PARLIAMENTARY DEBATES

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GENERAL COMMITTEES

Public Bill Committee

DEFAMATION BILL

Fifth Sitting

Tuesday 26 June 2012

(Afternoon)

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Saturday 30 June 2012

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

The Committee consisted of the following Members:

Chairs: Mr Christopher Chope, † Mr Dai Havard

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

Sarah Thatcher, Eliot Barrass, *Committee Clerks*

† attended the Committee

Public Bill Committee

Tuesday 26 June 2012

(Afternoon)

[Mr Dai Havard *in the Chair*]

Defamation Bill

Written evidence to be reported to the House

D05 Elaine Decoulos

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.'.—*(Robert Flello.)*

Brought up, read the First time, and Question proposed this day, That the clause be read a Second time.

4 pm

The Chair: I remind the Committee that with this we are considering 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 (Stoke-on-Trent South) (Lab): On this glorious afternoon, let us see how we can canter our way through. During the break, I reflected on a point that my hon. Friend the Member for Bishop Auckland raised about the Derbyshire principle. It occurred to me that there may be members of the Committee for whom that principle is a grey or indeed completely unenlightened area, so it is worth clarifying. It is relevant because we are effectively looking at an extension of the Derbyshire principle to corporations.

The Derbyshire case concerned the propriety of certain investments made by that local authority of moneys in its superannuation fund. The House of Lords determined that a democratically elected governmental body, including a local authority, and indeed any public authority or organ of central or local government, should be open to uninhibited public criticism and does not therefore have the right to maintain an action for damages for defamation. To allow otherwise would have an inhibiting effect on freedom of speech. The court did, however, acknowledge that if the reputation of an individual councillor or executive carrying out the day-to-day management of the authority's affairs is damaged as a result of the defamation, that individual can himself or herself bring proceedings.

The House of Lords decision focused my mind on corporations and circumstances in which a company chief executive or a senior manager in a company might find themselves in a similar position. Again, it is worth pointing out that adverse public comment about local authority actions is common, but occasionally strays into criticism of individual officers or employees. Such criticism can be damaging for the individual concerned. The Derbyshire principle has established that a public authority cannot sue for defamation, but, if the reputation of an individual officer is impaired by a publication attacking the activities of the authority, that individual can bring a claim for defamation. There is no limit to an individual officer's right to sue, provided that the comments refer to and defame the individual.

I am alive to and slightly concerned about a situation whereby one of the corporations that we will look at shortly tried to get round new clause 4 or new clause 7 —should the Minister in his great generosity agree to accept them—by having perhaps the chief executive of the company or the chairman of the board take the case themselves. Again, we have a situation in which the inequality of arms kicks in and the company funds the lawsuit for the chief officer, chairman or whoever. In that case, going back to what happened in the Derbyshire case and subsequent case law, the new clause would be helpful in ensuring that there was not that trespass, as it were, into such a situation. I am sure that the Minister will acknowledge that there is a possible cause for concern, but what has happened in Derbyshire should be directly comparable.

There are several examples of corporations using their might to inflict problems on individuals who are just going about their normal legitimate business. I want to draw the Committee's attention to circumstances in which such problems might occur. For example, a company might bring a case instead of engaging in scientific debate. In the earlier part of our discussions, we looked at the very helpful clause on the protection of peer-reviewed scientific debate. At the moment, rather than perhaps entering into an academic or scientific discussion, corporations use the libel law—defamation law—to chill such discussion. Two examples spring to mind: the case of Dr Peter Wilmshurst and the case of the British Chiropractic Association and Dr Simon Singh.

For the Committee's benefit, Dr Wilmshurst was a consultant cardiologist at the Royal Shrewsbury hospital, as I think he still is, and joint principal investigator on the clinical trial of a heart device. He was sued for libel in London by the American device manufacturer NMT Medical. Dr Wilmshurst's comments to a Canadian journalist at a cardiology conference in the US criticising the handling of data from the trial were reported on a subscription-only American website with little readership in the UK and remained online for only three days. NMT Medical was able to launch a case against Dr Wilmshurst that it prolonged for five years, restricting discussion of the trial's conduct. In the process, NMT Medical made defamatory allegations about Dr Wilmshurst, but, for personal reasons, he is not able to sue. Dr Wilmshurst could not avail himself of a public interest defence. He will never recover his costs. NMT Medical did not need to be able to sue for libel; it had other options, such as an action for malicious falsehood or simply entering into the scientific discussion. The UK charity HealthWatch launched a fund to support Dr Wilmshurst, and a little while ago, NMT's UK solicitors entered mediation.

