within institutions. I have asked the Minister this already, but how does he think the policy fits with other policy work that is going on in other parts of the Government about the corporate governance of newspapers and the position of journalists? If the issue is not taken seriously, we are then in the realm of the "I don't remember, I don't recall, I don't know" defence, which will be put by the defendant even when the reality is something very far removed from the honest opinion of the author of the piece.

4.45 pm

Paul Farrelly: A question that I raised on clause 2 is also relevant to the question that I want to ask the Minister on clause 3. Before I do so, I would like to point out that in his prepared remarks the Minister did not answer any of the three questions I asked, one of which was exactly the same as one asked by the right hon. Member for Bermondsey and Old Southwark. That is not meant as a personal comment—this is my first Public Bill Committee since the election, and not departing from a prepared text was an affliction that was rampant on the Labour side, too. I ask the Minister to read *Hansard* and, as is the normal practice, to write to members of the Committee where he feels that he has not answered a question.

Simon Hughes (Bermondsey and Old Southwark) (LD): I am not going to go into the history. Just to defend the Minister, he was kind enough afterwards to say that he was conscious that he had not answered one of my questions. Therefore, Ministers sometimes spot these things and realise it.

Paul Farrelly: Perhaps I should linger longer after Committee sittings.

My third question was essentially what regard he envisaged courts having in making provision to hold early hearings on meaning that would cut costs and speed cases. Here, on the defence of honest opinion, it would be wrong not to mention the Simon Singh case. It would be beneficial if the Minister made clear that, when honest opinion is an issue, the court should determine very quickly whether the piece is an opinion, as a first step, and then move swiftly on to determining meaning. I would welcome his comments on that.

Mr Djanogly: Clause 3 replaces the communal defence of fair comment with a new statutory defence of honest opinion. We seem to have consensus that this is the right thing to do, so this is more a question of detail and interpretation. This is an area where the law has become increasingly complicated and technical, leading to considerable uncertainty about how it applies in different situations. The result is longer and costlier disputes over points of detail, and the clause aims to retain key aspects of the current legislation that make the law simpler, clearer and easier to apply.

Subsections (1) to (4) prescribe three conditions that the defendant has to satisfy in order to succeed in a defence of honest opinion. The first of these requires a statement complained of to be a statement of opinion. This reflects the requirement, established in case law, that the statement must be recognisable as comment, as distinct from an imputation of fact. It is implicit that the court's assessment of whether the condition is satisfied will be made on the basis of how the ordinary person would understand the statement.

Robert Flello: Following on from what my hon. Friend the Member for Bishop Auckland said, many news stories now so mix up fact, comment and opinion. Does the Minister feel that as time goes on it will become far more difficult for cases of this nature to separate out what is a statement of opinion?

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

The second condition requires a statement complained of to have indicated, in general or specific terms, the basis of the opinion. That reflects the test that has been approved by the Supreme Court in the recent case of Spiller *v*. Joseph. An explicit provision has been included to address the concern of the Joint Committee on the draft Bill that unless an indication of the subject matter on which the opinion is based is included, it is difficult to assess the real nature of the criticism that has been made.

The third condition focuses on whether an honest person could have held the opinion on the basis of any fact that existed at the time the statement was published, or anything that was asserted to be a fact in an earlier privileged statement. That is intended to reflect the requirement in case law that the defendant must prove a sufficient factual basis for the opinion. The provision focuses on "any fact" to make it clear that any relevant fact or facts will be sufficient, and the defendant does not have to prove the truth of every single allegation of fact set out in the statement complained of. Section 6 of the Defamation Act 1952 contains provisions dealing with that point; subsection (8) will repeal those provisions, as they will no longer be necessary.

[Mr Djanogly]

The hon. Members for Stoke-on-Trent South and for Bishop Auckland asked various questions regarding opinion. The first was: why are we not amending the clause to require the statement to be recognised as an opinion? We believe that that would not add anything of substance, as, in considering the defence, the courts would inevitably ask themselves whether an ordinary person would have recognised the statement as one of opinion. We have, however, sought to make the position clear in the explanatory notes.

The other question that arose was: should not the person expressing the opinion have at least some knowledge of the facts when doing so? The clause currently requires that a fact must have existed

"at the time the statement complained of was published",

but not that the person expressing the opinion must necessarily have known it. In addition, the defence may be defeated if the claimant can show that the defendant did not honestly hold the opinion. We think that that strikes the right balance.

The reference to "an honest person" reflects the requirement in case law that there be a sufficient factual basis for the opinion. If the fact relied on by the defendant was not a sufficient basis for the opinion, then an honest person would not have been able to hold it.

Subsection (5) reflects the current law in relation to malice, providing that the defence will fail if the claimant can show that the defendant did not hold the opinion expressed. The situation could also arise where the defendant is not the author of the statement—for example, where an action is brought against a newspaper in respect of a comment piece, rather than against the person who wrote it. Subsection (6) provides that in those circumstances, the defence will fail if the claimant can show that the defendant knew or ought to have known that the author did not hold the opinion. We have dealt with subsection (7) through amendments, and subsection (8) will formally abolish the common law defence of fair comment.

As is the case in relation to clause 2, while the new statutory defence replaces the common law, we expect that the courts will continue to seek guidance from their earlier decisions in interpreting how the new defence should be applied.

Robert Flello: The Minister looked as though he was coming to the end of his comments, so I wanted to dive in quickly. He went quickly through subsection (5), which states:

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

He cantered through that one—slalomed through it, even. I am slightly concerned at the matter-of-fact way that he said it will replace malice and then moved on to the next item. There is a big responsibility on the claimant to show that the defendant did not hold the opinion. Will he return for a moment to that subsection and provide a little more meat as to his thinking on that point?

Mr Djanogly: I will see if I am able to do that before I sit down. If I am not, I will write to the hon. Gentleman.

The hon. Member for Newcastle-under-Lyme asked whether, when the opinion defence is an issue, the court will deal up front with the question of whether something is a fact or an opinion. The answer is yes. We envisage that the new early resolution procedure will include determining whether a statement is one of fact or of opinion, where that is an issue, as well as the meaning of the words complained of. I hope that that explains points for hon. Members. It seems that I will have to write to the hon. Member for Stoke-on-Trent South on his final point.

Question put and agreed to.

Clause 3 accordingly ordered to stand part of the Bill.

Clause 4

Responsible publication on matter of public interest

Robert Flello: I beg to move amendment 27, in clause 4, page 2, line 33, after 'interest', insert

'unless the claimant can show that the defendant acted irresponsibly in publishing the statement complained of'.

The Chair: With this it will be convenient to discuss the following:

Amendment 26, in clause 4, page 2, line 33, leave out from 'interest' to end of line 35.

Amendment 28, in clause 4, page 2, line 34, after 'defendant', insert

', having regard to the nature of the publisher, the publication and its context,'.

Amendment 29, in clause 4, page 2, leave out line 39.

Amendment 30, in clause 4, page 3, line 7, at end insert—

'(j) the reasonable judgement of the author or editor, having regard to what was known at the time of the decision to publish the statement.'.

Amendment 8, in clause 4, page 3, line 11, leave out 'this section' and insert 'subsection (3)'.

Clause stand part.

New clause 6—*Publication on matters of public interest*—

'(1) The publication of a statement which is, or forms part of, a statement on a matter of public interest is privileged unless the publication is shown to be made with malice.

(2) In defamation proceedings in respect of a publication under subsection (1) there is no defence under this section if the claimant shows that the defendant—

(a) was requested by him to publish in a suitable manner a reasonable letter or statement by way of explanation or contradiction (the "response"), and

(b) refused or neglected to do so.

(3) For the purpose of subsection (2), "in a suitable manner" means in the same manner as the publication complained of or in a manner that is adequate and reasonable in the circumstances, having particular regard to—

(a) the need for the response to have equal prominence as the publication complained of,

(b) the promptness of the publication of the response, and

(c) where appropriate, the extent and promptness of the removal or clarification of, or correction to, the publication complained of.

(4) Nothing in this section shall be construed—

(a) as protecting the publication of matter the publication of which is prohibited by law, or

(b) as limiting (or bridging) any privilege subsisting apart from this section.'.

Robert Flello: We have finally reached a clause where there are almost as many amendments and variations to the clause as subsections in it.

A common theme throughout the amendments that have been tabled is the concern that the Bill seems to have been drafted before *The Times v.* Flood judgment was published; that is the perception. Therefore it captures the old interpretation—the pre-Flood interpretation—of the Reynolds defence. It is worth putting on record a summary of what was in Flood:

"The Supreme Court considered the elements necessary for a successful claim of Reynolds privilege in a defamation claim, in particular, whether it was in the public interest to report allegations of police corruption whilst an investigation was ongoing, and the steps that a reasonable journalist should take to verify the information…

Appeal allowed in part. (1) Reynolds privilege protected the publication of defamatory matter where it was in the public interest that the information should be published, and the publisher had acted responsibly in publishing it. A claim for Reynolds privilege was often determined as a preliminary issue. However, that could raise a practical problem since in order to perform the balancing act between the desirability of the public receiving the information in question and the potential harm caused if the individual was defamed, it was necessary to determine the meaning of the publication. Meaning was normally a matter for the jury. However, the parties could agree to trial by judge alone. It would then be open to the trial judge to resolve any issues that arose… a responsible journalist should have regard to the full range of meanings that a reasonable reader might attribute to the publication."

That last sentence is worth emphasising, particularly in light of the learned and informed comments of my hon. Friend the Member for Bishop Auckland on the subject.

Paul Farrelly: I should like to point out to my hon. Friend and the Minister that some very sensible balanced, experienced people have made the point that the way this clause, for all its good intentions, is drafted not only does not take account of Flood but is in some respects retrograde and not as advanced as the Jameel case.

