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GENERAL COMMITTEES

Public Bill Committee

DEFAMATION BILL

Fourth Sitting

Tuesday 26 June 2012

(Morning)

CONTENTS

CLAUSES 6 to 16 agreed to.

New clauses under consideration when the Committee adjourned till this day at Four o'clock.

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The Committee consisted of the following Members:

Chairs: MR CHRISTOPHER CHOPE, † MR DAI HAVARD

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

Public Bill Committee

Tuesday 26 June 2012

(Morning)

[MR DAI HAVARD *in the Chair*]

Defamation Bill

Written evidence to be reported to the House

D02 Booksellers Association of the UK and Ireland Ltd

D03 Celia M. Bibby

D04 Hardeep Singh (Sahota)

10.30 am

The Chair: Before we begin, I understand we have shared objectives this morning to try to complete the business up to and including clause 16, if that is possible, allowing a proper debate on new clauses in the second sitting today.

Clause 6

PEER-REVIEWED STATEMENT IN SCIENTIFIC OR
ACADEMIC JOURNAL ETC

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

Robert Ffello (Stoke-on-Trent South) (Lab): Thank you, Mr Havard, and I will certainly endeavour to ensure that we reach the end of clause 16, although we need to ensure that we debate the Bill properly and as thoroughly as we can.

Although I remain disappointed that the amendments to clause 5 were not accepted, I am glad to say that I have a much more positive view of clause 6, which deals with peer-reviewed statements in a scientific or academic journal. I might not go so far as to describe it as a thing of beauty, but it is certainly one of the more attractive aspects of the Bill. I am delighted that the clause has been included, because scientists and academics across the globe have been extremely concerned about the prospect of being sued for libel in this country. There is no greater example of the chilling effect of our current legislation than what has happened to scientists of late. The case brought against Simon Singh by the British Chiropractic Association is one of the best known examples.

The Bill strikes the right balance between removing the chilling effects on scientists and academics of the current legislation, and showing that the new privilege will not be open to abuse. Subsection (2) makes it clear that the statement in question must relate to a scientific or academic matter, and subsection (6) ensures that if it can be proved that the statement has been published with malice, the defence is lost. Those provisions reduce the potential for abuse, and they are to be welcomed.

In the case of Simon Singh, where comments were made in a newspaper rather than in a journal, will the Minister clarify whether the defence in clause 6 would have been available? Such a situation might have been addressed by the adoption of new clause 6, which would have provided a true public interest defence. I would, therefore, appreciate the Minister's comments on whether he would be willing to give the matter further consideration, given that academic and scientific journals are not the most popular publications for the average person on the street. In my view, it is still necessary for statements such as those made by Simon Singh to be available in more widely circulated publications.

I am sure that the Minister will be pleased to know that the Libel Reform Campaign supports the clause, believing that it will provide better protection for academic and scholarly publications. With that, in the spirit of trying to move forward, I will sit down.

Paul Farrelly (Newcastle-under-Lyme) (Lab): I have a brief comment. I congratulate the Government on accepting the recommendation of the Joint Committee on the draft Defamation Bill and bringing forward the clause. It is valuable, and the Government are to be praised for introducing it.

The Parliamentary Under-Secretary of State for Justice (Mr Jonathan Djanogly): It is nice to see that there is clear consensus on support for the clause, which creates a new defence of qualified privilege for peer-reviewed material in scientific or academic journals. A core concern underlying our commitment to reforming the law is to protect scientific and academic debate from the threat of unjustified libel proceedings. Clause 6 is one of a number of measures in the Bill that are intended to encourage open and robust scientific and academic debate. As hon. Members have said, it responds to a recommendation made by the Joint Committee on the draft Bill.

Subsections (1) to (3) provide for the defence to apply where certain key elements that relate to the peer review process are met. Those are that the statement concerned "relates to a scientific or academic matter"

and that before it was published

"an independent review of the statement's scientific or academic merit was carried out by the editor of the journal, and one or more persons with expertise"

in the matter concerned.

Subsection (8) clarifies that where a journal has more than one editor, the reference is to the editor or editors who were responsible for the decision to publish the statement concerned. Those requirements stem from discussions we have had with editors of major journals, and they are intended to reflect the core aspects of a responsible peer-review process to ensure that only publications with appropriate procedures are given the protection of the new defence.

Subsection (4) ensures that the protection offered by the defence is available not only to the author of the peer-reviewed statement but to those who have conducted the independent review of its scientific or academic merit. We consider it fair that reviewers participating in the process, who may need to assess the papers submitted by the author and comment on them, and whose assessments are published in the journal, should also be protected.

Subsection (5) extends qualified privilege to fair and accurate copies, extracts and summaries of the peer-reviewed statement. Subsections (6) and (7) contain provisions that apply to qualified privilege in other contexts. They establish that privilege is lost if publication is shown to be made with malice, and that a person who publishes material in a scientific or academic journal is not prevented from relying on other forms of privilege such as that conferred by clause 7(9) on fair and accurate reports of proceedings at a scientific or academic conference.

The hon. Member for Stoke-on-Trent South asked whether the peer review defence would have been available in the Simon Singh case, and the answer is no. Simon Singh might, however, have been able to benefit from the other changes we are making on issues such as serious harm and honest opinion.

Question put and agreed to.

Clause 6 accordingly ordered to stand part of the Bill.

Clause 7

REPORTS ETC PROTECTED BY PRIVILEGE

Robert Ffello: I beg to move amendment 15, in clause 7, page 5, line 22, after ‘proceedings’, insert ‘, or of the contents of a press release circulated or published’.

My amendment would alter subsection (5), which in turn amends schedule 1 to the Defamation Act 1996. That schedule deals with qualified privilege and statements privileged subject to explanation or contradiction. I will not detain the Committee by going through the 1996 Act, because I am sure that Members know it almost off by heart as a result of their preparation for the sitting.

Amendment 15 is a probing amendment to deal with an issue that was raised in the judgment of *McCartan Turkington Breen v. Times Newspapers Ltd.* I draw the Committee’s attention to a section of the judgment—I suspect this will be less familiar than the Defamation Act 1996—which I will read for the sake of the record:

“The article contained a passage from the press release which was available at the press conference but only obliquely mentioned. Counsel for the solicitors argued that to this extent the article was not a report of the proceedings of a public meeting. Given a purposive construction of “public meeting”, recognising the role of the press informing the public, this argument cannot prevail. In substance, although not read out, the press release was in reality part of the agenda of the meeting. The technical and artificial argument to the contrary must be rejected.”

To provide some context for the Committee, I will quote the start of the judgment:

“On 24 January 1995 The Times published an article relating to the subject of a press conference which had been held the day before. The press conference had been organised by an informal Committee formed to secure the release and vindication of Private Lee Clegg, who had been convicted of serious criminal offences allegedly committed while he had been serving as a private soldier in the Parachute Regiment in Northern Ireland.”

The Clegg committee held that press conference at Lord St Oswald’s home in Yorkshire on 23 January 1995 to drum up support. The judgment continues:

“Representatives of the press were invited to attend. One of those who did attend was Mr. Wilkinson, the northern correspondent of The Times, who was despatched by his newsdesk to cover the conference and in due course wrote (with others) the article complained of.”

The important part is this:

“A press release was made available to all those attending but was not read aloud during the proceedings, although brief reference was made to it orally by one of the speakers...Mr. Wilkinson took the opportunity to put some further questions to Mr. McKay concerning criticisms of the solicitors made in the press release.”

The judgment explains:

“A measure of statutory protection has been granted to newspaper reports of proceedings of public meetings for over a century... This provision was replaced by a more elaborate provision in section 4 of the Law of Libel Amendment Act 1888”.

The Defamation Act 1952 took the matter further, and that led to the situation in which the judgment was made.

Through amendment 15, I want to clarify whether clause 7 restricts the *Turkington* judgment, possibly to the disadvantage of newspapers reporting on matters of public interest. As I have said, that judgment ruled that statutory qualified privilege covers fair and accurate—including verbatim—reporting of a press release available at a public meeting but not read aloud, and thus arguably not part of the proceedings. I have read extracts from the judgment, which held that in those circumstances the press release was part of the press conference.

Do we need to insert amendment 15 to ensure that clause 7 includes the *McCartan Turkington Breen* judgment, or does the Minister feel that it stands by itself? He is nodding from a sedentary position—I always find that a strange thing to say—so I hope that in a moment he will explain why clause 7 is sufficient without the benefit of amendment 15. My concern is that the clause is more restrictive than the *McCartan Turkington Breen* judgment would otherwise allow.

Paul Farrelly: The Defamation Act 1996 contains a valuable list of sources that attract qualified privilege. Clause 7, which is welcome, extends that list. I hope that the clause will also help people such as Dr Peter Wilmshurst, who made bona fide contributions to academic conferences. Sense About Science is to be congratulated on its campaign to protect members of the academic, scientific and medical communities. The clause will not stop people such as me checking whether there are representatives from Carter-Ruck or Schillings at certain professional conferences. One has sometimes to look around the room to see who might sue one, depending on the remarks one makes, but extending the measure to include professional conferences would widen it and might encourage sloppy speaking. We do not want to do that, or to encourage sloppy journalism.

I hope that the extension of qualified privilege will comfort non-governmental organisations and make them less fearful of so-called reputation management companies. I hope they will be less fearful that they have to prove the truth of reports, some of which have emanated from bodies such as the United Nations. I hope that clause 7, together with the defences for responsible journalism, will give mainstream publications the courage to be more robust when they are faced with claims from solicitors who tout their expertise in so-called reputational management around the world. Broadly, therefore, I welcome the clause.

Mr Djanogly: Amendment 15, which I appreciate is a probing amendment, would amend subsection (5) of clause 7, which sets out the terms of the qualified

[Mr Djanogly]

privilege to attach to reports of press conferences. Subsection (5) currently provides for the defence of qualified privilege to apply to:

“A fair and accurate report of proceedings at a press conference held anywhere in the world for the discussion of a matter of public interest.”

There are drafting difficulties with the amendment but as the hon. Member for Stoke-on-Trent South confirmed, the intention is to extend qualified privilege specifically to a report of the contents of a press release circulated or published at a press conference, in addition to the protection given to reports of the proceedings generally.

The Government do not consider that such a provision is necessary or appropriate. Subsection (5) is intended to reflect the law as it stands, the courts having already recognised that fair and accurate reports of a press conference fall within the scope of a “public meeting” under schedule 1 to the Defamation Act 1996, for which qualified privilege is available. The courts have also held that a report based on material that was handed out to people attending the press conference was still a report of the proceedings at the meeting, even though it was not read out during the meeting. In view of that, we consider a separate reference to press releases to be unnecessary. In any event, it would appear preferable for the court to apply the term “proceedings” in an open and flexible way. On that basis, I hope that the hon. Member for Stoke-on-Trent South will agree to withdraw the amendment.

10.45 am

Robert Flello: I am grateful to the Minister for putting that point on the record, and I hope that if the courts are subsequently required to consider the clause, they will have heard and accepted what he said. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 7 ordered to stand part of the Bill.

Clause 8

SINGLE PUBLICATION RULE

Robert Flello: I beg to move amendment 31, in clause 8, page 6, line 44, leave out from ‘applies’ to end of line 3 on page 7 and insert

‘, if—

- (a) a statement is published to the public (“the first publication”), and
- (b) there is subsequently published (whether or not to the public) that statement or a statement which is substantially the same.’

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

Amendment 11, in clause 8, page 7, line 17, at end insert—

- (c) the comparative quality and credibility of the source of the subsequent publication, compared with the first publication.’