Mr Andy Slaughter (Hammersmith) (Lab): Presaging a debate we will have later this afternoon, as a defendant, rather than a claimant, Dr Wilmshurst was the beneficiary of a conditional fee agreement. Does my hon. Friend agree that, whatever the Government's view of CFAs, which no doubt we will hear later, CFAs can prevent oppressive behaviour towards defendants of limited or impecunious means, such as Dr Wilmshurst?

Robert Flello: Absolutely. I look forward to my hon. Friend's comments on new clauses 10 to 13 later this afternoon.

Helen Goodman (Bishop Auckland) (Lab): Notwithstanding the remarks of my hon. Friend the Member for Hammersmith, surely the point on the disparity in resources between an ordinary citizen and a corporation is that a person who might in normal life be of above-average income and wealth, and therefore not entitled to legal aid, is much poorer in a dispute with a large corporation. That is why we need a set of rules to address such situations.

Robert Flello: I agree entirely with my hon. Friend. The wider implication for people such as Dr Wilmshurst is that their reputation is potentially at risk—as I said, defamatory comments were made about Dr Wilmshurst—and their livelihood and personal financial position are at risk due to unrecoverable costs. The greatest reputational risk that Dr Wilmshurst faced as, I am sure, a thoroughly decent, good and upstanding member of society, was that he was under pressure to retract what he had said. We cannot have situations whereby a corporation, because of its size, deep pockets and ability to throw its weight around, can have people withdraw or lie just to stop themselves being dragged through the court at huge cost. That is potentially dangerous.

Mr Slaughter: To clarify the point raised by my hon. Friend the Member for Bishop Auckland, in using the word "limited" I meant not "modest" but a contrast with "unlimited". The Murdochs and the international corporations of this world can use costs as a weapon by saying, "We will discuss costs later."

If this method of balancing the two sides of the equation and ensuring that there cannot be oppression by large corporations is more attractive to the Government, they would be well advised to seize on these new clauses.

Robert Flello: I am grateful for that enthusiastic support for my new clauses. At the moment, justice is effectively for sale to whoever has the largest pot of gold. For the unfortunate person sued—no matter how eminent, learned, able to make the case and prove correctness—huge corporations can still use legal proceedings instead of entering scientific debate.

The second case I referred to occurred in 2008. The British Chiropractic Association launched a libel case against science writer Dr Simon Singh, following an opinion piece he had published in *The Guardian*, concerning a lack of evidence for claims that chiropractic can be used to treat childhood colic and asthma, and the related conduct of the BCA. *The Guardian* withdrew the article and offered the BCA the right to reply, which it did not take. Instead, it decided to sue Dr Singh. BCA dropped the case after two years of extended and expensive legal argument, when the Court of Appeal ruled that Dr Singh could use the defence of fair comment.

Despite winning, Dr Singh will never reclaim all his costs. A common-law public interest defence was not available to Dr Singh, which meant that the case was bogged down in the exact meaning of his words and whether he could prove the truth of the claimant's asserted meaning. I am sure that the Minister will say that the Bill would now give Dr Singh that defence. Leaving hanging the question of whether it would or would not, if corporations can stifle scientific debate by firing off letters from lawyers and starting libel or defamation cases, we will still have the situation whereby the Dr Singhs of this world may find themselves several months or years down the line without resolution of their cases while incurring costs. That could all be solved quite easily by adopting new clause 4 or new clause 7.

Let me move on to the second concern, where proceedings are started but material is withdrawn before they are made. Again, with the cost of defending a libel case so high, even when successful, and the possibility of losing and having to pay all costs quite likely, relatively few cases reach court. Under current law, early strike out can take months and costs tens of thousands of pounds. Even trivial or weak threats can lead to withdrawal

[Robert Flello]

of the publication. Scientists have reported that they, their editors or publishers have withdrawn articles and sometimes apologised for material that the scientists stand by but they or the publishers cannot afford to defend.