Robert Flello: My hon. Friend and neighbour makes an absolutely accurate point to which I will return. The tests listed in this clause do not reflect the existing common law and therefore need to be improved. The Joint Committee also says so; its recommended changes to the draft Bill state:

"The Reynolds defence of responsible journalism in the public interest should be replaced with a new statutory defence that makes the law clearer, more accessible and better able to protect the free speech of publishers. The Bill must make it clear that the existing common law defence will be repealed."

Well, we have that, but then there is the point about a new law that is clearer, more accessible, and better able to protect the free speech of publishers.

Overall, the Joint Committee supported the approach that was taken in the clause on responsible publication in the draft Bill. In particular it agreed that the term "public interest" should not be defined. The list of factors that is used to determine whether a publisher has acted responsibly should be amended, in its view, as follows:

"a) A new factor should be added that refers to the 'resources' of the publisher."

Again, I will return to that point shortly. The list goes on:

"b) A reference to the statement and context should be added…

c) The term 'urgency' should be removed… and replaced with the more general test of whether 'it was in the public interest for the statement to be published at the time of publication'

d) The reference to whether the publication draws 'appropriate distinctions between suspicions, opinions, allegations and proven facts'… should be removed; and

e) When deciding whether publication was responsible, the court should have regard to any reasonable editorial judgment of the publisher on the tone and timing of the publication."

That is what the Joint Committee felt.

5 pm

Not surprisingly, I will refer to the Libel Reform Campaign's comments—I am sure my hon. Friend the Member for Newcastle-under-Lyme will be particularly attentive to this:

"Clause 4 is not a new public interest defence. It is the codification of an out-of-date version of the 'Reynolds Defence' of responsible publication. The Libel Reform Campaign, and the thousands of writers, citizens and organisations affected by the chilling effect of libel, have called for a new public interest defence. Reynolds has been of use to large newspaper groups, but even for them it has been expensive, unpredictable and time consuming to establish. It is ill-suited to the natural discourse of citizens, such as patient group forums and has been of no use to the ordinary man on the street, to scientists such as Simon Singh and Ben Goldacre, nor to human rights organisations such as Global Witness."

Huge concerns are already being raised about clause 4. The Joint Committee said that the draft Bill's original clause was not suitable, and that a new clause was needed. The Libel Reform Campaign is saying that the revised clause 4 is not a new public interest defence and is not doing what the Joint Committee suggested.

For balance, because getting balanced views from all quarters is important, let me cite the British Medical Association's parliamentary briefing:

"The BMA has been concerned for some time that English libel law may be inhibiting free and open discussion of matters of critical public concern in the sciences. Although individuals who have been defamed should have proper recourse to procedures to defend their reputations, this should not be allowed to inhibit the reasonable expression of opinion, or the critical discussion of matters of evidence."

That is the BMA's starting point.

Specifically on clause 4, which deals with responsible publication on matters of public interest, the BMA says:

"There is a strong public interest in ensuring safe and effective medical treatment. In the BMA's view, codifying the Reynolds defence in this way will help support free, open and informed debate relating to medical procedures, products and innovations."

The BMA clearly has high expectations and high hopes that clause 4 is the positive move that the Joint Committee advocated, but given the Libel Reform Campaign's concerns, I fear that those high hopes and expectations will be dashed.

We all appreciate the work of Which?, the consumer champion, which has also, quite understandably, raised that point:

"We strongly welcome the stated objectives of the Bill. However, our view is that in many cases the Bill is codifying the existing common law rather than reforming or re-balancing it. There are…areas in the Bill in need of expansion or clarification".

Which? goes on to say:

"Clause 4 should be amended to require the court to have regard to all the circumstances of the case in addition to the considerations set out in 4(2) when determining whether the defendant had acted responsibly in publishing the statement complained of.

Some of the considerations in clause 4(2) used to determine whether the defendant has acted responsibly in publishing the statement complained of relate to action likely to be taken pre-publication (for example 4(2)(e), (f) and (g)). These considerations will often not be appropriate in deciding whether fast breaking news stories can benefit from the defence."

That reminds me of the observation of my hon. Friend the Member for Bishop Auckland. On fast-breaking news stories, modern newspapers will undoubtedly have the pressure of wanting to be the first on the scene and wanting to get the scoop, but those are not the same things.

Helen Goodman: Exactly.

Robert Flello: My hon. Friend helpfully brought to the Committee's attention the fact that there is a perverse pressure from less responsible editors, who are weaker on journalistic values. They will also be putting the pressure on—never mind the fast-breaking news stories.

Which? continues:

"As drafted, it could be difficult for contemporaneous news coverage to benefit from the defence because many of the considerations in clause 4(2) place an emphasis on verification and reflecting the claimant's views without a balance of the urgency of the publication."

It believes that the problem can be dealt with by amending subsection (2)(a)

"to include a reference to whether the statement complained of was part of a report of current events the reporting of which was in the public interest and including a reference to the urgency of that reporting."

It states that, as in clause 2, the word "imputation" is used in clause 4 where "meaning" would be clearer. Which? thinks that "neutral" is preferable to "impartial" in subsection (3) because it better describes the situation covered by the measure,

"namely the reporting of disputes between parties without supporting either party in that dispute."

It highlights

"a typo in clause 4(4), which should refer to 4(3) rather than to 'this section'."

I, too, picked up on that and have referred to it in my amendments.

My amendments 27 and 26 are intended to provoke a debate about where the burden of proof should lie in proving whether publication was made responsibly. Amendment 27 would amend clause 4 (1)(a). After the word "interest", it would insert

"unless the claimant can show that the defendant acted irresponsibly in publishing the statement complained of."

Amendment 26 would leave out paragraph (b).

The purpose of the amendments is to reverse the burden of proof—of irresponsibility—for the Reynolds defence by putting it on to the claimant, who, under the proposals would have to show that the publication was made irresponsibly. Commenting on my amendments, the Libel Reform Campaign said:

"The responsible journalism defence should also require the claimant to show that the defendant has been irresponsible if the statement is on a matter of public interest, rather than requiring the defendant to show he has acted responsibly. This would ensure that a person who has made a statement in the public interest would benefit from a rebuttable presumption that they have acted responsibly. They would still have to act responsibly to benefit from this defence, but would not have to carry out the expensive task of proving this in a court claim unless specifically challenged on this point by the claimant."

Interestingly, its view is slightly different from mine. It does not think that the change would represent a reversal of the burden of proof, which, it says,

"stays on the defendant to show that an allegation of fact is justified".

However, in a non-malicious publication on a matter of public interest, it would

"put the initial onus on the complainant to argue irresponsibility against the same criteria as currently exist."

From discussions, the thinking behind that is that if there is a challenge, both sides would have to begin getting their evidence together. There is a cost to both sides anyway, whether they are making the allegation or mounting a defence. There is push and pull. The amendments might make the Reynolds defence less daunting for a public interest publisher. It has been suggested that without such changes, the defence would prove to be too high-risk and too expensive to make a significant difference to such publishers.

Amendment 28 would amend clause 4, inserting the words,

"having regard to the nature of the publisher, the publication, and its context."

Amendment 29 would basically leave out line 39.

These are probing amendments, intended to make it clear that the nature of the publisher and the publication, as well as the context of the publication, are an essential element in the defence, and not just one of several factors to be weighed up. That is what is sought by deleting subsection (2)(a), and effectively inserting it into subsection (1)(b). The purpose of doing so is to address the view held by many people that smaller publishers, or rolling news publications, cannot be expected to undertake the same level of due diligence on responsible publication as larger publishers, which can also be done when there is time to consider the issues between publications.

This is an interesting point in many respects because, as we have discussed, if there is a situation in which a large newspaper publisher claims that they do not have the time or resources to undertake due diligence, perhaps we would question whether that was correct. However, looking at some of the smaller publishers—some of the bloggers, for instance, or people who occasionally publish items of interest, perhaps on a back-bedroom computer set-up—would we expect the same level of due diligence to be undertaken by them?

This probing amendment is designed to draw a response from the Minister on whether he agrees or disagrees with that view. Commenting on this group of amendments, the Libel Reform Campaign observed:

"The factors determining responsibility should always be considered against the nature and context of the publication and the resources of the publisher, rather than these points merely counted on among all the other factors. This would make what is and would remain a rich man's defence"—

I think it might also interpret it as a newspaper group's defence—

"at least more accessible to the little man. Perhaps case law might show that—for example in the case of a single-handed publisher—the requirements to show responsibility when publishing non-maliciously on a matter of public interest are not onerous."

My intention is to test the view of the Committee as to whether that is correct, or indeed if it is felt that the same level of diligence should be required of all publishers. Should we have the same hurdle for a newspaper group with hundreds of employees and a turnover in the millions?

Helen Goodman: Is my hon. Friend thinking of the difference between, let us say, a national newspaper looking at the tax avoidance scheme of a large national company, and a local newspaper looking at corruption in a local authority? Is that the kind of distinction he is trying to make?

Robert Flello: Indeed, that is one of the distinctions I am looking at. What I am trying to do is test the clause. We need to dig deeply into some of the clauses. With the greatest respect to the Minister, I feel that in some of his responses we have had a sort of downhill slalom approach: if you get in the way, you are swept away by a sweep of snow. I would rather have the warming sun melting those snowy peaks to reveal what lies beneath.

With that lovely thought on this summer's day, my intention is to test the view of the Committee: is this the correct thing? Should we require the person sitting on the settee with a laptop, playing on the Xbox and on the mobile phone to their friends while gathering news stories, to have the same level of due diligence as the experienced and, hopefully, sufficiently well-paid journalist working for a big media organisation with all the resources available to them?

Simon Hughes: The reality of modern media is that somebody who sends a Twitter response or an e-mail, or who writes a little article on a blog, might end up getting far better local, national and international circulation than somebody writing a column for a serious broadsheet newspaper. There is no logic in saying that there should be a different standard for each person in this day and age, although experience and so on should be taken into account. People have to take responsibility for what they put up for other people to read.

Robert Flello: The right hon. Gentleman makes a good point.