Amendment 32, in clause 8, page 7, line 17, at end insert—

‘(5A) Publication shall not be deemed to be materially different merely by virtue of—

- (a) the publication, as part of a regular series of publications, without charge on the internet of academic or scientific journals which required payment to access when originally published; or
- (b) the creation of an archive accessible on the internet.’

Robert Flello: Amendment 31 probes why the protection of the single publication rule is restricted to re-publication by the same person who published the first statement. Surely that cannot be relevant, provided that the manner of publication is not materially different. I hope that the Minister will explain why it has to be the same person, or—hopefully—agree that the Government must go back and reconsider the clause. The Libel Reform Campaign is similarly concerned that it should not be relevant who subsequently publishes the statement, as long as the manner of publication is not materially different.

Amendment 11 is designed to look at whether there has been a material change if the first publication was in a less credible source than the subsequent one. We are concerned that, for example, in the case of a book based on a newspaper article—the article might have been small and discreet, and might not have attracted a great deal of attention; perhaps it was published in a newspaper known for a somewhat weak adherence to the facts—an author might decide to rely on the information in the article, publish a book and find that the situation we are discussing would otherwise apply. The amendment represents an attempt to determine whether the subsequent publication is as credible as, or more credible than, the original one. We are trying to drill down into the credibility of the argument.

Amendment 32 is somewhat different from amendments 31 and 11, which were probing amendments. It is designed to provide clear protection under the single publication rule for two categories of re-publication. First, a number of scientific journals, which were initially available by subscription—probably, therefore, in paper form—are made open access on the internet after a year. Publishers often find that because of the nature of science, the number of reads of a paper copy of an article falls off quite dramatically a few weeks after publication. There is not much point, therefore, in publishers’ restricting access to the articles after a short time; it is much better for them to open up the publication. It also allows scientists in developing countries to access scholarly works quickly and easily. A monthly journal can cost a university library thousands of pounds, which can be prohibitive for a developing country that seeks to keep as up to date as possible with scientific developments. When the initial clamour for their publications tails away, scientists make them open access on the internet.

Secondly, there is public policy pressure for taxpayer-funded research to be made open access—at least after a year—by publication either in open-access journals or in a university or research institute repository. That is something valuable, and Governments should support and promote it. The amendment is also designed to address the creation of archives on the internet, or even on microfilm, which by definition are materially different in form compared with the original publication but which should not lose the protection of the single

publication rule. That rule can be ignored by a court in the interest of justice, but there are public policy advantages to making protection under the single publication rule the default position for archives.

I hope that the Minister will address those issues and explain why he feels that the probing amendments are not necessary. Regarding amendment 11, I hope he might agree to go away and reconsider the clause, and return with an improved version. Amendment 32 is a matter of public policy, which I am sure the Government would want to include in the Bill to protect archives, and academic and scientific journals that make scientific research and knowledge available through open access. I look forward to the Minister's comments.

Paul Farrelly: Broadly, subject to the questions raised by my hon. Friend the Member for Stoke-on-Trent South, I welcome clause 8. It follows the recommendations of the report by the Select Committee on Culture, Media and Sport on press standards, privacy and libel, to which I contributed. The question of archives remains, however. The report contained a specific recommendation concerning archives, and I, too, would welcome the Minister's comments on that.

The ultimate test of the clause in operation would be the *Private Eye* archive test. Is it likely to give comfort to the publishers of that sometimes scurrilous but mostly greatly investigative magazine to be able to publish its archive online?

Mr Djanogly: The amendments relate to clause 8, which provides for a single publication rule. Generally speaking, an action for defamation must be brought against a publisher within a year of publication. Under the current law each publication of defamatory material gives rise to a separate cause of action, so subsequent publications reset the clock. That means, in relation to online material, that each hit on a webpage creates a new publication and potentially a separate cause of action. As a result, publishers are potentially liable for any defamatory material they publish that is accessed online, no matter how long after initial publication the material is accessed. Clause 8 therefore provides a single publication rule to protect subsequent publications by the same publisher.

Amendment 31 would apply the single publication rule to the subsequent publication of the same material by any publisher, rather than by the same publisher, by removing the reference to "a person" in the opening line of subsection (1). It would refocus the provision on the statement being published rather than the act of the person publishing, and it reflects a recommendation made by the Joint Committee. As the Government indicated in their response to the Joint Committee, we do not agree with that recommendation, because we do not believe that extending the single publication rule in such a way would provide adequate protection for claimants.

For example, if a claimant were to bring an action in relation to the original publication and that action took more than a year to resolve, he would have to rely on the court to exercise its discretion under the Limitation Act 1980 and permit him to bring a further action against another person who might re-publish the material. Although the claimant may have obtained a court injunction against, say, the local parish magazine to prevent further

publication of the defamatory material, a national broadsheet would still be free to re-publish it. A claimant would be barred from bringing a claim unless the court felt it would be equitable to allow the claim to proceed.

Amendment 11 would allow a court, in considering whether a subsequent publication of the same—or substantially the same—material was made in a materially different manner from the original publication, to have specific regard to the quality and credibility of the source of the re-publication compared with that of the first publication. To strike the correct balance between protecting the claimant's reputation and protecting the publisher's right to freedom of expression, subsection (5) provides that the single publication rule does not apply if the manner of the subsequent publication of the statement is materially different from that of the first publication. Subsection (5) indicates that in considering whether a publication is made in a materially different manner the court may have regard, among other matters, to the level of prominence that a statement is given and to the extent of the subsequent publication. The amendment would add to those factors the comparative quality and credibility of the source of the subsequent publication in comparison with the original one.

Unless it is considered in conjunction with amendment 31, it is difficult to see when amendment 11 would apply. If a statement is published for a second time by the same publisher, the comparative quality and credibility of the source will almost always be the same, even though the place where the subsequent publication appears may be different. In any event, the list in subsection (5) is non-exhaustive so if such considerations were relevant the court could take them into account. Because we do not consider amendment 31 appropriate, we do not believe that amendment 11 is necessary either.

Clause 8(4) provides that the single publication rule does not apply when the manner of the subsequent publication of the statement is materially different from that of the first publication. Under amendment 32, a subsequent publication shall not be deemed materially different in two specific instances: first, where the statement is part of a scientific or academic journal, originally accessible only on payment of a fee, which becomes accessible free of charge; and, secondly, where the subsequent publication is the result of the creation of an archive that is accessible on the internet.

The Government's consultation on the draft Bill expressly recognises that subsection (4) might mean that the single publication rule does not apply to an article that is made available on a free-access basis after it was initially published in a subscription-based scientific journal with a small readership. There may, however, be circumstances when making a previously subscription-based journal article freely available could significantly increase the extent of the publication and cause harm to the claimant. In the light of that, we do not believe that it would strike the correct balance to say that a claimant could never bring an action in such a case. We prefer to leave it to the courts, which will need to be satisfied that the publication has been made in a materially different manner, and that the new serious harm test in clause 1 is satisfied, before finding for the claimant.

[Mr Djanogly]

11 am

Likewise, it is possible to see how placing material on an archive that is accessible on the internet, especially when the material was previously available only in an offline publication, could bring it to the attention of a much wider audience and have a damaging effect on the claimant's reputation. It is difficult to attempt a precise definition of all the possible situations in which material may be re-published. We believe that it would be unduly inflexible to set out in statute specific instances when the test of whether a publication has been made in a materially different manner may, or may not, be satisfied. On balance, therefore, we believe that it is best to leave the application of the materially different manner test to the courts in individual cases.

The Government consider that clause 8 strikes the correct balance between protecting freedom of expression, by preventing publishers from facing open-ended liability, while safeguarding claimants' right to protect their reputations. On that basis, I hope that the hon. Member for Stoke-on-Trent South will agree to withdraw the amendment.

Robert Ffello: May I seek some guidance, Mr Havard, on whether we will move to a stand part debate if I withdraw the amendment?

The Chair: If you withdraw the amendment, we will move to a stand part debate. If you want to start picking and choosing among the amendments, I will give you other advice.

Robert Ffello: In that case, I will leave my comments until the stand part debate, and I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

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

Robert Ffello: It seems more appropriate to make my comments in this context. One thing that struck me in the Minister's response—I am grateful to him for it—is that we started with a Bill that sought to codify case law and bring together a set of rules in one place, but he now says we should leave things to the courts to decide. When he spoke about clause 8, he said “may” several times, and several times he said that it was best to leave matters to the courts. I am concerned about the apparent contradiction between the two positions.

Clause 8 is a good clause, and it is very welcome. Broadly speaking—85% to 95%—it gives clarity, but we have reservations about online archives and material that becomes open access after being behind a pay wall. I urge the Minister to ensure that he and his officials work further on the clause and tighten up the wording before Report.

Mr Djanogly: I shall respond specifically to that point by saying that when we create new statute we invite new court decisions and the creation of a new body of case law.

Question put and agreed to.

Clause 8 accordingly ordered to stand part of the Bill.

Clause 9

ACTION AGAINST A PERSON NOT DOMICILED IN THE UK OR A MEMBER STATE ETC

Paul Farrelly: I beg to move amendment 52, in clause 9, page 7, line 27, leave out ‘against a person who is not domiciled’ and insert

‘by a person or against a person neither of whom are domiciled.’.

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

Amendment 53, in clause 9, page 7, line 32, at end insert—

‘(1A) This section also applies in an action for defamation where the court is satisfied that the words or matters complained of have been principally published outside the United Kingdom.’.

Amendment 54, in clause 9, page 7, line 37, at end insert

‘taking all relevant factors into consideration and having regard also to the extent of publication elsewhere.’.

Paul Farrelly: If you will allow me, Mr Havard, before I address each of the amendments I will make a short preamble on libel tourism so that I do not have to repeat those remarks and extend the stand part debate.

The Chair: Okay.

Paul Farrelly: I do not really need to go into the phenomenon known as libel tourism; it is succinctly summarised on pages 48 to 56 of the Culture, Media and Sport Committee's report on press standards, privacy and libel, which was published in February 2010. I would like to make two overarching points, however.

First, many people, including members of the judiciary, have questioned the real extent of the problem. This point goes back to observations on other forms of journalism. The extent of the problem—the chilling effect, and the incentive that the law gives publishers not to publish, or to withdraw material, even where publication is in the public interest—cannot be measured by the number of cases alone.

Secondly, libel tourism is inextricably linked to the question of court practice. One of the most extreme cases of libel tourism, which has been mentioned before in the Committee, is *Mardas v. New York Times*. In the so-called Magic Alex case—I will not repeat the details—the Master of the court ruled that it was an abuse of jurisdiction for it to be heard in the UK, but the judge in the case overruled his Master. In our report, we are quite critical of that, but I think that we pull our punches with respect to the judge, Mr Justice Eady. We said:

“On balance, we believe there is sufficient evidence to show that the reputation of the UK is being damaged by overly flexible jurisdictional rules and their application by individual High Court judges, as exemplified by Mr Justice Eady in the *Mardas* and *New York Times* case.”

The argument that is often put in the High Court is, “If you disagree with my judgment, you can appeal.” However, appeals are expensive and sometimes time consuming, and that goes to the heart of the problem, which is the

cost of defamation law. With respect to court practice, I draw the Minister's attention to rule 6.36 of the civil procedure rules. He will see that it is extremely broad and that it gives no guidance, particularly on the extent of publication in the UK. The discretion is almost limitless, which is one of the reasons why we wanted the Government to follow the recommendation of the Joint Committee on the draft Bill that we consider the proposed changes to the civil procedure rules that would give effect to the intentions behind the Bill.