Examples include the editor of a newsletter of a health charity who withdrew an article criticising claims about umbilical-cord blood banking after the company concerned threatened libel action. There were similar concerns about a threat to sue the writer personally after she spoke of her concerns about the company's claims on a BBC radio programme. The author and editor of the newsletter were uncertain how a case would proceed and could not take the financial risk of defending their words against a large company.

Another example is a scholarly review of a new specific type of lie-detector technology, written by two professors of linguistics at Swedish universities and published in the *International Journal of Speech Language and the Law* in 2007. That was also withdrawn after a libel threat from the manufacturer, a large corporation with deep pockets, able to intervene and take action. That again shows that the new clause is vital.

Helen Goodman: The last example my hon. Friend gave is of particular interest. That kind of lie detector was being tested by the Department for Work and Pensions when I was a Minister there. My officials said that they thought it would work, but I said that I had read criticism of the lie detector. They said that I could ignore that. The ramifications are immense if we do not get down to the truth. It is not simply a question of truth and untruth; vast amounts of public resources could be wasted if we do not know the truth of the case.

Robert Flello: Absolutely. In many cases, it is a matter of life and death. Take a situation—similar to the Wilmshurst case—in which a heart valve is developed by a major manufacturer who has invested a lot of time and money in it. An eminent specialist then says that, under certain circumstances, the valve can block and cause the death of a patient.

4.15 pm

Currently, the corporation, which has invested lots of money, could say to the person publishing that paper: "If you do this, we will sue you." I appreciate that the Bill talks about peer-review papers, but there may be something about which the specialist is so keen and concerned, and wishes to get into the public domain quickly while the peer review is happening, that the publisher ends up having to withdraw and publish an apology while the peer-review process is going on. There are huge concerns about this. As my hon. Friend the Member for Bishop Auckland has said, the Israeli lie–detector manufacturer threatened the publisher with legal action for defamation and the publisher withdrew the article. How can this help anybody?

Rather than pursuing these actions, often letters are sent and threats are made, even when they are not legally sound. Many letters threatening libel action are not legally sound, but access to expert legal advice is not always available and non-legal threats often lead to that unnecessary chilling of scientific or medical discussion. It is very difficult for the Committee this afternoon to know how many non-legal threats result in withdrawing material. I will give a couple of examples. A plastic surgeon, Dr Dalia Nield, was sent a letter by lawyers for a company threatening further legal action if she did not withdraw comments published in the *Daily Mail* about boob job cream. The manufacturers, Rodial, claimed it could increase breast size. Dr Nield said Rodial had not provided a full analysis of tests on the cream. Again, there was threat of legal action, which had untoward consequences.

A science writer, Martin Robbins, received a letter threatening unspecific legal action from a vitamin pill manufacturer, Principle Healthcare, about a series of posts criticising claims that the company made about its products. The letter told Robbins that he had seven days to remove the blog before legal action would be taken. He sought legal advice from readers of his blog and wrote to Principle Healthcare, asking it to clarify the complaint. There was no response and the posts remain accessible. Again, it illustrates that, all too often, companies are reaching for their lawyers' phone number or e-mail address, and firing off threats of legal action or actually taking legal action.

I also want to refer to something I came across only a few hours ago. A citizen journalist received a bizarre letter from lawyers who claimed to be acting on behalf of the Olympic Delivery Authority, alleging,

"serious, false and defamatory allegations",

against the authority and one of its employees. The blog article was published on the *Indymedia* website and covers the eviction and arrest on 10 April of protesters campaigning against the construction of the Olympic basketball training courts at Leyton Marsh in Waltham Forest. The letter demands that a phrase be removed from the blog immediately, and made unspecified threats that if it remains published,

"you may well leave our client no option but to take matters further".

The accusations of defamation imply that the ODA would initiate a libel action, but public authorities are barred from using libel, on the Derbyshire principle, as I outlined earlier. A Government authority cannot sue for libel on behalf of itself, or, as I understand it, on behalf of its employees. Employees themselves, of course, can sue. Other cases then came to light, in which it appears that the Olympic Delivery Authority tried to prevent criticism about the effects of the work that has gone on. Clearly, there are cases out there of companies using threats of libel action, even when they cannot take the action that they have threatened.

The final area that I want to highlight is what has been called editorial spiking. Perhaps unsurprisingly to members of the Committee, particularly to those who have served on the Joint Committee on the draft Bill, medical and scientific journals regularly and frequently consult libel lawyers and sometimes do not publish material in order to avoid perceived libel risks.