5.15 pm

Helen Goodman: The issue that the right hon. Member for Bermondsey and Old Southwark raised is epitomised by the nine-year-old Scottish schoolgirl blogging about school meals. There is a question about whether one expects the same level of diligence from a nine-year-old, a 19-year-old and a 90-year-old, for example. Her blog went viral, as they say, and 2.5 million people read her reports on her school meals.

Robert Flello: I am grateful to my hon. Friend for picking up on the point made by the right hon. Member for Bermondsey and Old Southwark, which is a good one. A lot of well-respected media commentators and reporters, and journalists more widely, use Twitter to try to get their stories into the blogosphere and taken up more widely. We have to take account of the different media in existence in our discussions, but given that it may be another 20 years before the next Defamation Bill is discussed in the House, we must also think about what media might exist five, 10 or 15 years' time.

Simon Hughes: Last night, along with colleagues from all political parties, I attended the first awards ceremony held by PoliticsHome. Today, Paul Waugh, the editor, reckoned that they had 1 million followers from different Twitter feeds—people like Lord Prescott, and so on—as a result of that event. A Member of the House of Lords or of the House Commons who decided to put something out as a result of that event should realise that they have a different obligation from the young woman in Scotland, who was just making an innocent, childish comment on her school food. We may not be professional journalists, but we know that if we send something out into the ether it could be just as libellous, damaging and problematic as anything written by a responsible journalist from an international newspaper.

Robert Flello: I am grateful for the right hon. Gentleman's powerful intervention. Those 1 million followers cast my paltry number of Twitter followers in a different light. That is a good point and it brings me back to amendments 28 and 29, which were tabled to allow Committee members to consider the nature of publication. It is essential that a court considers who the publisher is. Is it a nine-year-old girl or a widely respected blog site? Is it somewhere between the two or is it something different? Is the publication a 140-character Twitter stream, as opposed to a double-page spread in *The Times*? The context of publication must be considered. Is it a nine-year-old schoolgirl reporting on school meals, a well-read newspaper or a Twitter user with a following of 1 million-plus?

Mr MacShane: This is an interesting point, because possibly the most famous example of libel law in our history, with huge political and literary consequences, is that involving Oscar Wilde. The publication was a visiting card that read: "For Oscar Wilde posing as a sodomite".

Christopher Pincher (Tamworth) (Con): And a poseur.

Mr MacShane: Well, it was less than the 140 characters of a tweet, on a tiny bit of card, yet it ruined one of our greatest writers and made the name of one of the most odious QCs ever to leave Ulster.

Robert Flello: They are long since dead, so let us return to amendments 4 and 5. The calling card was, in a way, the Twitter of the day, and, returning to my point, we must be careful, because what we do in this Committee will have ramifications for technology that has not been invented yet. I will not incur the wrath of Mr Havard by saying that these sorts of things really will become matters of grave concern when we come to debate clause 5, because we do not know what the equivalents of Twitter and Facebook will be in 15 years' time. We probably do not know what they will be in five years' time.

Simon Hughes: I shall make final point linked to new clause 6, which my right hon. Friend the Member for Carshalton and Wallington will speak to if he catches your eye, Mr Havard.

Putting right something that is false is much more difficult in the viral world. It is one thing to argue, as I have done for a long time, that if someone is libelled on

[Simon Hughes]

the front page of *The Sun*, it should put the correction in equal-sized characters—that has never been done, but there is strong case for doing so. However, if somebody is libelled in a tweet that goes viral, how can that be corrected in the same way and with the same sort of probable guarantee that the people who got the first false message will get the second correct message? It is much more difficult to deal with.

Robert Flello: Absolutely. That is, again, an extremely good point, and I will return to the topic when we consider the other amendments and new clauses, and when we consider clause 5. There is the whole issue around getting a name cleared and getting some recompense for the damage done by a tweet—I will allude to a case—where information is made available that is subject to a super-injunction and that turns out to be damaging. The defence of truth starts to come into play, but if something of the same nature that was not true was put out there, the damage is done. How can it be undone? I will park my observations and return to them later.

I move to amendment 30. As I have mentioned briefly already, the existing case law following the Gary Flood ruling has moved beyond where the Bill is currently. The amendment's intention is to give the courts the clear ability to consider what an editor or author might have considered at the time of the decision to publish and what is a test of reasonableness and judgment in the mind of the court. I again refer to the comments of the Libel Reform Campaign. It stated that clause 4

"should be amended to reflect the more recent responsible journalism defence as outlined"

in Flood *v.* Times Newspapers, when Lord Mance held that journalistic judgment and editorial freedom were entitled to weight when considering how much detail should be published. That is reflected in amendment 30, which adds reasonable journalistic judgment to the list of factors to which the court may have regard when considering whether the defendant acted responsibly in publishing a statement. It is an objective test by the court of what was a reasonable decision for the editor to make in the circumstances, and is relevant, for example, to rolling news coverage where there is little chance for extensive checking. That is a good point, and it is why I moved the amendment. Without the amendment, clause 4 is actually worse than the existing common law position established in Flood *v.* Times, which is the point that my neighbour and hon. Friend the Member for Newcastle-under-Lyme was making earlier.

I look forward to hearing the views of the Committee and the Minister as to whether the clause as drafted comes close to replacing the Reynolds defence that it seeks to strike out.

Paul Farrelly: The Minister must be pleased that we have got to page 3 of the Bill so speedily, notwithstanding the heroic efforts of my hon. Friend the Member for Stoke-on-Trent South in tabling so many probing amendments in such a short space of time. He will be the first to recognise that his list of amendments is by no means exhaustive. Indeed I have some additional proposals to discuss under stand part and some alternatives, which may have the same effect or an even better result than those of my hon. Friend. I hope that he and the Minister will consider them in due course.

Robert Flello: I am grateful to my hon. Friend. Obviously, with stand part being taken as part of the group, I look forward to the contribution that he is itching to make. With his experience of these matters, which is far greater than mine, his amendments probably would have been far superior, even though I had the interesting job of staying up till the wee small hours to try to get them in. I return now to my observations and amendments.

Amendment 8 tidies up a drafting error. Hon. Members have heard me say that a few times today. The amendment is intended to show that subsection (4) cannot be used in isolation from subsection (3). I cannot recall whether it was *Which?* or another organisation that spotted that point. Amendment 8 would

"leave out 'this section' and insert 'subsection (3)."

If members of the Committee turn to page 3 of the Bill, I will touch on some of my concerns.

Before I do so, I am reminded that my hon. Friend the Member for Newcastle-under-Lyme made the slightly jovial point that we have managed to get to page 3. I want to put it on record that the Bill is important. We should not see it as some sort of exercise in how quickly we can race through it. That is not why the House convenes its Committees. I do not need to tell right hon. and hon. Members that the House convenes Committees to ensure that the legislation that goes through them is the best it can possibly be. It is also important to point out that there are only 16 clauses in the Bill, so to get to page 3 of a very short Bill on the first day does not seem too much of a problem.

Subsection 3 states:

"Subsection (4) applies in relation to the defence under this section if the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party."

That seems reasonable, so we then expect to jump to subsection (4). I will pause, because if we do not read through the Bill sequentially, but decide to go straight to subsection (4) having not read the previous subsection, we read:

"In determining for the purposes of this section whether the defendant acted responsibly in publishing the statement complained of, the court must disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it."

We then start to get worried, thinking, "Hang on, what does that mean?" Does it mean, as the Bill states:

"In determining for the purposes of this section whether a defendant acted responsibly in publishing"?

Clearly it does not mean for the purposes of the clause, but what does "this section" mean? It is a wide get out of jail free card, if it is not clarified and qualified:

"In determining for the purposes of"

subsection (3)

"whether a defendant acted responsibly in publishing the statement complained of, the court must disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it."

We return to the points that my hon. Friend the Member for Bishop Auckland has repeatedly made about taking the time to verify that what is being said is true.

5.30 pm

The purpose of the amendment is to show that subsection (4) cannot be used in isolation from subsection (3). If, as I hope, the amendments are agreed to, we will get a more robust clause 4.

Helen Goodman: A clause 4 moment.

Robert Flello: Indeed. Moving swiftly on, subsection (1) would then read:

"It is a defence to an action for defamation for the defendant to show that the statement complained of was, or formed part of, a statement on a matter of public interest, unless the claimant can show that the defendant, having regard to the nature of the publisher, the publication and its context, acted irresponsibly in publishing the statement complained of."

Subsection (2) would read:

"Subject to subsections (3) and (4), in determining for the purposes of this section whether a defendant acted responsibly in publishing a statement the matters to which the court may have regard include (amongst other matters), first, the seriousness of the imputation conveyed by the statement; secondly, the relevance of the imputation conveyed by the statement to the matter of public interest; thirdly, the importance of the matter of public interest concerned; fourthly, the information the defendant had before publishing the statement and what the defendant knew about the reliability of that information; fifthly, whether the defendant sought the claimant's views on the statement before publishing it and whether an account of any views the claimant expressed was published with the statement; sixthly, whether the defendant took any other steps to verify the truth of the imputation conveyed by the statement; seventhly, the timing of the statement's publication, eighthly, the tone of the statement; and finally, the reasonable judgment of the author or editor, having regard to what was known at the time of the decision to publish the statement."

Subsection (3) would then go on to say:

"Subsection 4 applies in relation to the defence under this section if the statement complained of was, or formed part of, an accurate and impartial account of a dispute to which the claimant was a party."

Subsection (4) would then say:

"In determining for the purposes of subsection (3) whether the defendant acted responsibly in publishing the statement complained of, the court must disregard any omission of the defendant to take steps to verify the truth of the imputation conveyed by it."

Mr MacShane: I am genuinely confused, because of the defences in subsection (2). If I sue a paper for libel, saying that it told untruths about me, the newspaper would be asked whether it took any other steps to verify the truth of the imputation conveyed by the statement—the nasty things that were said—and it would have to show that it had checked the facts. My hon. Friend then skips down to subsection (4), which says that

"the court must disregard any omission of the defendant to take steps to verify the truth"

of the nasty things said about me.