Just to conclude my preamble, the real issue is not just the number of cases in the past or their chilling effect but the reputational damage that has been done to the UK and our courts by some of the cases. Let me point out, as an example, the Rachel Ehrenfeld case, which led to the so-called Rachel's law—not a campaign run by the *News of the World* but a law passed at New York state level followed by attempts at congressional level that would make UK libel decisions unenforceable in US courts. On reputational damage, I draw the Minister's attention to the submission made by the Association of American Publishers to our Select Committee. It said that many of the publishers, some of the best names in journalism, made the comment that the libel courts here, with their attendant costs, were tantamount to a racket. It said that a small number of judges of first instance, with lawyers, often from the same chambers, were hearing cases that in its opinion, and our opinion, should never have been allowed to be brought. That submission is also referred to and described in our Select Committee report.

The amendments are probing amendments. Amendment 52 is there to capture the essence of libel tourism, which is where a foreign person or a foreign company brings an action in the UK against another foreign person or foreign company. For example, it is intended to capture the case of Rinat Akhmetov, a Ukrainian businessman, who sued a Ukrainian language website, Obozrevatel, here in the UK. It is also intended to capture the case of Iceland's Kaupthing bank, which was allowed to sue a Danish newspaper, Ekstra Bladet, in the UK—and we all know what happened to Kaupthing along with the rest of the Icelandic banking industry. As the Minister will recognise, the amendment is intended to address the England and Wales issue. There has been some concern that the clause would make it harder for someone in England and Wales to sue in their own courts.

Amendment 53 captures circumstances in which publication occurs outside the United Kingdom. The case of Dr Peter Wilmhurst comes to mind. He was sued here by a US company, which has since gone out of business, over a report on a Canadian medical news wire and website about comments he had made at an academic conference in the United States. I hope that Dr Wilmhurst would be protected by other clauses in the Bill. Similar circumstances could extend to a UK politician criticising a US politician in the US, if a website carried a report and the US politician felt that he had a case to sue in the UK courts, although no substantial publication had occurred here.

With respect to substantial publication, the amendment seeks to include some recommendations by the Joint Committee on the draft Bill, which alluded to the good elements in the drafting of Lord Lester's private Member's Bill. The wording of amendment 53 mirrors some of

Lord Lester's drafting. Amendment 54 would have the same effect as amendment 53. Without amendment to the civil procedure rules, the Bill allows discretion to remain in the hands of judges, notwithstanding the explanatory notes. Amendment 54 makes explicit reference to the extent of publication elsewhere and how it needs to be considered.

In conclusion, I wish to draw the Minister's attention to the importance of introducing amendments to the civil procedure rules before the Bill comes into force, so that we can judge the effect of the Bill before it completes its passage through Parliament, and in the instance of libel tourism, we need to look at the application of civil procedure rule 6.36 in particular.

Mr Denis MacShane (Rotherham) (Lab): I support my hon. Friend. I hope that, in the general spirit of bipartisanship, the Minister is prepared to accept the amendments which substantially strengthen the Bill and would finally bury London's reputation as a town called "Sue", where people from outside the UK, with no connection to the UK, can bring a libel action. In this great international city—indeed, this multinational, multicultural country of ours—something can be read on the internet or perhaps a publication sent in by mail, so, technically, deemed to be available in the UK.

On the whole, British law should be for the health and protection of British citizens, not for oligarchs from anywhere in the world. It was not a problem until 20 years ago and the end of the communist world. Very rich people in other parts of the world have been advised that if they come to London, and only London, they can take action against people who irritate them. The Kaupthing bank case is a good example, because it was an attempt to kill the canary in the coal mine.

The Danish paper paid a little more attention perhaps than our *Financial Times* or *The Economist* to the appalling goings on in the Icelandic banking system, which were known on the island itself and to those who tracked Iceland. It referred to the fact that the bank was run by people who had no qualifications and who should not have been allowed to be bankers at all. Instead of alerting the world to the impending menace, which has caused devastating trouble, particularly for our many local authorities that invested with the bank, the opposite happened. That is to say that the London courts were used to try to shut down criticism. Is the Minister prepared to look at my hon. Friend's amendment, so that we delete the phrase,

"against a person who is not domiciled"

in the UK, and replace it with

"by a person or against a person, neither of whom are domiciled"?

That seems quite a reasonable and modest extension to the wording of the Bill.

11.15 am

I strongly urge Members to support amendment 53, so that any action for defamation has to be about words that have been principally published inside the UK. One cannot just go on a huge trawl round the world. There are a lot of ugly websites and magazines. I do a lot of work in the Caucasian/Black Sea area, where journalistic ethics are pretty poor. People insult first, defame second and then think about checking their facts. These papers are not even owned by Rupert Murdoch or Lord Rothermere.

None the less, I do not think that those quarrels, serious as they may be, should be transferrable to the English court system.

To read the editorial in *The New York Times* about how any American notion of press freedom was absolutely mocked by what happened in English courts, in the Ehrenfeld case in particular, was for me, both as a journalist and parliamentarian, deeply shaming. I do not know whether the Minister has to say that he is not going to accept this today, just pro rata. However, I invite him and his officials seriously to consider my hon. Friend's amendments on Report.

Simon Hughes (Bermondsey and Old Southwark) (LD): I want to make a general point and a couple of quick specific ones in relation to the first two of the three amendments. In relation to asylum applications, for some years, the system has required an asylum seeker to apply in the first country they arrive in after they have left the country from which they seek asylum. There is an international arrangement that effectively determines what that is. The Home Office and its officials are allowed to say that it is not appropriate for an application to be brought here. For example, someone might have first arrived in France and therefore should be remitted to the French authorities.

I welcome the Government's inclusion of this important clause. We need to deal with the abuse that has been long identified; bluntly, we were being used by people who did not really have an interest in coming here to use our courts. I am interested to hear from the Minister how this can be made to work in practice as efficiently as possible, effectively using the civil procedure rules to allow an initial inquiry to be made of the court, so that the court can quickly knock out a case with which it is inappropriate to deal here. That is what we ought to aim at. Does the Minister think there is civil co-ordination under the treaties referred to—the Lugano treaty and others—that could allow a quick reference? That might happen when the facts are given to a judge or a master here or someone at a preliminary hearing, who can say it obviously looks like a case that should be taken to the courts in Switzerland, Portugal or wherever, and therefore rules that that is the most appropriate jurisdiction.

Amendment 52 seems attractive, because it appears to govern both the claimant and the defendant, and requires a domicile link for either or both, rather than, as the Bill is currently drafted, only in relation to an action for defamation against a person who is not domiciled. I am interested to hear what the Minister has to say about what seems a sensible tightening of both ends of the action. The second amendment seems to suggest a reasonable test for the judge to apply at the initial hearing before the substantive one. With respect to the hon. Member for Newcastle-under-Lyme who tabled the amendments, the Minister might say that the third one is covered more clearly by the drafting. However, I will leave it to the Minister to respond to that.

Lastly, sweeping that up into a general conclusion, so far, the Minister has been helpful in Committee and has said that he is listening and is willing to continue the process of getting the legislation right—a process started with the draft Bill and the work of the Joint Committee—which is positive and constructive. The hon. Member for Stoke-on-Trent South has also been co-operative, as have my right hon. Friend the Member for Carshalton

and Wallington and I. If we can tighten up the measure and improve it, we ought to do so. If there are technical problems with the amendments, everyone understands that, so I am not suggesting that my right hon. Friend and I leap in and stand behind the hon. Member for Newcastle-under-Lyme, saying, "This must be voted through now." I hope, however, that the Minister can be sympathetic to the first two of the three amendments in the group and that he can talk to us a bit now or under clause stand part about the process for ensuring that as little time as possible is spent in our courts by a case that should be dealt with somewhere else.

Ben Gummer (Ipswich) (Con): I shall speak against the amendments. I have great respect for the hon. Member for Newcastle-under-Lyme and his deep knowledge and interest in this area, but I fundamentally disagree with the position that he and the right hon. Member for Rotherham are taking.

I do not understand why it is necessarily wrong that contracting parties or non-contracting parties who are not domiciled in the United Kingdom cannot use our courts for libel purposes. The issues raised by the hon. Gentleman and the right hon. Gentleman are problems with the decision of the court, as they see it, but not necessarily with the parties concerned. It is all right to bring up the example of *Kaupthing*, which might be reasonable in retrospect, but that was a problem with the decision of the court and not with what he sees as libel tourism. Had *Kaupthing* been a British bank and the newspaper *British*, the decision would no doubt have been the same and still erroneous in that instance, just as many court decisions in libel cases have been erroneous in retrospect and subsequently caused criminal prosecutions, because of perjuries committed during the prosecution of the libel cases.

Mr MacShane: With respect to the hon. Gentleman, had it been a British bank and a British paper, the British paper would have been much better armed and much more ready to create public concern. Every British MP could have been alerted to the fact that a British bank was doing the monstrous things that *Kaupthing* has done. I do not see why British courts should come to the aid of a crooked Icelandic bank suing a Danish paper.

Ben Gummer: The right hon. Gentleman is the foremost proponent of the European Union in this House, so I find it an odd argument that the Danish press is any less good at defending its corner than our own, or any less good or less scrupulous at making its own case—in fact, in many instances, it is probably more scrupulous than many of our own newspapers.

It is my contention that, were those parties British and fighting the case in British courts, we would end up with the same decision. It would be no less different or erroneous than it was, so the argument of the Opposition Members is with the process, which is addressed elsewhere in the Bill.

Paul Farrelly: My problem is with both the courts and the plaintiffs, as well as with the lawyers who encourage forum shopping for the most favourable jurisdiction where the libel laws are most restrictive.

That is the problem with lawyers, courts and plaintiffs. It is also a problem with costs, because so often such actions have led to non-publication or to settlements, as in the Kaupthing case, because of the sheer cost of defending them.

Ben Gummer: The hon. Gentleman is entirely right. I was not taking issue with his position but with that of the right hon. Member for Rotherham. The right hon. Gentleman was drawing from the example of one case a reason to change the law, and I thought that that was an erroneous association to make.

May I put a hypothetical situation to the hon. Member for Newcastle-under-Lyme for which his amendments would fail to provide a remedy? Let us say that, in the happy event that the murderous Assad regime is toppled, there is at some point in the next few years a general election in the absence of a fully developed jurisdiction for libel. Let us say that Press TV libels and defames one of the principal candidates during the election campaign; an interview or accusation is made which is covered partially in the United Kingdom, but is seen by many more people across the globe. The candidate's only recourse for challenging that defamation—the most elegant and efficient way with backing from a supporting party—would be in the United Kingdom courts. If the amendments of the hon. Member for Newcastle-under-Lyme were accepted, that would be impossible.

Mr MacShane: It is impossible under the law.

Ben Gummer: I shall come on to that.

Looking at the unhappy examples that the hon. Member for Newcastle-under-Lyme has given, I completely understand why he would want to see reform both in law and in jurisdiction. However that could have unintended consequences and it is important that the Government respond, for this fundamental reason: the English courts are used around the world in commercial contracts. This is the largest centre for clearing commercial contracts in the world; in a similar vein, people who want to set up a commercial trust go to Delaware, which specialises in creating corporate trusts that work in the United States.

I think that that is a good thing for British courts. It creates an enormous amount of work for the City of London and helps oversight of our own corporate governance because it is such a big part of our jurisdiction. The Government are very much concerned with corporate law, not only for our own purposes, but for international reasons.

Mr Andy Slaughter (Hammersmith) (Lab): The hon. Gentleman is making a good case, particularly as the Minister and the Lord Chancellor often promote British courts, even having suites of courts fitted out and air-conditioned for commercial disputes, attracting clients from around the world. However is there not a distinction between the quality of justice and the courts system here, and the deficiencies in libel law? It is the latter that has attracted libel tourism.