A survey of journal editors was undertaken a couple of years ago to gauge the extent of editorial spiking. The main results were that, first, journal editors in all subject areas have been threatened with libel; almost a third of the respondents said that their journal had been threatened with libel action. Secondly, editors

modify papers before publication; some 44% of respondents said that they have asked for changes to the way papers or articles were written to protect themselves from libel action. Thirdly, scientific editors have refused work for fear of libel action; some 38% of respondents have chosen not to publish certain articles because of a perceived risk of libel action, for example about controversial subjects or concerning particular people or companies. Finally, both peer-reviewed and non-peer-reviewed content, including editorials and commentary, news, letters to the editor and book reviews, was being chilled. It seems that legal advice is always being taken in order to play it safe. Self-censorship is going on. Never mind corporations starting legal action; merely the fear that they may start an action is enough for self-censorship to be rife out there.

We are trying to restrict corporations in the use of libel laws. I completely accept that corporate claimants and other non-natural persons should be able to use laws where they have actually been defamed, but they should not be able to use them just to manage their brands. They should not be able to use defamation law just because someone says something about them that they do not like, even though it is absolutely true and justifiable. There is certainly widespread support for restriction on corporations' use of defamation.

I referred earlier today to "Mc" corporations looking at and using defamation laws. I want to return to that and talk about the case of McDonald's Corporation *v.* Steel and Morris, which came to be known as the McLibel case. McDonald's Corporation filed a suit against environmental activists Helen Steel and David Morris, who are often referred to as the McLibel two. The case concerned a pamphlet that they had produced that criticised the company. The original case lasted 10 years, making it, as I understand it, the longest running case in English history. Even though McDonald's won two hearings in English courts, the partial nature of its victory, the David versus Goliath nature of the case, and the drawn-out litigation were in some ways just as damaging to its brand as anything else. The case was then taken to the European Court of Human Rights, where it was found that the provisions of articles 6 and 10 came into play.

I was going to talk about a couple of other cases, but I am conscious that time is pressing on. Just for the Committee's reference—it may wish to refer to this later—there was the case of GE Healthcare, a US corporation. It dropped a controversial defamation case against a scientist who had criticised one of its drugs. In dropping the case, the firm said that it did not intend to stifle academic debate. Nevertheless, it shows again how willing and ready companies are to reach for defamation lawyers first, rather than taking a more measured and considered view.

The purpose of new clause 4 is to ensure that companies realise that they must convince the court before they can reach for the libel lawyers. It would give protection and reassurance to all the folk I have cited so far, and to the hundreds—possibly thousands—of bloggers, scientists, academics and journalists who know that writing something about a company or a corporation will bring them immediately into the firing line of people who have far greater resources than they could possibly hope to command.

I turn again to one of my favourite tomes, the Joint Committee report, and I draw the Committee's attention to the discussion of corporations on page 57. It is lengthy and detailed, so I will not go through it in detail, but I hope that members of the Committee have studied the report hard and taken it on board. I draw the Committee's attention to paragraph 109, which states:

> "In contrast, we heard recurring evidence from other witnesses, including legal representatives and non-governmental organisations that publishers are routinely and unfairly threatened".

I read that out earlier, so I will not repeat it. There is certainly a chilling effect, because companies have access not only to defamation law but to the resources that they need to use it.

New clause 4 would require a corporation to obtain the permission of the court before bringing a claim for defamation. If a corporation felt that it had genuinely been defamed and that a serious problem had to be addressed, it should not fear that requirement. The corporation would be able to approach the court and obtain permission to bring the defamation action.

The new clause sets out some of the matters that the court would have to look at in determining whether to grant permission. First, is there an arguable case? In many of the examples that I have cited, there clearly was not an arguable case, and the courts should be able to strike such cases out quickly and easily. If the court believes that there is a case to argue, it can give permission. Secondly, are there alternative means of redress? Organisations such as the Libel Reform Campaign have highlighted that companies can take other actions, such as making a malicious falsehood claim. That question should focus a company's mind on whether the matter should really be the subject of a defamation claim, or whether the company can seek an alternative form of address that would not involve dragging somebody through a lengthy and expensive court case to protect their reputation.