On one level, the court is being told that if nasty things are said about me it is important that the truth of those things is verified, but on another, that it can disregard any omission, so if the newspaper that said the nasty things about me has omitted to take the necessary steps, the court can ignore that. I do not know whether that is due to the drafting or whether it is because of the difficult problem that different learned friends have different forms of words.

I do not know whether my hon. Friend can help me through this, but the trouble is that when we get to the Minister's reply, it is almost too late. He will undoubtedly have an explanation, and if he does not, one is being written very quickly now, but it will be too late to find the correct words for what seems, on the face of it—I might just be an extremely ignorant layman—to be a clause with an internal self-contradiction.

Robert Flello: I am grateful to my right hon. Friend. His point returns to amendment 8, because if subsection (4) sits there in splendid isolation, becoming a reason for disregarding the

"omission of the defendant to take steps to verify the truth of the imputation conveyed by it",

that is very powerful. The court must disregard it, as my right hon. Friend rightly says. It is only safe to allow it when it is linked to subsection (3), which talks about

"an accurate and impartial account of a dispute."

I take my right hon. Friend's point because if we are not careful, there is a danger. If the clause is not amended and improved, I will have serious doubts about whether we can support it, but I will return to that point in a moment.

Subsection (5) would state:

"For the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion"

while subsection (6) would state:

"The common law defence known as the Reynolds defence is abolished."

That is what the clause would look like if those amendments were accepted.

In evidence to the Select Committee on Culture, Media and Sport, defamation lawyer Mark Stephens said:

"The cost of a *Reynolds* defence is somewhere between £100,000 and £200,000, plus of course the risk of losing. You have got an adverse cost risk as well on top of that. That is the sort of sum of money which NGOs just cannot afford to spend. Although they have a very good defence—and invariably that is the advice we are giving—they are not able to deploy it."

That was during the Committee's inquiry into press standards, privacy and libel, which was its second report of the 2009-10 Session.

As it stands, the defence is also ill-suited to the natural discourse of citizens, such as patient group forums, and it has been of no use to the ordinary man on the street, to scientists such as Simon Singh or Ben Goldacre, or to human rights organisations such as Global Witness. In my view, and that of the Libel Reform Campaign, the fundamental case is that even an amended clause 4 will never be the public interest defence that is required, which is why, regardless of what happens to the clause, a new defence is needed.

New clause 6 is proposed as a means of speeding up the resolution of public interest-related defamation claims. I will take a moment to go through what new clause 6 says, because it is important that we have that in front of us.

Subsection (1) should be read as a way of providing a defence where a statement is made that is, or forms part of, a statement on a matter of public interest where no malice is involved. Having drafted the new clause and speedily rushed it to the Table Office, I had my own concerns about using the word "privileged" with all its attendant meaning. The meaning I am after, however, is one of providing a defence. Although the subsection states:

"The publication of a statement which is, or forms part of, a statement on a matter of public interest is privileged unless the publication is shown to be made with malice",

my intention is that it is a defence. Therefore, a statement which is, or forms part of, a statement on a matter of

[Robert Flello]

public interest has a defence, unless it is shown to be made with malice. Subsection (2) deals with the case in which the claimant asks the defendant to publish a response, but they refuse to do so. I am sure that the right hon. Member for Bermondsey and Old Southwark is now starting to see where his earlier comments around the front-page splash come in, and I am sure he will make an extremely valuable contribution on this point shortly.

Subsection (3), perhaps unsurprisingly, explains what is meant in the preceding subsection. It broadly establishes that a front-page story must require a front-page response, and that a response a year later is frankly not good enough. I suspect that hon. and right Members will raise questions about the new clause. Indeed, I would want to consider whether such a clause could be open to manipulation by an unscrupulous publisher or author, despite the requirement that no malice be involved.

A concern has already been expressed to me outside the Committee about whether there is a danger under the new clause that somebody gets the restitution of having a front-page response printed, but then is not able to get any recompense for the damage that has been done to their reputation. I fully accept that there is that danger with the new clause as I have tabled it. However, I think it is important that we start to dig in and ask whether it is a remedy for someone who feels that, although the money would be very nice, but what is important is getting that front-page response in a timely manner in a way that is equal to the harm that was done to them in the first place. The speed of that restitution would be sufficient to mean that they were less concerned about any pound notes that may flow from that.

I want to highlight what I consider are the four fundamental points that let down the clause. First, it is not worth putting the common law on to a statutory basis unless the law is changed and improved. Otherwise,all that is done is a freezing of the status quo at a particular point in time, even though the case law itself has continued to evolve, as has happened with Reynolds following Flood. Secondly, the way in which the clause is drafted does not improve the common law and therefore, in my humble opinion, achieves nothing. Thirdly, the clause reflects a worse version of an already unwieldy, inaccessible and expensive defence than exists in common law. The fourth point is that people's expectations of clause 4 are that this really will finally deal with the issue of responsible publication on a matter of public interest. They feel that organisations will feel let down by the clause before too long.

Mr MacShane: Subsection (6) states:

"The common law defence known as the Reynolds defence is abolished."

That takes quite an important weapon out of the armoury. The Reynolds defence is not perfect, as we know, but it helps journalists responsibly to investigate serious malpractice by politicians. An example dear to many of us was when a newspaper paid a criminal more than £200,000 for a stolen disk relating to MPs' expenses, but most of us, even those who suffered the lash of the public coverage of that, think that that was actually in the public interest. I am nervous of just, with a flick of a pen, booting the Reynolds defence not into the long grass but out of any legal consideration. Whose interest does that really serve? It is part of the problem.

Despite the well-meaning and bipartisan intentions of the Bill, the wording does not seem to match with all the desires of both the journalistic community that wants to be defended in its proper course of duty and, on the other hand, the members of the public—the trivial people—who find themselves without any recourse to m'learned friends. The Reynolds defence cuts both ways. My hon. Friend is making an important point. Going to ask lawyers to take up a libel case is unbelievably expensive.

The Chair: Order. Mr MacShane, that was supposed to be an intervention. You will be able to speak in the stand part discussion and the discussion that follows.

5.45 pm

Robert Flello: My right hon. Friend makes an extremely good point, and it was worth testing the patience of the Chair, in my humble opinion, to hear its extent, because it is exactly right. We are getting rid of the Reynolds defence and replacing it with something inferior. The Reynolds defence has continue to grow since the Bill was drafted—I refer to my opening comments on the Flood case—and yet we have in the Bill something that is far weaker and does not do the job, despite the best hopes and aspirations of an eager public waiting to see clause 4 come forward in all its glory. I am sure that the Minister will say that it is not a problem, because case law will build up on clause 4, but case law has to start from an earlier point, rather than where it is currently. That cannot be satisfactory.

I hope that, in answering this debate, and dealing with the amendments, the new clause and the stand part, the Minister will accept that clause 4 is flawed and provide sufficient reassurance to the Committee that the Government will go away and come back with much better thought through proposals. I will await and listen with a great deal of interest. It may well be that although I do not press the amendments. I reserve the decision on whether we will vote against the clause, because it is at best misdirected and at worst sets us back hugely in dealing with the issue of responsible publication on a matter of public interest.

The Chair: Order. Before I call Mr Brake, a general point. I appreciate that there are lots of interconnections and overlaps with this, but there are later clauses about websites and process. This clause is about responsible publication on a matter of public interest. If people could bear that in mind when making their contributions, it would be helpful, just so that we can make some progress.

Paul Farrelly: On a point of order, Mr Havard. For clarity, we are taking the stand part debate in the general run of things.

The Chair: That is correct. Yes is the short answer to your question.

Tom Brake (Carshalton and Wallington) (LD): I intend to direct my remarks to new clause 6, and I hope that they will be perfectly in order and to your satisfaction, Chair.

One thing that is clear about the clause—it was clear from the discussions that were effectively organised by the hon. Member for Newcastle-under-Lyme and the briefings from the Libel Reform Campaign—is that it is perhaps the most significant clause in the Bill and the one that requires the most attention. It was clear from the meeting organised by the hon. Gentleman, which was attended by lawyers who represented both claimants and defendants and investigative journalists, and also from the Libel Reform Campaign that those people do not believe that the clause represents a strong enough public interest defence and that there are various ways in which that could be addressed.

As this Committee is consensual in nature, the shadow spokesman has lifted Liberal Democrat policy word-for-word for new clause 6. According to Evan Harris, the new clause is a thing of beauty, although I accept that things of beauty may be imperfect, and that the Minister may have detected some things in the new clause that require amendment. It seeks to improve the present situation by providing a new public interest defence. My right hon. Friend the Member for Bermondsey and Old Southwark and I would like the opportunity to discuss the new clause with the Minister in the near future.

The hon. Member for Newcastle-under-Lyme has organised a rally on 27 June in support of a new public interest defence. Dara O'Briain, Professor Brian Cox, Dave Gorman and Simon Callow, among others, will be in attendance, and a petition of 60,000 signatures will be presented. I am sure that it would be in the Minister's interest to attend that rally as a conquering hero who has delivered exactly what those personalities are campaigning for, namely a new public interest defence.

Simon Hughes: Colleagues should remember the previous Government's experience when Miss Joanna Lumley got involved in a debate and the media came out of it better than Ministers.

Tom Brake: I thank my right hon. Friend for that intervention and I am sure that the Minister has logged that fact. I do not want to delay the Committee further, only to say that new clause 6 encapsulates a significant proposal that, certainly according to the variety of groups and individuals who have lobbied us, would present a stronger public interest defence. I hope that the Minister will be willing to meet me and my right hon. Friend to discuss the matter in the near future.

Helen Goodman: I draw the Minister's attention back to clause 4(1). We all understand why he does not want to include a definition of the public interest. On Second Reading, I argued that he should set out, for the guidance of the courts, an indication of what he believes the public interest to be, if only so that we could once and for all squash the ludicrous conflation between the public interest and what interests the public. I asked him specifically whether he agreed with the definition of "public interest" in the Press Complaints Commission's code of practice, which states that it

"includes, but is not confined to…Detecting or exposing crime or serious impropriety…Protecting public health and safety…Preventing the public from being misled by an action or statement of an individual or organisation",

or whether he adheres to the Crown Prosecution Service's longer definition, which, unfortunately, I do not have to hand. Will he say something about the public interest?