Ben Gummer: I agree—this is a happy moment—very much with the hon. Member for Hammersmith. I see no problem at all with offering London as a centre for

international litigation on defamation, for parties who have got absolutely nothing to do with the United Kingdom, and in doing so I take issue with the Government's position. I will not die in a ditch on it, but I do not see why we are closing off a position where we can offer a business centre to the rest of the world, especially as the global media have created more and more opportunities for newspapers to be read around the globe. The *Daily Mail* is the third most read newspaper website outside the United States. That will only continue, so it seems rather odd to create this insularity around our national media jurisdictions.

Simon Hughes: I am listening carefully to my hon. Friend. I understand his argument, but may I clarify something? He seems to be making two different arguments. First, if it is impossible for a case to be brought, such as in the Syrian example that he posited, it ought to be possible for somebody to come somewhere where they have a chance of bringing a case that they could not bring anywhere else. Secondly, we are a good place for these sorts of cases because of the business they bring. I am very sympathetic to the first proposal and wonder whether my hon. Friend thinks it is possible to amend the drafting of the measure—it would not be miles away from where it is—to accommodate it. The second proposition is quite a different one, which the Government have not so far adopted. Am I right in that analysis: he is arguing for two sorts of cases that ought to come here? Some of us may go with him part of the way, even if we do not go with him all the way.

Ben Gummer: Yes, that is a correct distinction, but there are many instances which should be excluded by the amendments. I have no particular problem with rather unattractive parties fighting defamation cases in the United Kingdom if the law itself can be improved to the point where they know that they will receive a fair hearing, that costs will not be extortionate and that, if they take on someone of little means, they are protected. Those are my key caveats.

Paul Farrelly: First, I assure the hon. Gentleman that the example he gives of Press TV would be unaffected by the amendments. Press TV is a UK-based organisation that used to hold a licence here, but I do not know what the current situation is. Secondly—and this is a fundamental point—the hon. Gentleman seeks to make London the tourist destination of choice for litigants. I and his right hon. Friend the Member for Bermondsey and Old Southwark probably disagree with making it a duty for the British tourism association to encourage such activity.

Ben Gummer: The hon. Gentleman may be entirely correct, but in the hypothetical world we could take “Russia Today”, or whatever Putin's mouthpiece is called.

Mr MacShane: I have been on that.

11.30 am

Ben Gummer: The right hon. Gentleman has a show, I believe.

The point still stands. We could end up with a situation in which we do not offer the excellent service that our courts can provide in such an instance. I have no problem

[Ben Gummer]

with libel tourism if it drums up business for British courts, so long as people are protected in those courts, and there I have a slight difference with the Government. Perhaps the Minister will explain how, as the media become more and more global and international, drawing defined boundaries around us and the European Union will help to reform and modernise defamation law.

The Chair: I am looking at the clock and as general comments have been aired, I am minded to call the Minister to respond to the amendment, and then to ask for a formal stand part vote when we come to it.

Robert Ffello: I want to say a few words on stand part, not the amendment, if I may.

The Chair: We can combine the two. I call Ms Goodman first.

Helen Goodman (Bishop Auckland) (Lab): I have one question for the Minister, which would be part of a stand part debate. I understand that the issue is basically libel tourism, but the Minister did not address dog-legging when the claimant and author are both in the UK, but the website operator is in the overseas jurisdiction. I believe that this might be the place to sort out the problem. I would be grateful to hear whether the Minister had time over the weekend to think about that, and whether he will share his thoughts with us.

Robert Ffello: Clause 9, much like clause 6, is welcome. The intention is to deal with high-profile problems of libel tourism. It is widely held that current laws in England and Wales mean that claimants may bring a case here instead of abroad, and perhaps be more successful. I welcome the clause, but I have some concern about it. As it stands, it makes it clear that a court may hear a case only if it is

“satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring an action in respect of the statement.”

I hope that the wording is clear enough to remove any ambiguity, and I hope that a reasonable judge would read it and consider it sensible to hear cases only when it is clear that publication was mainly in England and Wales. However, there are problems. It seems to cover only defendants who are resident outside the European Union, and the Lugano convention comes into play.

I will curtail what I was hoping to say, mainly because of the extensive but perhaps equally curtailed debate a few moments ago on the amendment. It is important to raise what others have said about the clause. The main point that struck me was that despite the talk of tackling libel tourism, the clause, if unamended, would not deal directly with libel tourism—that is, foreign plaintiffs coming to this country to sue because it is a better place for the case to be heard. It covers only libel kidnap when a plaintiff, foreign or not, seeks to serve an action out of jurisdiction on a non-EEA-domiciled person. So the clause would cover the case of Rachel Ehrenfeld, the US author who, if she were to be sued anywhere by the Saudi plaintiff, should have been sued in the US.

Although the clause is effective on libel kidnap, it cannot address libel tourism because it cannot directly restrict jurisdiction in cases where the defendant is domiciled in the EEA by virtue of the Brussels regulation and the Lugano convention, as set out in subsection (5). Libel tourism is best addressed through the statutory strike-out procedure, as I have proposed in new clause 8. I will not incur your wrath, Mr Havard, by straying into that new clause, but I hope we have the opportunity to discuss it this afternoon, should the time allow.

The Chair: Mr Farrelly? [Interruption.] Sorry, I forgot about the Minister.

Mr Djanogly: I have a little bit to say, Mr Havard.

The hon. Member for Newcastle-under-Lyme set out the potential for reputational damage and the cooling effect on free speech seen through the impact of libel tourism. He helpfully highlighted examples presented to the Joint Committee. These are probing amendments, but they raise a number of relevant issues, which I will address.

Amendments 52 and 53 address the types of case caught by clause 9’s provisions on libel tourism. Under the clause, for the court to have jurisdiction to hear an action against a defendant who is domiciled outside the UK, EU or a state that is a signatory to the Lugano convention, the court must first be satisfied that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place in which to bring the action.

Amendment 52 would apply the new hurdle in clause 9 only in cases where both the claimant and the defendant are domiciled outside the UK, EU or a Lugano convention state. That would narrow the effect of the clause’s provisions on libel tourism because cases in which the claimant is domiciled in the UK, EU or a Lugano convention state would no longer be covered.

The Government currently do not consider that narrowing the clause’s scope is appropriate. Such narrowing would mean, for example, that a Russian oligarch domiciled in England or Wales might sue a person domiciled outside the UK in the English courts in circumstances where the alleged main harm to his reputation had occurred elsewhere. We consider it right that such cases should be caught by the test.

Where a claimant in a case in which the defendant is domiciled outside the UK, EU or Lugano convention state is unable to satisfy the court that, of all the places in which the statement complained of has been published, England and Wales is clearly the most appropriate place to bring an action, he or she should be refused access to our courts and should be required to seek redress abroad.

Such cases are not likely to arise with any frequency, but when they do they give rise to legitimate concerns about libel tourism, which uses up the court’s time and resources. We do not believe that the requirement to show that England and Wales is clearly the most appropriate place to bring the claim will cause undue inconvenience to claimants domiciled here who legitimately wish to bring an action in this jurisdiction to protect their reputation.

In most cases where a claimant is domiciled in England and Wales, the clause 9 test is likely to be satisfied, as the main harm to their reputation will have been caused here. In such circumstances, the claimant will readily be

able to show that this is the most appropriate place to bring the claim. In cases where the test cannot be satisfied, however, it is right that claimants domiciled here should not be able to use our courts to pursue libel actions that are more appropriately heard elsewhere.

Amendment 53 would extend the circumstances in which the provisions of clause 9 applied to a defamation action where the court was satisfied that the words or matters complained of had been principally published outside the UK. That would mean that, in all cases where the court considered that the principal publication had occurred outside the UK, the court would have to be satisfied that this is clearly the most appropriate place for the claim to proceed.

The amendment would be a substantial extension of the clause's scope and would mean that, in every case where a defamation action was brought, the court would have to consider whether the allegedly defamatory material had also been published outside the UK and, if so, whether the principal publication had taken place here or elsewhere. How the court would decide whether the principal publication test had been satisfied is also unclear. If such a decision hinged on the extent of publication here, as opposed to elsewhere, that would omit a range of factors that may also be relevant, such as the extent of the claimant's connection to the UK or his or her reputation here. That would add significantly to the evidence that the claimant would need to provide, and hence to the cost of the proceedings.

In addition, the amendment would mean that if the court decided that the words complained of had been published principally in France, for example, then unless the court was satisfied that England and Wales was none the less clearly the most appropriate place to bring the claim, the claimant could be prevented from doing so, notwithstanding the fact that the defendant was domiciled in this jurisdiction. That would conflict directly with the core principle in article 2 of the Brussels I regulation, under which the court generally has no discretion to refuse jurisdiction in cases where the defendant is domiciled in England and Wales. We must ensure that our law is compliant with European legislation, so we cannot accept the amendment.

Amendment 54 would require the court, in considering under clause 9(2) whether England and Wales is clearly the most appropriate place in which to bring an action, to take all relevant factors into consideration and to have regard to the extent of publication elsewhere. The Government do not believe that the amendment is necessary because in considering whether the clause 9 test is satisfied, the courts will naturally take all the relevant circumstances into account. In addition, we do not believe that it would be appropriate to single out a specific factor such as the extent of publication.

Extent of publication will, of course, be an important factor. However, the range of circumstances that the court may wish to consider are diverse, and the balance between them will depend on all the circumstances of the case. For example, in addition to the extent of publication, the court may also need to consider factors such as the extent of each party's connection to England and Wales, the extent of the claimant's reputation here and whether the claimant would receive a fair trial elsewhere. We do not consider it appropriate to give greater weight to a particular factor by including it in the Bill.

We also consider that, due to the diverse range of circumstances that may be relevant, it would be preferable to set out such factors in secondary legislation, where a more flexible approach can be taken. I have given an indication of some of the factors that would be relevant, and I can confirm to the hon. Member for Newcastle-under-Lyme that we will ask the Civil Procedure Rule Committee to consider a suitable list in due course, including the one identified by him. I say to my right hon. Friend the Member for Bermondsey and Old Southwark that we will consider how the rules can best support the new clause generally and will ensure that procedural guidelines are made available when it comes into effect.

I can tell my hon. Friend the Member for Ipswich that I have been active in encouraging companies to use English jurisdictional clauses, and we have the new commercial court. We want Britain to be a place where people do business—that includes signing their contracts and then disputing them—but that is different from being seen as the libel capital of the world based on defamation arbitration and invalid concerns for our reputation as defenders of free speech. Very few cases go to court in any event. It is the cooling effect that is of most concern.

Simon Hughes: Will the Minister address the other point made by our hon. Friend the Member for Ipswich about cases such as the Syria example? I hope that we would be able to accommodate a claim in such cases, where there is no possibility of any such action being taken in the other country.

Mr Djanogly: My hon. Friend asked why a case that can be brought elsewhere, such as in Syria, should not be heard here. There are a range of factors that the court will want to take into account in deciding whether the clause 9 test is met and whether the claimant would receive a fair trial elsewhere. That is one issue that the courts might want to consider.

The hon. Member for Bishop Auckland asked what the position is when an author in the UK brings a claim against a non-UK website operator. An action could still be brought against that website operator if the court were satisfied that the UK was the most appropriate place to bring a claim. On that basis, I ask that the amendments be withdrawn.