Thirdly, what is the size and area of operation of the company? If an allegation was made against a small corner shop that had a real impact on that shop's business because of its size and area of operation, the court might well grant permission for that case. The court might not, however, grant permission to a huge corporation on the carcase of which an allegation had barely the impact of a mosquito bite. Fourthly, what is the proportionality of allowing the corporation to bring a claim, by reference to the likely costs of the proceedings? If the corporation is likely to suffer a miniscule amount of harm as a result of the matter, would the cost of a huge, drawn-out, 10-year legal case be proportionate?

That explanation of the structure of new clause 4 brings me nicely to new clause 7, which is a simplified version of new clause 4. New clause 7 says:

> "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".

This is much simplified, more straightforward—it simply asks whether there is malice or actual or likely financial harm. It does not go through all the things that new clause 4 looked at—the impact on share prices; the costs of restoring the brand—it simply looks at those two points.

4.30 pm

I shall pause and delve more deeply into "likely financial harm" in both new clauses. My concern in drafting these was whether a corporation of whatever size would be able to manipulate its balance sheet and profit figures, and use clever creative accounting to show an "actual or likely financial harm". The problem is that it may well be able to do those things, but that is why, in new clause 4, getting the permission of the court is important. A court can take into account whether the balance sheet or the profit and loss figures have been manipulated to show actual or likely financial harm.

New clause 7 reflects the view of the Libel Reform Campaign, which feels that courts should not entertain libel or defamation actions from corporations at all; that it should be far more restrictive. I am hesitant about new clause 7 because I think that there are circumstances in which a non-natural person, as we have discussed, should be able to bring a case where there is genuine defamation and actual or likely financial harm. So I am testing the water with new clause 7, to see whether it is a step too far, or whether it is something that should be looked at.

I have not tested the Committee's view—but this is an appropriate place to do it—on the situation in which a corporation is acting for a Government body, but is not caught by the Derbyshire principle. There is one company that springs to mind, and my hon. Friend the Member for Newcastle-under-Lyme will immediately recognise the heartfelt sentiment with which I say the word "Serco", remembering our experience in north Staffordshire with that company and its activities regarding our children's education and schooling. There is a host of companies out there doing work for Government, in many cases standing in stead of a local authority, but which it is not possible to criticise in the way one could criticise a local authority and know that the Derbyshire principle applies and protects free speech, effectively, against Government. Where a private company is standing in stead of a local authority, clearly such a challenge is not possible.

Indeed, people have made representations to me who are concerned about the organisation Atos, which undertakes assessments on behalf of the Department for Work and Pensions. Allegations have been made to me that Atos has reached for the lawyers when blogs have made statements about how that company has operated and behaved, irrespective of whether there is merit in what they are saying. If it were the DWP doing those reviews, there would be no recourse, but because Atos is standing in the shoes of the DWP, it can reach for the lawyers and take action.

Helen Goodman: My hon. Friend has made an absolutely brilliant point. He is highlighting the loss in public accountability when public services are privatised and contracted out. Does my hon. Friend agree that that loss is deeply damaging to our democracy?

Robert Flello: Not only do I agree, but that was the point I was about to come on to. Over the past 20 years or more, we have seen the increasing engagement of the private sector. I suspect that we will see a massive growth—I am sure that the Minister will not take the bait on this one—in the number of private companies getting involved in delivering services, particularly for the national health service.

Helen Goodman: My hon. Friend has put his finger on something significant, and that point is paralleled by the fact that we cannot recover information through parliamentary processes because we are constantly being told that it is commercial in confidence.

Robert Flello: My hon. Friend makes an extremely valid point. It is increasingly difficult to get information to hold private companies and corporations outwith Government to account, and if anybody puts their head above the parapet outside of the privilege we have in this place—there was a question on Tuesday about whether that privilege will continue, and I know the House is looking at that—the danger is huge. If even Members of Parliament cannot question what is happening with private corporations acting on behalf of the Government—

Helen Goodman: Using taxpayers' money.

Robert Flello: Absolutely. They are using taxpayers' money, effectively standing in for the Department, Government agency or local authority concerned, but without the ability to be questioned. When bloggers and journalists rightly want to start digging into them in a responsible way, raising questions, they will be shut up by firms and corporations saying, "Sorry, but you have defamed us. Here is our writ." We have to stamp on that quickly.