Clause 4(1)(b) states that it is a defence for defamation if it is shown that

"the defendant acted responsibly in publishing the statement complained of."

How does that relate to a completely different area of legislation, namely the Official Secrets Act? For example, it could no doubt be claimed that parts of the WikiLeaks publications were in the public interest, but others, such as those showing where and how terrorists might attack installations, were clearly not. Has the Minister given any thought to the issue of acting responsibly in publishing and what it means in relation to other issues? It seems that it could pass the defamation test, but not another test. Has he thought about that?

My hon. Friend the Member for Stoke-on-Trent South has said a lot about subsection (2). It is important to remember just how revolutionary the Reynolds judgment was. It was a sea change in defences for journalism, because we moved from the truth and harm criteria to issues about whether a journalist had, in investigating stories, behaved in ways that might reasonably have led him to believe that a story was true. That is the difference between true belief and knowledge, which I spoke about when dealing with clause 2.

I am not clear what the Minister intends to do with clause 4. My hon. Friend has set it out clearly that that does not reflect the law at the moment, as it does not take account of Flood. Is the Minister simply trying to reflect the current state of case law, or is he trying to pull it back or move it forward? For example, the Bill includes

"the nature of the publication and its context".

"Context", I think, is an addition. It also includes, in paragraph (d), "the importance", which is also in addition to Reynolds. However, there were things in Reynolds that are not in the Bill, such as the nature of the information and whether the paper had affirmed whatever claims it made as a statement of fact or had called for an investigation on it.

The explanatory notes did not help me much in trying to understand that matter. Paragraph 31 of the explanatory notes state that

"subsection (2) sets out a non-exhaustive list of matters…broadly based on the factors established by the House of Lords in Reynolds and subsequent case law".

The Minister should respond in detail to my hon. Friend's points. Will he set some context? What is he trying to do here? That would help the Committee to understand the clause and where we are going with it.

Paul Farrelly: Clauses 1 to 3 have been relatively uncontroversial, subject to a small number of clarifications that have been requested. There are, however, real problems with clause 4, and I want to rehearse two main concerns.

First, as has already been said, the clause does not reflect the current common law position following the Supreme Court decision in Flood *v.* Times Newspapers Ltd. It is more restrictive regarding responsible journalism

[Paul Farrelly]

and puts judges firmly back into the editorial chair, which a series of Supreme Court cases have said should not be the case.

Secondly, and importantly, the list of matters in subsection (2) runs the risk, again, of becoming a defined tick list of hurdles over all of which a publisher has to jump to use the defence. That remains a worry, despite the inclusion of the words "may have regard" and "include", which the Minister will no doubt state naysays the concerns. The reason why it is still a worry is that in both Reynolds and Jameel, which gave rise to the defence, even though the judges emphasised that the factors that they had listed should not constitute a set of hurdles, lower courts interpreted them in that way.

For that reason, some experts in the legal field whom we have talked to and some newspapers would like to see the list deleted entirely. That would also cover concerns about the cost of running a Reynolds defence across the tick list, in terms of lawyers and court time. Opinions on that, though, differ. A list has the advantage of clarity, as long as it is made abundantly clear that it is not a tick list, and that the court will have regard to all the circumstances applicable in a particular case and will look objectively at the conduct of the publisher in the round at the time. Serious investigative journalists with whom I have worked in the past do not want a charter for sloppy journalism, because that would destroy the craft in the trade. I encourage the Minister to steer a middle way, and I will offer some sensible suggestions for amendments to the list.

6 pm

First, I will rehearse the Flood case. The judgment in Flood *v.* Times Newspapers was delivered by the Supreme Court on 21 March 2012. The hearing took place on 17 and 18 October last year, and it would no doubt have helped the drafters of the Bill if the judgment had come sooner. The case concerned an article in June 2006 about Gary Flood, a detective sergeant of the Metropolitan police against whom investigations of corruption had been made that led Scotland Yard to start an investigation against him.

That investigation found no evidence that Sergeant Flood had acted corruptly, but the case hinged on whether *The Times* could report the fact of an investigation in the public interest without risk of losing a case for defamation. I reassure the Committee that the judgment in favour of *The Times* was not a licence to libel by any means; it contained many safeguards about content, tone and approach to reporting. The history of the case speaks volumes about the lack of clarity surrounding the current "responsible journalism" defence. In 2009, in the High Court, Mr Justice Tugendhat ruled that Times Newspapers was protected by the Reynolds defence. In 2010, the Court of Appeal reversed that decision, only for it to be reversed again by the Supreme Court in March this year. That is the sort of uncertainty with which newspapers acting in the public interest have had to contend until now.

The contention of defamation experts in law and in the newspaper industry—there seems to be real consensus about this—is that clause 4 does not take Flood into account. I would like the Minister to respond to that contention, and to tell the Committee whether he is prepared to table amendments to the clause on Third Reading to ensure that it codifies existing common law, if that is the intention. I suspect that he does not want the clause to be a retrograde step, and that the answer lies in the timing of the Flood case. The Bill was published on 10 May, however, which meant that there were some weeks for thought following the case. As my hon. Friend the Member for Bishop Auckland said, if the Bill intentionally disagrees with the Supreme Court and Flood, the Minister must say so and explain the reasons why.

If the list of matters in subsection (2) is to remain, I urge the Minister to consider the merits of some further changes. I have tabled amendments for this Thursday to introduce some of those changes, but given the speed with which we are considering the Bill I am conscious that they will be overtaken. These are some suggestions for the Minister to consider in addition to those made by my hon. Friend the Member for Stoke-on-Trent South and the right hon. Member for Carshalton and Wallington.

I will not make again the point about the Minister responding to concerns about the use of the word imputation rather than a clearer word such as allegation; I will address the list in subsection (2). To take account of the nature of rolling news, will the Minister consider adding, as amendment 35 suggests,

"including whether it was part of a report of current or developing events"

after the word "context" in paragraph (a)? We do not want a charter for sloppy journalism, and I would like him to consider how we can strike a balance.

Will the Minister consider deleting paragraph (c) or, if not, will he explain what it means and why it was included? Some of the legal experts I have spoken to say that it introduces a potential source of confusion and uncertainty. As a tidying amendment, and for clarity, will the Minister consider inserting, before the second mention of "views" in subsection (2)(f), the word "such"?

Subsection (2)(g) is my main concern, given the ruling in Flood. That subsection is more restrictive than the position confirmed in Flood *v.* Times Newspapers by the Supreme Court. If the word "invitation" refers to meaning, in cases where there is a Chase level 1 meaning—these are not my words, but those of an eminent QC; in other words, guilt—the newspaper may in the Flood case have been required to prove the truth of the allegations themselves. Will the Minister consider the deletion of that subsection or, at least, its replacement by the phrase "whether the defendant took steps to verify what was published"?

Will the Minister consider the deletion of subsection (2)(h) and the insertion instead of "the urgency of the matter"? That would replace the current words with those actually used by Lord Nicholls in Reynolds *v.* Times Newspapers. That would also address the concern that comment is quite often deliberately withheld to delay publication, which is especially relevant to weekly, fortnightly or monthly publications and television news programmes. Will the Minister clarify what is meant by "tone" in subsection (2)(i)?

On subsection (3), which relates to neutral reportage, will the Minister consider the deletion of the words

"to which the claimant was a party"?

I am not sure why that is so restrictive. The word "dispute" in that subsection is also questionable. Lord Lester had the term "pre-existing matter". My question is why should a dispute be all that can be reported by way of neutral reportage, as the subsection implies?

On the non-exhaustive nature and clarity of the list, many commentators preferred the drafting in Lord Lester's private Member's Bill. May I refer the Committee to how he handled that matter in his Bill? He made it explicit that the list was not exhaustive, stating in clause 1(3):

"The court when deciding for the purposes of subsection (1)(b) whether the defendant has acted responsibly must have regard to all the circumstances of the case."

That is very clear, and the beginning of clause 1(4) states:

"Those circumstances may include (among other things)—"

That drafting is preferable and clearer than the current drafting of this Bill. Will the Minister consider including that drafting and, indeed, any of Lord Lester's drafting that would make the Bill better and clearer?

Finally, I draw the Committee's attention to another suggestion regarding the judgment in Flood. An eminent QC wrote to me to say that two members of the Supreme Court in Flood thought that the Reynolds defence came down to this single question:

"Could whoever published the defamation, given whatever they knew (and did not know) and whatever they had done (and had not done) to guard so far as possible against the publication of untrue defamatory material, properly have considered the publication in question to be in the public interest?"

This, the QC suggested, could be usefully reflected in statute with a new subsection that I would ask the Minister to consider. It might be drafted as follows:

"If the court considers that, having regard to all the circumstances of the case, the defendant could properly have considered that the publication of the statement complained of was in the public interest, it shall find that this defence is established."

The reason for suggesting that as an alternative to one of the amendments that my hon. Friend the Member for Stoke-on-Trent South has advanced about editorial judgment is that it applies to everyone and not just the media. Editorial judgment will apply to the media, but not to other people, so this is a broader test. It would involve looking at the judgment of the person who published it, and it would exclude cavalier, slipshod or reckless statements.

In summary, the recognition of the defence of responsible journalism in the Bill is very welcome. There are always dangers in codification; if it is not right it will become retrograde, which is why the Select Committee for Culture, Media and Sport, of which I am a member, was very cautious in that regard. I ask the Minister to be flexible enough to consider improvements to reflect what has been discussed in our debate when we come to Third Reading.