Paul Farrelly: With respect to the comments about using UK courts to settle disputes, I take that as not entirely tongue in cheek, but I understand that the Minister is a corporate finance lawyer by background standing up for his profession. The intention of the amendments, imperfect as they are, was to probe the Government's intention behind the clause, which relates to the broad parameters of civil procedure rules. The issue takes us back to the operation of the courts and I want those rules to be tightened. I welcome the Minister's intention to produce a list and I hope that we will see it before the Bill is enacted.

I am sure that the issue will come up again on Third Reading and in the other place, given the Joint Committee's recommendations on the draft Bill and the wording in Lord Lester's private Member's Bill. At present, however, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Clause 9 ordered to stand part of the Bill.

Clause 10

ACTION AGAINST A PERSON WHO WAS NOT THE AUTHOR,
EDITOR ETC

11.45 am

Paul Farrelly: I beg to move amendment 51, in clause 10, page 8, line 20, after ‘for’, insert ‘damages for’.

This amendment, along with amendments 49, 16 and 50, is complementary to those that we tabled to clause 5. As I recall, the Minister listened with some sympathy to our arguments in favour of those earlier amendments.

Simon Hughes: On a point of order, Mr Havard. I am probably thinking what you are thinking—namely, that although the hon. Gentleman is trying to help the Committee, we have to take the amendments separately.

The Chair: Thank you, Mr Hughes. Thank you for being helpful, Mr Farrelly, but for the sake of process we will have to take the amendments one at a time.

Paul Farrelly: Amendment 51 would confine the clause to actions for damages only. Without that, a person covered by the clause could carry on publishing defamatory material, even if the author, editor or publisher was successfully sued. When we debated clause 5, I gave the example of a malign constituent posting defamatory material about an MP on a political forum maintained by an opposing party. Without the amendment, the operator of a forum who gave up the identity of the author and did or did not sue him or her could keep the defamatory material online and the MP, or any other claimant, would have no remedy. The amendment would, again, bring the take-down procedures within the jurisdiction of the courts.

Mr Djanogly: Amendment 51 would provide that a court does not have jurisdiction to hear and determine an action for damages for defamation brought against a person who was not the author, editor or publisher of the statement complained of, unless it is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher.

It appears that the amendment is intended to allow the court to hear an action against a person who is not the author, editor or publisher of the statement complained of, but to remove damages as a potential remedy in such actions. That could lead to a situation where even when it is reasonably practicable for an action to be brought against the author, editor or primary publisher, the secondary publisher would end up having to defend a claim—incurring costs in the process—although they would not be liable for damages if the claimant were successful.

I believe that the amendment is intended to work alongside the amendments tabled by the hon. Member for Newcastle-under-Lyme to clause 5—I think he said that earlier—addressing situations where a secondary publisher does not remove defamatory material despite a successful claim having been brought against an author, editor or secondary publisher who cannot himself remove the statement. As I have already said, we will be giving

further consideration to that issue and on that basis, I hope that the hon. Gentleman will agree to withdraw his amendment.

Paul Farrelly: This is all to do with the interaction between clauses 5 and 10. On the basis of the Minister’s remarks, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Paul Farrelly: I beg to move amendment 49, in clause 10, page 8, line 21, after ‘person’, insert ‘(other than an operator of a website (as defined in Clause 5)).’.

Again, the provision is to do with the interaction between clauses 5 and 10. As it stands, the clause is confined to persons other than the operators of websites, which means that clauses 5 and 10 cover different things; otherwise clause 10 would provide a complete defence to website operators in relation to any case where the author, etc., was reasonably identifiable, and the sensible clause 5 notice procedures would be redundant. Therefore I urge the Minister again to consider the interaction of the two clauses. He has remarked previously on clause 5 about the sense of allowing website operators to rely on the duality in both clauses.

Mr Djanogly: Amendment 49 would prevent website operators from benefiting from the protection that clause 10 provides to those who are not primary publishers of allegedly defamatory material. Clause 10 as drafted extends to any person who was not the author, editor or publisher of the statement complained of and provides that person with protection from potential liability unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher. This has a much wider application than the defence under clause 5, which is restricted to website operators, and reflects the Joint Committee’s concern that there should be greater protection for secondary publishers generally, such as booksellers.

The intention behind the amendment may be to ensure that website operators engage with the process set out under clause 5 by preventing them from relying on clause 10. We do not believe that extending clause 10 to secondary publishers generally, including website operators, will do that. It is true that website operators are not obliged to follow the clause 5 process. Not doing so simply means that they will lose the defence that clause 5 would afford them. However, if a website operator were to fail to follow the clause 5 process and then attempted to rely on clause 10, on the basis that they are not the author, editor or commercial publisher of the third party material, it would be for the court to decide whether the fact that they had failed to follow the process set out in clause 5 meant that it was not reasonably practicable for the claimant to pursue the primary publisher.

For example, where the author of the third party material is posting anonymously, the website operator’s failure to follow the process designed to assist the claimant in identifying the author would make it significantly more difficult for the claimant to pursue the author. If a court judged that it no longer made pursuing the author “reasonably practicable,” it could allow the claimant to bring an action against the website operator in respect of the third-party material.

Alternatively, the amendment may be intended to work in conjunction with the other amendments tabled by the hon. Member for Newcastle-under-Lyme, which is the case that he made. In so far as that is the case, we will consider whether anything further is needed to deal with such situations, as I have already indicated. We believe that clause 10 represents a fair and balanced approach and I hope that the hon. Gentleman will agree to withdraw his amendment on that basis.

Paul Farrelly: Again, it is all about interaction. I invite the Minister, as the Bill proceeds, to consider whether a choice of either/or, with the duality of clauses, creates some uncertainty, and potentially increased costs in the whole process. However, given the Minister's remarks, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Robert Flello: I beg to move amendment 16, in clause 10, page 8, line 22, leave out from 'court' to end of line 24 and insert—

- '(a) is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher; and
- (b) has made a determination that the statement complained of is defamatory.'

The amendment would make a relatively small change, but by seizing an opportunity to prevent unnecessary cases from coming before a court it represents a common-sense approach. In addition to deciding whether it is "practicable for an action to be brought against the author, editor or publisher", a court would make an early ruling on whether the statement concerned was defamatory. That would allow a case that was clearly frivolous or had no hope of success to be thrown out, so that the associated costs would be avoided.

I hope the Minister agrees that that is common sense, and that it would provide a major benefit at the cost of very little extra court time. Although the Minister has yet to adopt any of our amendments, I hope that today he might be in an accepting mood, and that he will rise to accept amendment 16. The amendment would provide an early win by allowing the court, after determining that the case satisfies the existing condition in clause 10, to strike out and say, "There may not be any reasonable practicality, but the matter is not defamatory so let us just get rid of this case and deal with it quickly." I hope that the Minister will be in a positive mood and will accept the amendment.

Mr Djanogly: I am always in a positive mood. Clause 10 limits the circumstances in which an action for defamation can be brought against someone who is not the primary publisher of an allegedly defamatory statement, by providing:

"A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher."

Amendment 16 would require that in determining whether it has jurisdiction, the court should also determine whether the statement complained of is defamatory. In practice, that would require the court to consider whether the serious harm test in clause 1 had been met.

Clause 10 focuses on the determination of whether the court has jurisdiction to hear a case against a secondary publisher at all. The amendment would create a rather perverse situation, because the court would have to determine the substance of the case at the same time as it decided whether a case could be brought at all. The Government do not consider that that would be appropriate. It would involve additional evidence and expense, which would be wasted if it was held to be reasonably practicable for the claimant to pursue the primary publisher.

We believe that it is preferable to keep jurisdictional matters distinct from matters that should rightly be considered once proceedings have commenced, and that the question of whether there is serious harm should properly be addressed at an early stage in any substantive proceedings that occur. On that basis, I hope that the hon. Gentleman will withdraw the amendment.

Robert Flello: I knew that I would continue to be disappointed with the passage of the Bill through Committee. I hear what the Minister says, and I am disappointed, but I will keep my powder dry and perhaps recast my amendment in a different form on Report. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Paul Farrelly: I beg to move amendment 50, in clause 10, page 8, line 26, at end add—

'(3) Nothing in this section shall prevent a court from granting any injunction or order requiring a person to cease publishing a defamatory statement.'

The amendment is entirely complementary to amendment 51 so its fate in Committee is predictable, but I would welcome the Minister's comments first.

12 pm

Mr Djanogly: As I have explained, the purpose of clause 10 is to encourage claimants to pursue the author, editor or primary publisher of defamatory material where possible, to reduce the likelihood of secondary publishers being threatened by libel proceedings. Amendment 50 provides that nothing in clause 10 prevents the court from granting any injunction or order requiring a person to cease publishing a defamatory statement. It would prevent actions for defamation being brought against secondary publishers where it is reasonably practicable for an action to be brought against the author, editor or primary publisher, but it leaves the possibility open that an injunction or order might be made in respect of secondary publishers via some other route.

Like amendment 51, it seems that the amendment is intended to complement those tabled by the hon. Gentleman on clause 5. As I have indicated, we will give further consideration to that situation, so I hope that the hon. Gentleman will withdraw the amendment.

Paul Farrelly: Unpredictably, in light of the Minister's comments, I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

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

Simon Hughes: I shall be brief. All Members of the Committee, including the Minister, will have received a submission from the Booksellers Association. The association is very positive and grateful about the clause's inclusion in the Bill, but it has three questions. I am keen for the Minister to answer those questions on record; the third seems particularly relevant.

First, the association asks when what it calls a "clogging letter" has authority:

"Will the Courts require the Clause 10 issue to be adjudicated before a claimant (or his/her lawyers) can rely upon a so-called 'clogging letter' demanding that the bookseller remove the book from sale?"

That point is obviously a concern for bookshops that are indirectly passing on the document. They are worried that they will not have had the chance to read, proof read and go through the content in the same way as the editor or publisher, and they therefore might be caught. A lot of the shops are independent booksellers that would find themselves in great financial difficulty if they were on the end of a defamation case in the courts.

Secondly, the association asks about section 1 of the Defamation Act 1996 and its interrelationship with the clause. Finally, and most importantly, help is asked over the definition of "reasonably practicable", which is the key phrase in clause 10. As drafted, the clause states:

"A court does not have jurisdiction to hear and determine an action for defamation brought against a person who was not the author, editor or publisher of the statement complained of unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher."

The association wonders how that will be clarified; perhaps the Minister anticipates that there will be a definition in secondary legislation. I am aware that the phrase is used often in law, so there is plenty of case law on reasonable practicability in other areas of law. I can see the association's point, however, and I hope that the Minister will help by alleviating those concerns.

We want good bookshops that are brave and stock controversial books. We do not want them to be timid. They should be places that people go to for interesting, planned purchases, as well as for things that they may not have intended to look for, but discover while they are there. We have great bookshops in Bermondsey now, although we did not when I was first elected. It is of great benefit to the community that we have locally owned, locally run bookshops, and not just national corporate chains. They are good community centres that have discussion evenings, coffee facilities, nice cakes, and all sorts of things.

I hold my surgery in Woolfson and Tay, a bookshop in Bermondsey square. It is a good place and a good community centre that regularly accommodates my surgery. It has not lobbied me about this matter, to be clear, but we need to look after bookshops' interests. I hope that the Minister will be helpful.

The Chair: Other reading outlets are available, including public libraries.

Robert Flello: I wonder which section of the bookshop the right hon. Gentleman holds his surgery in.

Simon Hughes: The community section.

Mr MacShane: Myths and fables.

Robert Flello: I fear that we will stray into defamation under slander before too long, so I will move swiftly on.

Simon Hughes: We are immune.

Robert Flello: Indeed.