When the Minister responds on new clauses 4 and 7, I hope he recognises that a huge danger lies before us, which will grow as more companies get involved, whether in the NHS, or in other areas of Government and local government business. Companies are becoming increasingly involved and unless we tackle the issue of corporate bodies through the Bill, we may well find in a few years' time that they are completely untouchable. Despite the level of Government money that they receive, we may be unable to bring them to account, because as my hon. Friend says, we cannot question them. When anybody dares to say anything, they will fall back on the provisions in the Bill, after it is enacted, and produce their get-out-of-jail free card.

The Committee probably has the gist of where I am coming from on the two new clauses. I certainly hope that Committee members have looked at the Joint Committee report, but if not, they probably have a few moments to do so. It is a glaring error that should have been addressed in the Bill, and I do not understand why it was not. I am sure the Minister will give me an extremely good explanation, but I do not stand alone on that issue. A huge number of people out there cannot see why corporations were not included, and this is the opportunity for that to be put right.

Tom Brake (Carshalton and Wallington) (LD): I shall go over much of the same ground as the hon. Member for Stoke-on-Trent South, but I intend to do so much more concisely, as the Committee will be pleased to hear.

It looks as though there may be an alternative, albeit possibly a transient coalition, building up around the issue of corporations. That is an omission, and the opportunity should have been taken to consider restricting corporations' ability to use libel laws in the way that the

hon. Gentleman has described. There is often a David and Goliath scenario, and the right hon. Member for Rotherham might be raising a more topical David and Goliath case than others that have been mentioned.

Kwasi Kwarteng (Spelthorne) (Con): There is this distinction: my understanding is that the David and Goliath case referred to by the hon. Member for Stoke-on-Trent South was won by McDonald's.

Tom Brake: I thank the hon. Gentleman for his intervention, although I am not quite sure what his point was.

Mr Denis MacShane (Rotherham) (Lab): About big burgers.

Tom Brake: It is probably safer for me to pursue my points, although there may be other interventions about David and Goliath cases.

Paul Farrelly (Newcastle-under-Lyme) (Lab): Further to the previous intervention, McDonald's did indeed win, but—after nine years—it was awarded £40,000, which it declined to collect.

Tom Brake: One has to speculate on the reputational damage incurred by McDonald's along the way, in achieving that win.

As was outlined by the hon. Member for Stoke-on-Trent South, corporations have many other legal avenues to pursue. I made this point last week, and I will repeat it: I wonder whether any corporations have made representations against what we are discussing. If they are happy, I want that to be on the record, so that their exact objections, if any, can be known. The view of the Libel Reform Campaign, and my view, is that if corporations are allowed to use libel laws in such a way, they must show that there is actual or likely serious financial harm and malice, dishonesty or reckless disregard for the truth.

Helen Goodman: The right hon. Member's point about representations was what I raised in my question to the Minister. If the Minister has managed to get that information on a slightly faster timetable, does the right hon. Member agree that it should be shared with the Committee?

Tom Brake: I agree with the hon. Lady that that would be helpful. What is unusual about our discussion on corporations is that all the arguments are coming from one side. It is rare that we have a debate where there are no representations from the other side. One can draw conclusions from that, and mine is that corporations are not particularly bothered whether the Government make the changes we are seeking.

Robert Flello: To turn that on its head, if restrictions in line with my new clauses 4 and 7 had been included in the Bill, I suspect we would all have been deluged with representations from corporations.

Tom Brake: I suspect that corporations have sufficient parliamentary advisers to keep track of what is happening. They will be aware that this is a subject of debate, and they may have wanted to pre-empt things by making representations to prevent the introduction of proposals such as those in the new clauses.

My final point is on the Derbyshire county council case, which has been mentioned. I understand that it has set a common law rule that public sector bodies cannot sue in libel because they do not have article 8 rights in reputation and therefore do not need the same remedy as natural persons, and because of the public interest in not chilling free debate about the conduct of powerful organisations. It seems to me that those criteria should also apply directly to corporations.

If, for some reason, the Government feel that that cannot be conceded, could they at least envisage applying the cut-down version referred to by the hon. Member for Stoke-on-Trent South? That version would ensure that private providers have to play by the same rules as public providers on public services—a matter which I have raised in relation to the Independent Police Complaints Commission and freedom of information—and it would mean that there was a level playing field between the two types of providers.