Simon Hughes: We owe a debt of gratitude to Lord Lester who started this ball rolling. He was very clear that the law needed to be changed, and put a proposition before Parliament. We are also grateful to our colleagues on the Joint Committee, who did the work that prepared the Bill, in the draft Bill procedure—Lord Mawhinney, who chaired the Committee, and our colleagues, my hon. Friend the Member for Cambridge (Dr Huppert), Lord Marks of Henley-on-Thames, and Members from other parties, and no-party Cross Benchers—as well as to our noble Friend Lord McNally, who is leading on the Bill for the Ministry of Justice. A lot of work has been done, and I acknowledge that, and we are grateful for it. It has taken us a long way.

However, my right hon. Friend the Member for Carshalton and Wallington made the point that this clause is the one that needs the most work to get it right. It is very important. The question of how to define the public interest, the justification, and the defence, is not easy, and we have had a proposition put by the hon. Member for Stoke-on-Trent South in the form of the new clause.

Whether it is a work of art or a beautiful creation is for each of us to form a judgment on. I am sure that no clause is so wonderful that it cannot be improved. No amendment is so wonderful that it cannot be bettered, but we have put down a marker that we need to address the provision.

I want to make two substantive points. The first is that there is a debate, understandably, for the Minister and Ministers in the MOJ, about how much to legislate in the context of the Bill's reform of the law on defamation. It has waited for a long time, and as colleagues have said, it is not something we would want to do often, nor should we. There is a question of how far we should make changes here, or whether Parliament should wait for the Leveson inquiry to report on matters that are also within the compass of the measure, and covered in it. There is an obvious issue in new clause 6 that is central to that debate. In all my lifetime, when somebody is libelled in a publication, I do not think there has ever been a requirement on the publisher to correct it in a similar way.

Often people do not want to go to court or to have millions of pounds of damages. They just want it to be put right when their local Friday morning paper, or the daily evening paper in London, or the national tabloid that people pick up in the newsagent, has said something about them on page one, three or eight, with a big headline and a big article, which was clearly untrue and not checked out. The hon. Member for Bishop Auckland gave a good example about allegations about youngsters in her constituency that were not justified. That is the claim of most people when things go wrong in life. Most people who have complained about their local hospital do not want £1 million damages; they want somebody to own up and say "We were wrong," and they want an apology.

6.15 pm

Robert Flello: I am enjoying the right hon. Gentleman's contribution. When drafting my new clause, I considered situations in which someone is defamed to such an extent that their life is completely changed. Revisiting that, I am slightly concerned about someone in that position, having been defamed in front-page splashes across all those papers, being unable to get any financial restitution to put their life back in order.

Simon Hughes: An example relates to a gentleman who gave evidence recently to Select Committees. The gentleman, who is from Bristol, was arrested in relation to the murder of his neighbour, and he was absolutely

[Simon Hughes]

slated in all the press. In the event, he was proved to have nothing to do with the crime; somebody else was later arrested, charged and convicted. For that gentleman to restore his reputation must be almost impossible. He has tried hard and, because he has been willing to go on the front foot and take on the situation, he has done better than most people would have done, but not everyone is in a mental, emotional and psychological position to do that.

To take the obvious historical example from the tabloids, if a school keeper, a teacher, or whatever, is branded a paedophile in a tabloid, the chance of their being able to restore their reputation fully is pretty nigh impossible. The weaker their character, or the more damaged they are, the more difficult that is.

Helen Goodman: There is another reason why we need to leave open the possibility of people getting financial recompense, as well as the important apology that the right hon. Gentleman has mentioned: in practice that might take time, and the person might suffer real financial loss—they might lose their job, for example. We do not want to rule out the possibility of recompense and redress.

Simon Hughes: I absolutely agree. I am not arguing that that should not be a possibility, but I am making the general point that most people want a correction in the public domain of the injustice done to their reputation, rather than the money. Of course, there are people who lose their job, whose relationship breaks down or whose family life is disrupted.

My key point is that I would like the Minister to be open and honest with the Committee on whether Ministers have decided that the issue should not be addressed here and now in the Bill because they want to wait for Lord Justice Leveson to report—he will no doubt address it, because it is one of the issues bouncing around his inquiry—and, therefore, the view of the Ministry of Justice is that we will come back to the question in the near future, in light of Lord Justice Leveson's recommendations.

I do not have an absolute view, but given the mood of the nation and of Parliament, across parties, last year when the Prime Minister rightly set up the Leveson inquiry, which was agreed by the coalition parties, it is imperative that we do not think that we will not need a space in the legislative timetable, almost certainly in the next Session, to address Lord Justice Leveson's recommendations. My worry, to be absolutely honest, is about consensus across the House. I remember the debate we had downstairs, when everyone said something must be done, and the Prime Minister came to the House and said, "We will have the inquiry." The inquiry is doing a good job, but I worry that the momentum may start to dissipate because as we get near the general election, there will be the usual unwillingness to be strong towards the press. People may be a bit more worried, and a little keener to get the press barons and baronesses on board.

My core question to the Minister is this: is it his current view that we need not address the question here and that we can leave it till later, or are he and his colleagues willing to address it now? I hope the answer is the latter, that we could and should address the question here. If that is the case, new clause 6 would set out in the Bill that a publisher may correct a libel in similar form, allowing them to exculpate themselves and giving them a defence, "Okay, we made a mistake, but we have corrected it." That is the central debate.

The proposition is that we effectively get rid of juries for libel cases. In future, there would be fewer libel cases and people would not bring their libel and defamation cases to courts in this country from other parts of the world. Juries are expensive and complicated, but there is one area where juries probably do a job that is more in tune with the public view than judges do, not through any fault of the judiciary, but because the jury is a cross-representative group of the British public. That job is to judge what is in the public interest.

Public interest varies according to time. Committee members might remember the Tisdall case and other cases about whether to convict people of spying. Sometimes juries decide that it is not in the public interest to have a conviction in such a criminal case, because they think that is inappropriate and that the state is being over-mighty. My one reservation—it is not a party position that I am arguing on behalf of my right hon. Friend the Member for Carshalton and Wallington and me—leads me to ask whether, in the public interest debate, it is wise to exclude in all or most cases testing a case through a jury of some sort.

I believe that juries are capable of hearing a debate about whether it was or was not in the public interest for something to be published, and capable of forming a view about whether the published correction was sufficient. I ask my right hon. Friend the Minister whether there has been deliberation in Government about whether more than just judges could be used to determine those matters. The measure might have more credibility and might be more accepted by people if such decisions were made by a jury. It need not be a 12-person jury—it could be a smaller jury—and this is not an argument for juries across defamation litigation.

My central questions are: first, are Ministers keen to get this matter dealt with in the Bill or will they leave it until after Leveson? I hope that it is the former. Secondly, is there a case for thinking about whether the public interest might usefully be, in some way or other, a jury matter and not just a judge matter?

Mr Djanogly: In response to the hon. Member for Newcastle-under-Lyme, the right hon. Member for Rotherham and the hon. Member for Stoke-on-Trent South, the analogy of downhill skiing and speeding through the Bill and the implication that we have not given it enough time are not accepted by the Government. We agreed a programme motion and we believe that we have gone overboard to work with all parties to set up the time needed for the Bill and to take on board various national events and give leeway to accommodate hon. Members. I am not moving from that point of view.

Mr Andy Slaughter (Hammersmith) (Lab): The Minister is seeing an argument that is not there. It was clear on Second Reading that there was broad agreement that the Bill moves the law in the right direction. Our aim is

to avoid creating new problems in legislation by defining what the Government mean—in clause 1 and subsequent clauses—and being more accurate about the criteria, for example, the common law qualified privilege. It would help if the Minister did not try to pick a fight on the main issues, but answered some questions from Opposition Committee members on some of the detail.

Mr Djanogly: I shall move on.

Paul Farrelly: I fear that the Minister misunderstood my remarks regarding speed. They were made tongue in cheek, because we have proceeded diligently through the Bill today.

Mr Djanogly: I thank the hon. Gentleman for his clarification.

The amendments would make a number of changes to clause 4, dealing with the responsible publication defence on matters of public interest. Amendments 26 and 27 would remove the requirement under subsection (1)(b) for the defendant to show that he or she acted responsibly in publishing a statement on a matter of public interest, replacing it with a requirement that the claimant show that the defendant has acted irresponsibly. That would reverse the burden of proof to put the onus on the claimant.

As I think was recognised by the right hon. Member for Rotherham and the hon. Member for Bishop Auckland, the Reynolds defence on which clause 4 is based has been developed by the courts in recent years to provide an additional protection for defendants in circumstances where defamatory material that is not necessarily true on a matter of public interest may have been published, but where the defendant can show that he or she has acted responsibly in publishing it. That defence has developed in recognition of the importance of ensuring that a proper degree of protection is given to publications that are in the public interest.

The Government consider that to go further and to put the onus on the claimant to prove that the publisher had acted irresponsibly would unfairly tilt the balance against the claimant. The onus is already on the claimant to show that the statement complained of is defamatory; and in doing that, under the terms of clause 1, he will have to show that he has suffered, or is likely to suffer, serious harm as a result of its publication. It is right that the onus should then rest with the defendant to show that he has a defence to the action. In addition, it may be difficult for the claimant to adduce evidence to demonstrate irresponsibility: for example, he is unlikely to be in a position to know what information the defendant had before publishing the statement, what he knew about the reliability of that information, and what steps he took to verify it.

Amendments 28 and 29 would remove

"the nature of the publication and its context"

from the non-exhaustive list of factors in subsection (2) to which the court may have regard in deciding whether a defendant has acted responsibly in publishing a statement on a matter of public interest, and would instead insert a provision in subsection (1)(b) relating to the nature of the publisher, the publication and its context. To make out the defence, a defendant would have to show that the statement complained of was, or formed part of, a statement on a matter of public interest, and that

"the defendant, having regard to the nature of the publisher, the publication and its context, acted responsibly in publishing the statement complained of."