Clause 10 is short, but vital because of the protection it provides to, for example, bookshops that stock a book that a claimant considers to contain defamatory statements about them. The clause ensures that a claimant can only take action against someone who is not the author, editor or publisher of a statement if a court considers that it is "not reasonably practicable" for them to take action against one of those parties.

The right hon. Member for Bermondsey and Old Southwark mentioned the recent submission from the Booksellers Association, which I shall return to in a moment. The association also provided written evidence to the Joint Committee, which explains the current problem well: even when no action is taken against the publisher or author, the threat of legal action against a bookseller can be enough to ensure that a book is not available for purchase.

The Booksellers Association believes that the common law defence of innocent dissemination was "inadvertently weakened" by the poor drafting of the Defamation Act 1996. The problem, as the association sees it, is that it is still possible for a claimant to threaten action against a bookseller, who would see little benefit in risking a potentially extremely expensive lawsuit to defend a statement they had no responsibility for and no specialist knowledge of. The clause should, therefore, ensure that that situation does not occur, though, as ever, the true test will come once the legislation is in place and being used.

In his opening comment about the submission from the Booksellers Association, the right hon. Member for Bermondsey and Old Southwark spoke about how booksellers were pleased with the clause, and it is worth drawing the Committee's attention to the start of that submission, which states

"we are absolutely delighted that the earlier Joint Committee and the Ministry of Justice have listened to our previous representations."

But, importantly, it goes on:

"However, in spite of secondary publishers like booksellers now being in an improved position, we are still concerned that the proposals don't give us the appropriate protection that we really need."

I hope, therefore, that when the Minister rises to answer the questions in that submission—I will not repeat them because we have heard them from the right hon. Gentleman—he will comment on the Booksellers Association's concern, that, I repeat,

"the proposals don't give us the appropriate protection that we really need."

I hope that the Minister will also comment on the clause, and provide a little more information on the definition of "reasonably practicable" so that we can be absolutely assured that the clause, unlike the 1996 Act, will tackle the problem it is intended to address.

Mr Djanogly: Clause 10 seeks to address the concerns that have been expressed about the impact of the current law on secondary publishers more generally, including

booksellers and newsagents. The Government consulted on the matter, alongside the draft Bill, following representations from booksellers and others that the defence provided to secondary publishers under section 1 of the Defamation Act 1996 was narrower than the common law innocent dissemination defence that had previously existed.

The respondents on that point in the consultation, and the Joint Committee, argued that the Government should include a provision in the Bill to offer booksellers and other secondary publishers greater protection. In light of that, and in accordance with our aim of ensuring that secondary publishers are not unfairly targeted and that action is taken against the primary publisher wherever possible, Clause 10 removes the possibility of an action for defamation being brought against a secondary publisher, except where it is not reasonably practicable for the claimant to bring the action against the author, editor or commercial publisher of the material.

My right hon. Friend the Member for Bermondsey and Old Southwark asked about the circumstances in which it would not be reasonably practicable for the claimant to take action against the author, editor or publisher. We do not believe that it is appropriate to prescribe in secondary legislation circumstances in which it would not be reasonably practicable for the claimant to pursue the primary publisher, as that will be for the court to determine in each individual case. He also asked how the clause 10 procedure would work in relation to clogging letters. If the claimant chose to bring a claim against a secondary publisher, it would be open to that publisher to oppose it on the basis that the court did not have jurisdiction. The court would then consider that as a preliminary issue in the proceedings, with the parties able to bring evidence as to whether it was reasonably practicable for the claimant to bring an action against the primary publisher.

My right hon. Friend also asked about the interaction between clause 10 and section 1 of the 1996 Act. The defence under section 1 will continue to be available alongside clause 10, so that in the event of an action against a secondary publisher being allowed, the section 1 defence will be available where appropriate.

The hon. Member for Stoke-on-Trent South asked more generally about booksellers' concerns and asked why we do not restore the innocent dissemination defence that existed before the introduction of section 1 of the 1996 Act. There are differing views about whether section 1 was more restrictive than the common law defence that was previously available. We decided that it would not be appropriate to provide a complete bar against any action against a secondary publisher, for example by introducing a requirement for knowledge that the statement is libellous for the defence to fail, as that could provide an incentive for website operators not to comply with the clause 5 procedure, in the knowledge that they would be likely to succeed in the other defence.

I hope that I have answered hon. Members' questions. On that basis, I ask that clause 10 stand part of the Bill.

Question put and agreed to.

Clause 10 accordingly ordered to stand part of the Bill.

The Chair: We now come to a series of clauses: 11 to 15. We can deal with them one at a time, but my proposition is that I group them together. I will read out

the numbers and if any Member wants to comment on a particular clause, they can do so. I will put a single question at the end, putting all the clauses together to put them in the Bill. I start with clause 11.

Clause 11

TRIAL TO BE WITHOUT A JURY UNLESS THE COURT
ORDERS OTHERWISE

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

Simon Hughes: I have just one question. This is obviously the clause that says that, in the future, the presumption in favour of jury trial will be changed to a presumption against jury trial in libel cases. I do not have a fundamental problem with that, but I raised the question with the Minister when we were debating the public interest test and I am somewhat concerned that in terms of the effectiveness and authority of a court decision in a libel case in which the key issue is public interest, that may be better determined if it is done by a jury. Of course the clause does not remove jury trial. It allows the judge to decide that there should be a jury trial. However, I am keen to know how the Minister thinks that will work. I am not against the clause, but I need to be persuaded that we have sufficient flexibility to ensure that the 12 representatives of the public can be there, determining what the public interest is.

Let me give two examples. The first—I am going back a long way—is in relation to literature that was not the subject of a defamation case; there were public order issues. I am referring to “Lady Chatterley’s Lover”. Obviously, that was adjudicated on by the courts, but it involved the public intervening as to what was appropriate. I remember more recently the case that Mary Whitehouse took against the publishers of a magazine in relation to a poem that was regarded as defamatory. Again, I think that the authority of the decision was the greater because it was taken by the public—by a cross-section of people, with different views, different faiths, different outlooks and so on. Deciding what the public interest is may, if it is a very important public issue, be better done by a jury, rather than by a single judge, however good and experienced that judge is.

I would be grateful if we could explore where the Minister thinks the balance will fall. I would like him to say on the record if he can that it certainly is not the wish of the Government that this should mean the end of jury trial for all defamation cases and to say that judges should be absolutely free to continue to decide that there ought to be a jury trial where that is appropriate.

The Chair: For clarity, I point out that because Members want to speak on this clause, we will deal with clause 11, and I shall move back to my list after that.

Paul Farrelly: I welcome the clause. I believe that some of the calls for jury trials to be maintained in what is a civil arena are misplaced. The overall right to trial by jury is utterly inimical to having early hearings on meaning that give clarity and reduce the cost of defamation cases and to having early hearings on whether a publication is fact or comment. Like the right hon. Member for

[Paul Farrelly]

Bermondsey and Old Southwark, I would like to hear from the Minister exactly how he envisages that the jury trial discretion would be used.

12.15 pm

Robert Ffello: I should like to give an early indication that I would like to speak briefly on clauses 12 to 14 and 16.

Clause 11 is another fairly simple clause, which will remove the presumption in favour of a jury trial in defamation cases. As the explanatory notes to the Bill explain, the Senior Courts Act 1981 and the County Courts Act 1984 provide a right to trial with a jury in cases of libel and slander, unless the specifics of the case lead a court to consider that to be inappropriate. Clause 11 will simply remove the words “libel” and “slander” from the relevant sections of both Acts.

The main benefit from the clause appears to be in the cost of defamation cases. The Publishers Association, in its submission to the Ministry of Justice consultation on the draft Bill, suggested that defending a libel case that reached the courts cost on average £1.33 million—a staggering figure. While the vast majority of cases already take place before a judge alone, with six cases in total between 2008 and 2010 taking place with a jury, the fact that the presumption is in favour of a jury means that unnecessary costs are still incurred in the preparation of a case, as all eventualities are prepared for.

That said, Liberty noted in its submission that the clause will make clear that

“actions in defamation will not be heard by a jury in any case unless the court orders otherwise.”

It drew attention to the fact that

“Lord Lester’s Private Member’s Bill similarly reversed the presumption of jury trial in defamation proceedings. Significantly ... Lord Lester qualified the reversal by stating that the court may order a trial by jury on application by any party if satisfied ‘it is in the interests of justice to do so’.”

That is quite markedly different from what we have in clause 11. Liberty continued:

“In so deciding the judge would be required to have regard to all the circumstances of the case, including, but not limited to, the public interest in the action, the identity of any parties to the action, the extent to which early resolution is likely to facilitate settlement of the action, etc.”

Liberty is quite clear that it does not support the approach either in the Bill or in Lord Lester’s proposals, but it felt that the latter was more palatable. It believed that

“juries serve a particularly important function in defamation proceedings and that the current strong presumption in favour of trial by jury should remain... Liberty understands the desire to reduce costs in jury trials and action reform that addresses the impact of real inequality of arms. We believe, however, that the presumptive right to a jury trial is an unnecessary casualty in the overall context of this reform.”

While I do not entirely share Liberty’s view of the matter, it is worth pointing out its view that having regard to overall justice is an important issue, rather than how it is narrowly confined in clause 11. I have not felt sufficiently strongly about the matter to table an amendment, but I hope the Minister will respond to the question of whether a wider reading in terms of when

justice is served by having a jury trial will apply, not least for the situations described by the right hon. Member for Bermondsey and Old Southwark.

Mr Djanogly: Clause 11 will remove the presumption in favour of jury trial in defamation cases, which currently exists under section 69 of the Senior Courts Act 1981 and section 66 of the County Courts Act 1984. In practice, few defamation cases actually involve juries, and a substantial majority are heard by judges alone. However, the retention of the right to jury trial creates practical difficulties and adds significantly to the length and cost of proceedings. That is because of the role that juries, if used, have to play, such as in deciding the meaning of allegedly defamatory material. It means that issues that could otherwise have been decided by a judge at an early stage cannot be resolved until trial, whether or not a jury is ultimately used. That means that proceedings take longer and cost more than they should.

More than three quarters of responses to our public consultation supported the proposed change, which also received support from the Joint Committee on the draft Bill. In light of that, subsections (1) and (2) respectively amend the 1981 and 1984 Acts to remove libel and slander from the list of civil proceedings where a right to jury trial exists. The court will retain the general discretion that it has to order jury trial where it considers that it is appropriate to do so. The result will be that defamation cases will be tried without a jury unless a court orders otherwise.

My right hon. Friend the Member for Bermondsey and Old Southwark asked in what circumstances would jury trial be appropriate. I can tell him that the courts are familiar with exercising their discretion in relation to jury trial. We considered that it would be preferable to allow them to continue to do so without specifying particular circumstances in the Bill. The issue of the public interest will of course be something that the courts will wish to consider.

I will speak more generally, because hon. Members have voiced general concerns. My right hon. Friend the Member for Bermondsey and Old Southwark and the hon. Members for Newcastle-under-Lyme and for Stoke-on-Trent South have all asked this question. Let me put it on the record that the Government are firmly committed to maintaining the right of a defendant to a trial by jury in criminal proceedings. However, although the position relating to juries in civil defamation proceedings can be clearly distinguished from this, I can confirm that it is not the wish of the Government to end jury trials in defamation trials where the court feels that it is appropriate.

Robert Ffello: I was listening carefully to what the Minister said and I was waiting for a little more clarity on the point about the courts currently having a wide scope. He touched on it in his first few comments about the court having discretion, but I have a slight fear that the measure narrows that discretion. Will he put on the record that the clause does not narrow in any way the right of the court to, in the wider sense of justice, take the case before a jury?

Mr Djanogly: Yes, that would be for the court to decide.

Robert Flello: I thank the Minister.

Question put and agreed to.

Clause 11 accordingly ordered to stand part of the Bill.

The Chair: Given what was said earlier, I am obviously not going to be able to group these, so we will have to deal with them one at a time.

Clause 12

POWER OF COURT TO ORDER A SUMMARY OF ITS JUDGMENT TO BE PUBLISHED

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

Robert Flello: Clause 12 makes a relatively minor change to current legislation, but one that is welcomed as it provides a further means of non-financial recompense for a successful claimant in a defamation case. The clause provides the possibility for a court to order the unsuccessful defendant to publish a summary of the judgment. The wording of the summary and the time, manner, form and place of its publication is to be agreed by the parties, but if the wording cannot be agreed, the court can settle the matter. If there is disagreement over the time, manner, form or place of publication, the court can take into account what is considered reasonable and practicable before making a judgment.

I do not think that there is anything with which to disagree in the clause. I hope that such means for recompense for a defendant will be much valued. It is worth speaking on the clause, because I think that what will be of interest is the interaction between this and whatever comes out of Leveson. I am hopeful that, with the wide-ranging hearing that Lord Leveson seems to be having, these words from this Committee today will fall upon him, and someone will point out to him, if they have not already, this particular clause. It will be interesting to see where that goes.

Paul Farrelly: I want to make three points about the clause. First, in connection with the point made by my hon. Friend, one of the unintended consequences of the clause may be to encourage a defamation action, because a litigant may be safe in the knowledge that—as drafted—where there seems to be a sure-fire outcome, they can get the court to order the publication of a judgment and order its provenance. That is one overarching concern. I am sure that the Minister would not intend that to be the outcome of the clause.

Secondly, if the parties cannot agree, or, in the case of a wealthy litigant, will not agree, does the Minister intend that a judge be in a position in which they can order where a judgment—effectively an apology—goes, and the size and content of it?

The third point, again in relation to the points made by my hon. Friend, is that nothing in the clause makes the court have any regard to any adjudication or decision by a press regulatory body. It is difficult for the Government to include a clause on having regard to an adjudication or decision by the successor to the Press Complaints Commission, but I hope that outwith the Bill the Government might come up with words that will make

courts take into account any successor body coming out of the Leveson inquiry or any future proceedings of the House.

Mr Djanogly: The clause extends the circumstances in which the court may order publication of a summary of its judgment, currently available under the summary disposal procedure. Alongside the adjustments in the law included elsewhere in the Bill aimed at supporting freedom of expression, we recognise the need to ensure that effective remedies are available to provide redress to people whose reputations have been seriously harmed. We also recognise, however, the concerns around editorial independence and the need to strike the correct balance in the law. Therefore, the provisions in clause 12 of the Bill, while giving the court the power to order publication of a summary of its judgment in defamation proceedings, will encourage the parties to reach agreement where possible on the contents of the summary and issues such as where, when and how it is published. The provisions enable the court to settle the wording of the summary and give directions on those other matters only in cases in which agreement cannot be reached.

I note the point made with respect to the Leveson inquiry and I agree that the clause should be brought to its attention. As regards the idea suggested by the hon. Member for Newcastle-under-Lyme that the clause might encourage defamation actions, we do not believe that that will be the case. We consider that there is a need to improve the remedies available to claimants in this way, to ensure that the right balance is struck. As to whether we should go further and enable courts to order publication of apologies and so forth, that was opposed by the Joint Committee and most of those who responded to our consultation; such a measure would not be appropriate. We share the Joint Committee's view that there is no value in forcing a person to make an apology that might be neither meaningful nor sincere.

Paul Farrelly: One effect of the clause—perhaps intended—might, equally, be to bolster effective regulation in the future, whereby a successor to the Press Complaints Commission knows that parties may go to court if editors do not act responsibly with respect to content and families.

Mr Djanogly: That is a possibility, but let us hope that they all start acting responsibly—or continue to do so.

The Chair: I think you had it right, Minister.

Question put and agreed to.

Clause 12 accordingly ordered to stand part of the Bill.

Clause 13

SPECIAL DAMAGE

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

Helen Goodman: I do not want to make a long speech. I am sure that clause 13 is intended to be what is called a modernising clause, which is fine, but I wondered whether the Minister had had any discussions with any

[Helen Goodman]

of the Asian communities in which attitudes to women are a good deal more conservative than in most of the community, and whether there had been any consideration of the impact of the measure in such communities.

Robert Flello: I have a similar point. I wondered why the provision had not been repealed before. Was it because of concern about the interaction with some of our communities up and down the UK, or has it merely never been brought to anyone's attention? I do not think for a moment that the changes will lead to a flurry of allegations about adultery, infectious diseases or any such thing, so there is not a great deal to disagree with.

12.30 pm

Mr Djanogly: Clause 13 repeals the Slander of Women Act 1891 and overturns the common law rule relating to special damage. Generally, in proceedings for slander, as distinct from libel proceedings, a claimant must prove that the statement complained about has caused him or her special damage. The 1891 Act created an exception in relation to slanderous statements about the chastity of women where the damage is presumed. A similar common law category applies where the imputation is that a person is suffering from a contagious or infectious disease, such as a venereal disease, leprosy or the plague. The Government believe that these provisions are outdated and are no longer relevant or appropriate to modern society. An overwhelming majority of those who responded to consultation on this point were in favour of repealing the 1891 Act and overturning the common law provision.

I have no knowledge of any recorded proposed impact on particular communities. If I hear otherwise, I will write to the hon. Lady on that point.

Helen Goodman: Exactly. If the Minister received representations that were not in favour, it would be interesting to hear from whom those representations came.

Mr Djanogly: I will do that.

Question put and agreed to.

Clause 13 accordingly ordered to stand part of the Bill.

Clause 14

MEANING OF "PUBLISH" AND "STATEMENT"

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

Robert Flello: Briefly, I want to pick up on the visual images point. The clause says:

“‘Statement’ means words, pictures, visual images, gestures or any other method of signifying meaning.”

Last week, I said that it would take five years to review one second's-worth of videos uploaded to the internet by 2015, which is a horrifying thought. I am keen that the Minister is absolutely certain that this definition of statement will cover not only the existing situation but

any foreseen 3D holographic image or whatever that may be waiting for us in the mind of some very creative internet person.

Mr Djanogly: Clause 14 sets out definitions of certain terms for the purposes of the Bill. It provides for the words “publish” and “publication” to have the meaning they have

“for the purposes of the law of defamation generally”.

Simply put, that means communication to a third party. It provides for the word “statement” to mean

“words, pictures, visual images, gestures or any other method of signifying meaning.”

In this case, these definitions mirror those in the 1996 Act and ensure that the provisions in the Bill cover a wide range of publications in any medium, which reflects the current law. I think that I have answered the hon. Gentleman's point and, on that basis, I ask that clause 14 stand part of the Bill.

Question put and agreed to.

Clause 14 accordingly ordered to stand part of the Bill

Clause 15 ordered to stand part of the Bill.

Clause 16

SHORT TITLE, COMMENCEMENT AND EXTENT

Mr Djanogly: I beg to move amendment 1, in clause 16, page 10, line 3, leave out subsections (2) and (3).

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

Government amendments 2 and 3.

Mr Djanogly: I think that it is quite rare to have got so far during the course of a Bill Committee before the Government start tabling amendments. It is a good sign.

Amendments 1, 2 and 3 extend certain provisions in the Bill to Scotland. The civil law on defamation is generally a devolved area, and the Bill reforms the law in relation to England and Wales only. However, we have been requested by the Scottish Government to extend certain specific provisions to Scotland, and these amendments are intended to fulfil that request. The Scottish Government have confirmed that a legislative consent motion will be put before the Scottish Parliament on a timely basis following these amendments being moved in order to secure their consent.

Amendment 3 amends the provisions on extent in clause 16 of the Bill to provide for the provisions on peer-reviewed material in scientific and academic journals in clause 6 of the Bill, and the provisions in clause 7(9) extending qualified privilege to fair and accurate reports of scientific and academic conferences, to extend to Scotland, together with clause 14, clause 15(5) and clause 16 for consequential reasons. I understand that the request stems from the desire of the Scottish Government to make available in Scotland the protections that the provisions offer against the harmful effect of current libel law on scientific and academic debate. Amendment 3 also provides that the commencement of

the relevant provisions in Scotland will be by order of Scottish Ministers. The other two amendments deal with consequential and drafting points. The Government believe that it is appropriate to accede to the Scottish Government's request.

Robert Flello: Amendment 3 will insert a new subsection (6), which states:

"Subject to subsections (7) and (8), the provisions of this Act come into force on such day as the Secretary of State may by order made by statutory instrument appoint."

Oh, the legalese of such clauses.

I might incur your ire, Mr Havard—I put you on notice, so that you will be listening carefully when I do—but I want to come back to my concerns about the entirety of the Bill in relation to the fact that the regulations provided for in clause 5 have not been tabled. The Government will get their way on these three Government amendments but, given that amendment 3 mentions an order made by statutory instrument, this is an opportunity to flag up to the Minister that the Committee has not considered those regulations. We have another sitting later, and by some miracle they may find their way to us by 4 pm, but somehow I doubt it.

We will not oppose amendments 1 to 3, because it is important that the Bill extends to Scotland and that Scottish Ministers have their say about the territorial implications and about when the Bill comes into force.

Simon Hughes: It is clearly a good idea to extend the Bill to Scotland. One anomaly of recent years has been that people can take legal action in England and Wales but not in Scotland, or vice versa, including people who have come to this country to take such legal action. I absolutely do not wish to trespass on the right of the Scots to have their own legal system, but it is better to have common legislation on such issues, if that is also the will—as it is—of the Scottish authorities. The amendments are clearly welcome and are a move in the right direction.

Mr Djanogly: I thank the Committee for supporting the amendments. I point out to the hon. Member for Stoke-on-Trent South that the secondary legislation he referred to would emanate from the Scottish Parliament, so the question is more for Scotland than for this House.

Amendment 1 agreed to.

Amendments made: 2, in clause 16, page 10, line 7, at beginning insert 'Subject to subsection (5),'.

Amendment 3, in clause 16, page 10, line 7, at end insert—

'(5) The following provisions also extend to Scotland—

- (a) section 6;
- (b) section 7(9);
- (c) section 14;
- (d) section 15(5) (in so far as it relates to sections 6 and 7(9));
- (e) this section.

(6) Subject to subsections (7) and (8), the provisions of this Act come into force on such day as the Secretary of State may by order made by statutory instrument appoint.

(7) Sections 6 and 7(9) come into force in so far as they extend to Scotland on such day as the Scottish Ministers may by order appoint.

(8) Section 14, subsections (4) to (8) of section 15 and this section come into force on the day on which this Act is passed.'—(*Mr Djanogly.*)

Clause 16, as amended, ordered to stand part of the Bill.

New Clause 4

ACTION FOR DEFAMATION BROUGHT BY BODY CORPORATE

'(1) Before bringing a claim for defamation, the body corporate shall obtain the permission of the court.

(2) In determining whether to grant permission, the matters to which the court may have regard include, but are not limited to—

- (a) whether the body corporate can demonstrate an arguable case;
- (b) whether it could pursue alternative means of redress;
- (c) its size and area of operation;
- (d) the proportionality of allowing the corporation to bring a claim by reference to the likely costs of the proceedings, and the level of harm suffered, or likely to be suffered, by the corporation.