The intention appears to be to make that consideration an overarching factor for the court to consider, rather than merely one of the range of factors in subsection (2). The nature and context of the publication already features in the non-exhaustive list of factors to which the court may have regard in deciding whether the defendant has acted responsibly in publishing the statement complained of. As the explanatory notes to the Bill make clear, the provision reflects the flexible way in which the clause is to be applied and the need for the court to bear in mind the circumstances in which the publisher was operating and the resources available to it: for example, the context of a national newspaper is likely to be different from the context of a non-governmental organisation or a scientific journal.

The Government do not consider that elevating the nature of the publisher, publication and context to the status of overarching factor is appropriate. It is of the utmost importance that the court has as much flexibility as possible when considering whether the defendant has acted responsibly. The considerations that are most relevant will differ depending on the circumstances of the individual case and the courts should be able to apply the factors in the list and any others they consider relevant factors flexibly. Elevating one factor above all the others would encroach on that flexibility.

Amendment 30 would insert an additional matter into the list of factors in subsection (2) to which the court may have regard in deciding whether a publisher has acted responsibly. As the list is not exhaustive, the amendment would draw to the court's attention that they may wish to take into account the reasonable judgment of the author or editor of the statement complained of, having regard to what was known at the time of the decision to publish the statement.

Concerns have been expressed in the light of the recent Supreme Court judgment in the case of Flood *v.* Times Newspapers—concerns raised again today by various right hon. and hon. Members—that clause 4 may not adequately reflect the terms of that judgment in relation to the weight to be given to editorial judgment in deciding whether the publisher acted responsibly. That decision came after the draft Bill was published, but I can confirm to the hon. Member for Stoke-on-Trent South that we have considered its impact in terms of clause 4. I do not believe that a specific amendment of this nature is necessary or appropriate. The question whether the defendant has exercised his judgment responsibly goes to the essence of the new defence, and it would be very difficult and potentially confusing to include a specific reference to editorial judgment in the clause, as the amendment would do. It would effectively be saying that in deciding whether the defendant had exercised judgment responsibly in publishing the statement, the court should have regard to the judgment of the defendant. There is also the need to ensure that the defence is clearly applicable in a wide range of circumstances beyond mainstream media cases, and focusing specifically on editorial judgment in this way might cast doubt on that.

[Mr Djanogly]

The hon. Member for Bishop Auckland asked whether the clause is intended to reflect or change the current law. I can tell her that it is intended to reflect the current law, but to make it more readily applicable in circumstances beyond mainstream journalism. The list of factors does not repeat the Reynolds factors word for word, but encapsulates them in a flexible and non-exhaustive way.

The hon. Member for Newcastle-under-Lyme and, I think, my right hon. Friend the Member for Bermondsey and Old Southwark queried Flood and asked for my views on it, specifically in relation to the timing of addressing the issue. I can tell them that the Bill is intended to and does reflect current case law. More important, it is clear about the core principles in such cases, but flexible enough to meet changing demands. In the Flood case, the Supreme Court did the very thing that the clause does: it asserts the principles of the public interest and acting responsibly, leaving the court to consider a non-exhaustive list of relevant factors, which was referred to by Lords Nicholls and Cooke. The court confirmed, as the clause does, that the weight to be given to such factors varies from case to case.

Our judges are sensible people. It is very unlikely that the courts will cease to consider and give weight to the existing case law in interpreting the new statutory defence where they consider it appropriate to do so, and as such we would expect that they will continue to want to have regard to the Flood judgment. In addition, the explanatory notes accompanying the Bill explain that the court does not have to determine whether it would have acted in the same way as the defendant, but merely whether the defendant acted responsibly, and that this means that an allowance will be made for what has been referred to in the case law as "editorial discretion". That should, I believe, provide sufficient clarity and reassurance that editorial judgment will continue to be taken into consideration by the courts without the need for a specific provision.

Amendment 8 would make a drafting amendment to the provisions in clause 4 dealing with reportage. In instances where this doctrine applies, the defendant does not need to have verified before publication the information reported, as long as the way that the report is presented gives a balanced picture: it must be, or form part of, an accurate and impartial account. The amendment would replace the words "this section" with "subsection (3)". We consider that the provision in the Bill is correctly drafted and that it will achieve the intended effect that subsection (4) will apply only in the circumstances referred to in subsection (3).

New clause 6, which was tabled by the hon. Member for Stoke-on-Trent South, but also discussed by my right hon. Friend the Member for Carshalton and Wallington, would introduce a form of qualified privilege for any statement on a matter of public interest. The defence would fail only if the claimant could show that the statement had been made with malice, or that he had requested the defendant to publish in a suitable manner a reasonable letter or statement by way of explanation or correction, and the defendant had failed to do so. It is not clear whether that new defence would operate alongside the one in clause 4 or replace it. I do not consider that there is any need for an additional defence of this type, and firmly believe that the clause 4 provision is preferable.

The Reynolds defence itself originated as a form of privilege and subsequently evolved into a more free-standing defence. Clause 4 reflects that by providing for a clear, flexible, free-standing defence that provides effective protection for defendants publishing responsibly on matters of public interest. The provisions relating to publication of a reasonable letter or statement by way of explanation or contradiction would cut across the existing offer of amends procedure under the Defamation Act 1996. Under that procedure a person who has published an allegedly defamatory statement can already make an offer of amends in the form of a correction, an apology and, where appropriate, a payment of damages. From our discussions with stakeholders and the consultation process, it is clear that there is a broad consensus that the offer of amends procedure provides a valuable means of settling cases promptly where the defendant accepts that he is wrong, and that the procedure is working effectively and does not need alteration. Introducing further measures relating to the publication of statements of explanation or contradiction would undermine the effective working of the current law and procedures to no discernible benefit.

The terms of the new clause could also create confusion: for example, it may be very difficult for a publisher to assess exactly how it should publish an explanation or contradiction to satisfy the requirement for it to be "in a suitable manner". The Government therefore consider that clause 4 strikes the right balance by providing effective protection for defendants who responsibly publish material on issues of public interest, while ensuring the claimants have a remedy where the defendant has not acted responsibly.

For the reasons I have outlined, I hope that the hon. Gentleman will agree to withdraw the amendment.

Paul Farrelly: I was an investigative journalist before coming to the House. I have been pursuing libel reform for many years, and let me say, without sounding too pompous, that in my experience it is rare that investigative journalists, newspaper lawyers, newspapers, and lawyers for claimants and for defendants, who often face each other across the court, are unanimous on anything. From the discussions that I and others have had, the unanimous view is that the effect of clause 4 is not to incorporate Flood. I urge the Minister to take advice on that.

Mr Djanogly: We will of course consult further on that; I am prepared to hear further points. The implication of what the hon. Gentleman says is not, of course, that all those different stakeholders who say that Flood has not been represented in the Bill would therefore say, "This is what we should do." They would all have different answers to that.

Tom Brake: The Minister may be about to address this point, but as part of that consultation, I assume he would be happy to meet colleagues who have concerns about clause 4 and the public interest defence.

Mr Djanogly: Of course. I have had representations from and meetings with a number of right hon. and hon. Members.

Many points were raised on stand part; I will do my best to work through them. If I do not get to them all, presumably hon. Members will remind me and I will drop them a line later.

The hon. Member for Newcastle-under-Lyme asked why the reportage provision applies only in relation to a dispute to which the claimant was a party, and not to any kind of dispute. We consider it right to ensure that the claimant was a party to the dispute because, where he is a party, one can expect him to have had an opportunity as part of the dispute to put his side of the story or say why what the other person has said is wrong. A fair and accurate report of that dispute would generally include the two sides and, where the claimant is a party to the dispute, there is a safety mechanism built in that does not exist where the claimant is not a party.

He also asked why the reportage provision focuses on a dispute. That provision is intended to reflect core elements of the current law as articulated by the courts, which focus on whether the publication was of an accurate and impartial dispute between the claimant and another party. He also raised the risk that the list of factors in the defence will be used as a check-list by the courts. I think he described that as a series of hurdles. We recognise the need to provide as much flexibility as possible. The Bill, therefore, sets out specific circumstances to which the court may have regard in considering whether the defendant acted responsibly in publishing a statement in an illustrative and non-exhaustive way, if the courts consider it appropriate within the overall circumstances of the case.

The hon. Member for Bishop Auckland and my right hon. Friend the Member for Bermondsey and Old Southwark asked for the meaning of "in the public interest", and that the clause should define that to ensure that issues are covered. We believe that, in view of the very wide range of matters of potential public interest and the sensitivity to factual circumstances, attempting to define it in statute would be fraught with problems. For example, there would be the risk of missing matters which are in the public interest, resulting in too narrow a defence. The risk of this would prove a magnet for satellite litigation over the terms of the matters specified in the definition. We believe that in the context of defamation this should be a matter for the courts to decide in all circumstances, rather than apply a definition used in other contexts such as the PCC code or CPS guidance.

The hon. Member for Stoke-on-Trent South and the right hon. Member for Rotherham asked how clause 4(4) would work in practice. Subsection (1) sets out the defence that applies generally, including in relation to reportage. The statement complained of must be on a matter of public interest and the defendant must have acted responsibly in publishing it. In working out whether the defendant did act responsibly, the court may consider the factors referred to in subsection (2), along with anything else that it considers relevant. But where the particular statement was reportage—an accurate and impartial account of a dispute to which the claimant was a party—one of those factors is switched off via subsection (4). The factor is any omission by the defendant to take steps to verify the truth of the imputation conveyed by the statement. In relation to reportage, for the defence to apply, the statement must still be on a matter of public interest, but so long as it was part of an accurate and impartial account of the dispute in question, the defendant need not verify its truth. That would of course require the defendant to consider the merits of the dispute.

The hon. Member for Stoke-on-Trent South asked why we do not just stick to the common law, which provides greater flexibility for the development of what is a recent defence.

Robert Flello: Perhaps I did not come across as succinctly as I intended. My point was why get rid of the common law defence of Reynolds unless the intention is to reflect the entire Reynolds plus Flood defence in clause 4, or indeed improve on Reynolds.

Mr Djanogly: I thank the hon. Gentleman for that clarification. Of course, I have already discussed that particular issue.

The hon. Gentleman also referred to the concern of Which? about drafting and its belief that "neutral" would be a preferable word to "impartial" in clause 4(3) because it better describes certain situations covered by that subsection, namely the reporting of disputes between parties without supporting either party in that dispute. We consider that the drafting of the provision accurately reflects the current law. He also said that clause 4 should be amended to require the court to have regard to all the circumstances of the case. We do not consider that to be necessary, because the clause as drafted already makes clear that the list of factors, to which the court may have regard in deciding whether a publication has been made responsibly, is flexible and non-exclusive.

The hon. Gentleman also asked whether reference should be made to whether a report was of current events, and the urgency involved. The clause already refers to the timing of the statement's publication as one of the factors in relation to the responsible publication, and the court will be able to take that issue into consideration where it is appropriate. The specific reference to urgency was removed on the recommendation of the Joint Committee which was concerned that it would narrow the defence by focusing unduly on whether the publication could have been delayed to enable further investigation, rather than considering whether it was published at an appropriate time.

The hon. Gentleman also asked whether the clause should refer to the resources of the publisher. The Bill already contains a provision to enable the court to consider the nature and context of publication, and I can confirm that resources would fall within that consideration, as the explanatory notes confirm. He also suggested that the Government should adopt an approach that protects any publication on a matter of public interest, unless the author was acting maliciously or recklessly. I believe that that suggestion came from the Libel Reform Campaign. As the Joint Committee recognised, such an approach would dramatically widen the scope of the defence, and we do not consider that that would offer sufficient protection to people whose reputations had been defamed.

6.45 pm

My right hon. Friend the Member for Bermondsey and Old Southwark asked about the need for recompense, such as apologies and corrections. Clause 12 will extend the ability of the court to order publication of a summary

of its judgment. It will also offer an amends procedure under the terms of the 1996 Act, which already allows the publication of an apology or correction where defendants accept that they are in the wrong. We will, obviously, look carefully at any recommendations from the Leveson inquiry.

Robert Flello: It is not often that we hear the words "thing of beauty" and "Lib Dem policy" in the same paragraph, let alone the same sentence. Even if these amendments—which, in my view, are good and sensible—were to be included in the Bill, I still would not think that clause 4 was good enough.

I am not entirely happy with the slightly flawed beauty of new clause 6. Sadly, we will not get a chance this afternoon to vote on it, but it would probably be a good thing for the strength of the coalition not to test new clause 6. I will seek to divide the Committee on clause stand part, but I beg to ask leave to withdraw my amendment.

Amendment, by leave, withdrawn.

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

The Committee divided: Ayes 11, Noes 6.

Division No. 2]

AYES

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	

NOES

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

Question accordingly agreed to.

Clause 4 ordered to stand part of the Bill.

The Chair: The programme order that we agreed says that we have until 7 pm. We have agreed that we will carry on and try to deal with amendment 17. We will probably adjourn after we have done that. It might take us a few minutes past 7 o'clock, and I am in your hands in that regard.

Clause 5

Operators of websites

Robert Flello: I beg to move amendment 17, in clause 5, page 3, line 23, at end insert—

'(2A) The defence provided in this section is not affected by the operator having a policy of amending content ("moderation") after it has been published provided that any changes made as a result of the actions of the moderator—

(a) do not significantly increase the defamatory nature of the words complained of;

(b) do not remove a relevant defence to an action for defamation in relation to the words complained of; and

(c) do not significantly increase the extent of the publication of the words complained of.'.

Mr Havard, can I confirm that we will not take clause stand part until we have dealt with both amendment 17 and the subsequent group of amendments?

The Chair: That is correct.

Robert Flello: Amendment 17 is the first of a number of amendments and new clauses tabled to try to make sense of what is, sadly, the worst part of the Bill. I said on Second Reading that I thought clause 5 was ill-thought out, shoddy and incomplete, and does the Minister and his officials no credit. It is extremely disappointing that such an important part of the Bill should be in the state it is in. I had hoped that the Minister would have taken time between Second Reading and now to come forward with something more than the letter sent to you, Mr Havard, and your co-Chair, Mr Chope.

The last time a Defamation Act was passed, the internet was in its infancy, trolling was rare and relatively unknown, and Twitter, Wikipedia, Google and Facebook were all years away from being launched. For all the benefits it has brought, the internet has therefore provided a heap of new challenges to our legal system, perhaps none more than defamation legislation, which has to keep up with an ever-moving target and increasingly varied and complicated means by which people are able to post or spread statements that may, or may not, be defamatory. This is where my amendment comes in. We will, of course, be able to debate those issues more widely on clause stand part, but I am keen to keep in this specific amendment. It is useful to refer to the Law Commission's report *Defamation and the Internet*, published in 2002, which is why this section of the Bill is so important and why I have tabled my amendment.

The Commission report states:

"There is a strong case for reviewing the way that defamation law impacts on internet service providers. While actions against primary publishers are usually decided on their merits, the current law places secondary publishers under some pressure to remove material without considering whether it is in the public interest, or whether it is true. These pressures appear to bear particularly harshly on ISPs"—

that is, internet service providers—

"whom claimants often see as 'tactical targets'. There is a possible conflict between the pressure to remove material, even if true, and the emphasis placed upon freedom of expression under the European Convention of Human Rights. Although it is a legitimate goal of the law to protect the reputation of others, it is important to ask whether this goal can be achieved through other means".

Amendment 17 seeks to introduce measures to better protect those internet intermediaries—internet service providers, search engines, discussion boards—from action. I hope that the reasoning for introducing this amendment is startlingly clear. I will however explain why it is necessary that these measures are in the Bill. This amendment is backed by the work of the Joint Committee and it is to ensure that someone who subsequently moderates a post does not open themselves up as an intermediary to any action, provided they have not made things worse or done anything that takes away somebody else's defence. Post moderation is something that should be encouraged. Many consider it best practice and so it would be a great shame if this Bill ended up creating a chilling effect of its own while failing to protect those who moderate posts.

As with many of my amendments, this does not run counter to anything which the Government are trying to achieve with this Bill. It would simply strengthen the Bill to ensure that, as I continue to warn, an enterprising lawyer does not consider that this is a loophole, leading to further debate and legislation being required in the years ahead in order to close it. I am sure members will be delighted to hear that I will not detain the Committee this evening more than necessary, but I would stress that this amendment 17 is one of a series that tries wherever possible to bring some sense back to clause 5, which is wholly inadequate. Amendment 17 would ensure that moderators do not find themselves stumbling into problems simply because, for example, they take out offensive language, tidy up a posting, or moderate a posting in a way that fits in with the particular style of the account on which the posting has been made. It is something that needs to be in here and I hope—perhaps in vain—that when the Minister rises, he will at least say some warm words about it, although I fear that we are not going to agree about clause 5.

Helen Goodman: I strongly agree with what my hon. Friend has just said. The editors of local newspapers, which frequently have websites where people can comment alongside the articles, tell me that if they moderate those comments, they open themselves up to such claims, with the law in its current state. It is important, because—I do not know how often you look at such websites or whether you have ever posted anything, Mr Havard—such comments are frequently followed by a lot of abuse, and that abuse needs to be stripped out. The abuse content is quite separate from the defamatory claims, so if we are to have a reasonable tone on the web in general, we need to enable newspapers to carry on moderating and not to fear that there is any risk in doing so. It is a particular issue for women, whose web articles far more frequently attract abuse, which has nothing to do with anything defamatory at all. If we are to get a tone on the web that will enable it to be a genuine network that people can use to exchange ideas, we need to offer some protection to participants. My hon. Friend's proposal would help to achieve that.

Mr Djanogly: We are now on clause 5, which deals with the operators of websites, and hon. Members will appreciate that I have now provided them with a note on the proposed procedure, which will be the subject of regulations relating to the clause.

Amendment 17 would insert a general provision into clause 5 relating to situations when a website operator moderates material posted by third-party users on a site that it hosts, which is one where it monitors and amends the content of the material. We share the view expressed by the Joint Committee on the draft Bill that responsible moderation of content should be encouraged. However, we do not consider that the amendment is necessary or appropriate to achieve that aim. Under the provisions in the Bill, a website operator will be able to rely on the defence under clause 5—provided it follows the prescribed process—regardless of whether or not it moderates the site in question, and we do not consider that a specific provision is needed.

Robert Flello: It strikes me that having to rely on the other provisions in the clause increases the level of effort, whereas a simple clause that just sets out the situation for moderators would mean that they would not have to rely on all the other defences.

Mr Djanogly: I am explaining why that would not necessarily simplify the case at all.

If the operator moderates content on the website so much as to change the meaning of what the author had posted in a way that made it defamatory or increased the seriousness of the defamation, that would be a factor that the court might want to consider as part of the question in subsection (2) of whether it was the operator rather than the author who could properly be said to have posted the material. Any dispute as to whether the operator had actually posted the material itself would be a matter for the court to determine in all the circumstances of the case. The Government do not consider it helpful to prescribe particular circumstances under which the operator should be regarded as having amended the material to a sufficient extent to be regarded as having posted the material. In any event, it is our view that the conditions contained in the amendment would provide an inappropriate level of protection for operators, given the need for the defamatory nature of the words and the extent of their publication to be significantly increased.

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

Robert Flello: I have continued to be disappointed throughout the day, and it will be a sad day in the Flello household. Despite our best efforts and the lateness of the hour, we really feel that reassurances and information are not coming through from the Minister. With the greatest respect, the Minister should perhaps have a word with his officials after this sitting in order to get some more detail into the briefings. That would be most welcome.

I shall not push the amendment, and I will ask the Committee to agree to withdraw it, not because the amendment is not good—it is—but because even if it were accepted, it would be a beauty spot on what is otherwise an ugly clause. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Ordered, That further consideration be now adjourned. *—(Mr Vara.)*

7.1 pm

Adjourned till Thursday 21 June at Nine o'clock.