(3) Subject to subsection (5), a body corporate which seeks to pursue an action for defamation must show that the publication of the words or matters complained of has caused, or is likely to cause, substantial financial loss to the body corporate.

(4) In determining for the purposes of this section whether substantial financial loss has been incurred, a court shall have regard to the following—

- (a) whether there has been, or is likely to be, a substantial loss of custom directly caused by an alleged defamatory statement;
- (b) whether the body corporate can prove likelihood of a general turndown in business as a consequence of the alleged defamatory statement, even if it cannot prove the loss of specific customers or contracts; this shall suffice as a form of actual loss, and satisfy the test of substantial financial loss;
- (c) a fall in share price shall not suffice as the sole grounds to justify the bringing of a claim;
- (d) injury to goodwill or any expense incurred in mitigation of damage to reputation shall not suffice as the sole ground to justify the bringing of a claim for defamation.

(5) The test specified in subsection (3) applies solely to bodies corporate, or other non-natural legal persons that are trading for profit, or trade associations representing "for-profit" organisations; it does not extend to charities, non-governmental organisations or other non-profit making bodies.'—(*Mr Flello.*)

Brought up, and read the First time.

Robert Flello: I beg to move, That the clause be read a Second time.

The Chair: With this it will be convenient to discuss new clause 7—*Corporations*—

'(1) A non-natural person will only have an action in defamation if they can show—

- (a) that the publication was published with malice; or
- (b) that they have suffered actual or likely financial harm.'.

Robert Flello: I am pleased that we have moved on to the new clauses. New clause 4 is about bringing a claim for defamation by a body corporate. Subsection (1) relates to getting the permission of the court. Under subsection (2), in determining whether to grant permission, the court needs to have regard to a number of issues,

[Robert Ffello]

which are inclusive, not exclusive. Under subsection (4), it is clear that a fall in share price alone will not be sufficient to justify bringing a claim.

New clause 4 is designed to pick up on the Joint Committee's requirement that although corporations should still be able to sue, there should be a higher test, and the court should need to give permission before action can commence. A number of commentators, including the Libel Reform Campaign, have publically expressed the view that non-natural persons should not be able to sue for defamation at all, pointing out that other remedies are available for companies, in particular, but also that non-natural persons do not have feelings to be hurt.

I was attentive to the debate when we considered amendments 4 and 5 on defamation of the newly deceased, tabled by my hon. Friend the Member for Bishop Auckland. The argument is that they should not be able to sue because they do not have feelings to be hurt. I was struck by the passion with which certain Government Members expressed their feelings that it was a very well established principle that the deceased, without feelings to be hurt, should not be able to take defamation action.

Ben Gummer: Will the hon. Gentleman give way?

Robert Ffello: I knew that I would provoke the hon. Gentleman.

Ben Gummer: The hon. Gentleman mistakes the purpose of defamation law. Defamation is to protect reputation, which is of value to someone or something, whether alive or existing as a corporate body. It is not to protect the feelings of a body or a person.

Robert Ffello: I am not sure that I entirely agree.

Anna Soubry (Broxtowe) (Con): That is the law.

Robert Ffello: The hon. Lady has made her feelings clear throughout the proceedings without rising to her feet once to comment.

The Chair: Communicating by other means.

Robert Ffello: Indeed. We dealt with understatement earlier in Committee. As a non-lawyer, I accept that I am reliant on reading material, but the reading that I have had to undertake over recent weeks and months certainly draws me to the view that there is a reference to feelings. I have read that a number of times. I accept that defamation deals with reputation, but there is the impact of reputation on feelings. I will not tempt the hon. Member for Ipswich to his feet—

Helen Goodman: Will my hon. Friend give way?

Robert Ffello: But I have tempted my hon. Friend.

Helen Goodman: My hon. Friend makes an interesting point with the parallel he draws. I listened closely to what the hon. Member for Ipswich said, but I could not see why he took the position he did, given that I do not think there is any move on the Government side to stop giving posthumous awards for gallantry. Clearly, a posthumous award for gallantry is given to somebody who cannot feel anything. It is what other people feel that is significant.

12.45 pm

Robert Ffello: I am grateful. I thought for a moment that the hon. Member for Broxtowe, with her customary ability to interject, wanted to intervene. The point that my hon. Friend the Member for Bishop Auckland is making, if I have understood it correctly, is that we recognise the reputation of somebody who is deceased by giving them an award posthumously. To relate that to corporations, the reputation of a company is obviously important—I shall come to that—but damage to reputation, and the feelings hurt by the non-natural person, are another matter entirely.

Mr Slaughter: I am not really following the discussion—well, I am not following it, full stop. We already have clear law in respect of local authorities, for example. I do not know whether local authorities feel pain in the same way as companies, or in a different way from them, but it seems to me that a clear precedent has been set.

Robert Ffello: Indeed. That is referred to as the Derbyshire principle, and I will come to that shortly.

Mr Slaughter: I should add for clarification that that was a provision introduced by the Thatcher Government. We all thought it was another bit of vindictive anti-local-authorityism at the time, but it actually proved quite a far-sighted provision, although I will not extend my approbation to any other measures passed by that Government. If that is right, surely it is a parallel that we should look to?

Robert Ffello: I hope to develop my argument, although clearly, from my hon. Friend's comments, it seems I have not got off to the best start. The point about the Derbyshire principle is a good one. There is the question of whether it extends to private companies working for the Government. [Interruption.] I hear my hon. Friend the Member for Bishop Auckland asking a colleague from a sedentary position about the Derbyshire principle, so I will take a moment to outline it.

In broad terms—I wait for the hon. Member for Broxtowe to make her customary pronouncements at this point—I understand the Derbyshire principle to be a way of preventing a local authority from protecting its reputation, following a case in which Derbyshire county council took action to do so. The outcome was that local authorities are unable to protect their reputation or their hurt feelings. Interestingly, political parties also fall under the same part of case law. A political party may well feel that it has been defamed, but it cannot take action to protect its reputation.

The second book that has graced my nightstand of late, the Joint Committee report on the draft Defamation Bill, has a lot to say about corporations. It begins:

“It is unacceptable that corporations are able to silence critical reporting by threatening or starting libel claims which they know the publisher cannot afford to defend and where there is no realistic prospect of serious financial loss.”

That goes to the heart of the problem that the new clause is designed to deal with. We have all known of such cases, or had them drawn to their attention. Companies have used their muscle—their ability to pick up the telephone to extremely well-paid lawyers—to issue letters to stop people saying what they are saying. I suspect many members of the Committee have received letters from lawyers when they have raised a topic on the Floor of the House. The subject matter may be factual, yet a lawyer’s letter, suggesting that an apology is required, will find its way to an hon. Member’s desk. We have qualified privilege. The point I make is that corporations miss no opportunity, as part of their general approach to reputation management, to issue writs left, right and centre, wherever they feel there is a way to manage that reputation.

Helen Goodman: Let me back up the point that my hon. Friend makes. As you realise, Mr Havard, I am a spokesman in another team, the media team. In that role, I have had a number of meetings with newspaper editors. I was very concerned about this point when the editor of a newspaper with a high reputation for business coverage told me that the receipt of threats from corporations was his No. 1 problem in providing good, accurate, truthful coverage for the public. We really do need to pay far greater attention to this matter.

Robert Flello: Absolutely; I agree entirely. I raised a matter on the Floor of the House a couple of years ago relating to a rendering plant just outside my constituency. I knew the facts I reported were true, but that did not prevent me from receiving a letter, threatening legal action if I did not withdraw the comments. Companies seem too quick to reach for the phone, or for an e-mail, to get their lawyers to issue threatening letters.

Helen Goodman: On a point of order, Mr Havard. I seek your guidance. I tabled a written question with a named day for the Minister, asking about representations and discussions on the Bill. So far, I have not had an answer within the time, and it would have been helpful to have had one, in order to inform this discussion. Is there any way that the Minister could answer the question before this afternoon?

The Chair: That is not a point of order for the Chair. The Minister has heard your request and is taking advice, and will doubtless comment when he can.

Mr Djanogly: I am happy to say that the named day was Wednesday. I expect to answer the written question within the time.

The Chair: Thank you, Minister. Doubtless you can incorporate some of the content in your later comments, if possible.

Robert Flello: I am grateful to you, Mr Havard, and I look forward to my hon. Friend the Member for Bishop Auckland giving the question an airing. I hope the draft answer is before the Minister, so that he can at least give a partial answer, although I accept that as the deadline is tomorrow, he might not have a complete answer.

Mr Slaughter: I am sorry to hear that my hon. Friend was threatened with libel action. I am pleased to say that in my time here, I have not been threatened with libel action by anyone except by my neighbouring Conservative MP. In my capacity as chairman of the all-party parliamentary group for democracy in Bahrain, I wrote to the sponsors of the Bahrain Grand Prix and asked whether they thought they were doing the wise thing. Myriad public relations agencies and everybody else deluged me with accusations of what they presumed was reputational damage. There has been a massive increase in what companies now spend, not just in advertising, but on anything that they can do about their reputation. There is a great imbalance that the clauses before us seek to redress.

Robert Flello: Absolutely; I do not disagree for a moment, and that is a point I shall return to shortly. On the issue of imbalance, the Joint Committee report said:

“In contrast, we heard recurring evidence from other witnesses, including legal representatives and non-governmental organisations that publishers are routinely and unfairly threatened with libel proceedings by corporations who do not want negative reviews or sensitive information to enter the public domain.”

This can lead to

“publishers modifying, withdrawing, or altogether avoiding publication, which harms their freedom of speech and wider public debate. This chilling effect is caused mainly by the high cost of defending a libel claim against a well-resourced corporation that is using expensive lawyers to pursue every available method to silence the critical publisher.”

It is that inequality of arms that is the problem.

Of course, as the report makes clear, there is huge variation in the size of companies. I will come back to this shortly when I refer to specific cases, but one might find oneself up against a huge multinational company—a “McNational” company—that is able to deploy the most expensive and best of lawyers. Not that the most expensive are always the best, but such companies are able to pick and choose the lawyers with the success rates that they are looking for.

It may well be that the company is at the other end of the spectrum. I am sure that this does not apply to anyone who is here advising the Minister today, but it may be a one-person company set up by a senior civil servant to channel his salary through. There is a huge range of companies, and that is why I have tried to frame my new clause in a way that seeks to provide justice both for the smaller company that is perhaps genuinely being defamed and needs to protect its reputation, as the hon. Member for Ipswich has said, and also, at the other end of the scale, for the huge multinational that wants to protect its reputation where there is risk of serious financial loss. However, we also want to make sure that a huge multinational is not able to inflict its opinions on anybody who is not able to reach for the chequebook in the same way.

[Robert Flello]

I feel particularly strongly about multinationals that are involved in exploiting the natural resources of the planet, particularly in developing countries. When somebody speaks out or publishes an article in the UK about the activities of one of these huge multinational resource-exploiting companies, the chilling effect is launched upon them, simply because the company is able to do so because of the amount of wealth that it can bring to bear. That cannot be good for free speech, or for any of the things that were discussed at Rio+20. It is just harmful, whichever way you look at it.

My new clause tries to address that wider problem. When the Minister gets to his feet, I hope he will explain

the logic behind leaving this measure out of the Bill completely. There is no mention of it in the Bill, as far as I can see. We have heard, over the past week and today, the excellent work of the Joint Committee being prayed in aid when the Minister feels it is appropriate, and completely dismissed in other areas. I will not pursue the analogy of attractive fruit, but it feels as though choice cuts—to change the analogy completely—of the report have been overlooked entirely.

1 pm

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

Adjourned till this day at Four o'clock.