4.45 pm

Mr MacShane: I have a modest experience of such matters. I wrote a book many years ago, which was quite profitable—the only one that was not remaindered and did make some money—in which I referred to the Institute of Journalists in derogatory terms. I was shocked to find that as a body corporate it could sue me. Because my publisher was a left-wing publisher, it immediately surrendered and I lost all the profit. *[Interruption.]* A long time ago, yes—a left-wing publisher.

I am concerned that as the Bill progresses, we have an extraordinarily egregious example of exactly the points that the shadow Minister, my hon. Friend the Member for Stoke-on-Trent South, covers in his new clause, and that is the news that the law firm Schillings is showering defamation writs on the citizens advice bureau—one of the most prestigious and respected of all the voluntary organisations that we all have relationships with—as well as the law firm Bates Wells and Braithwaite, the Justice Gap website and the consumer websites Legal Beagles and Consumer Action Group.

Why is Schillings doing that? It is because there is an extremely unpleasant practice now taking place in our retail industry—developed, I am sad to say, under a Labour Government—called civil recovery. In essence, 90% of all shoplifting in our stores is organised by gangs. About 8% or 9% is done by in-house stealing. The tiny 1% is done—frankly, for the most part—by rather sad people. I am not condoning shoplifting; none of us would. Quite a lot of people who walk out of Tesco or Boots have not put in the correct barcode. We have all had that problem now since we have had to, as it were, do our own till accounting. Then the people are pulled back into the shop, taken into a little room and told that they could face prosecution, but Tesco, TK Maxx, Boots or Primark will not prosecute. Instead they will ask for names and addresses and a few weeks later a company in Nottingham called Retail Loss Prevention, which is owned by one person—Mrs Jackie

[Mr MacShane]

Lambert—sends a threatening letter to the person saying that unless they immediately pay £150 or £180, they may face prosecution.

Most of the people are children or adolescents, often from families without much structure. They are terrified out of their wits. Retail Loss Prevention—this Jackie Lambert person—says that this practice has been approved by the Association of Police Chief Officers and is thoroughly legal. It is not. It is a threat to obtain money, because the point of detention is not to go forward and hand the shoplifter—if that is the case, and we are not condoning it—over to the police for prosecution. There have been 750,000—

The Chair: Order. Can you explain how your speech fits with the question of defamation?

Mr MacShane: Quite. This is exactly the core of the point. This is a £15 million racket used by a lot of major companies—corporate groups—such as Boots, TK Maxx, Primark, Debenhams, Superdrug and Tesco. They are all shops that we use. These bodies corporate are going to another body corporate called Retail Loss Prevention and getting it to obtain money from very vulnerable people. When the CAB, also a body corporate, seeks to take up the cases, it then faces defamation writs from Schillings. I am sorry if any member of the Committee does not see the seriousness of the matter and why we should stand with the vulnerable people in our society rather than the Nottingham company and its use of Schillings to put pressure on the CAB.

David Morris (Morecambe and Lunesdale) (Con): The whole point of scrutinising the Bill is to find out where we can improve it instead of going over old turf.

Mr MacShane: I would certainly welcome that, but until Government Members understand exactly what is going on, they will continue to support the Government's rejection of the new clause tabled by my hon. Friend the Member for Stoke-on-Trent South. We have a Standing Committee in order to go into the problems of the case in much greater detail than is allowed on Second Reading.

Here we have an example, before our very eyes, at this very time, of Schillings acting on behalf of one body corporate and companies that hide behind the Nottinghamshire-based company and Mrs Lambert. They seek to extract an estimated total of £15 million from poor and vulnerable people.

I am sorry that the right hon. Member for Bermondsey and Old Southwark is not present—he is obviously busy—but he has raised that point in an Adjournment debate in Westminster Hall. I know that the right hon. Member for Carshalton and Wallington is also aware of that case, so this is not a point of view from just the Labour side of the Committee.

As the company now realises that the CAB and other organisations are defending weak and vulnerable people, they have initiated one or two court cases for shoplifting, only to find that they are being thrown out by the High Court.

Anna Soubry (Broxtowe) (Con): It is theft.

Mr MacShane: The hon. Lady says from a sedentary position that it is theft. If it is theft, the store has an obligation to call the police, have the person arrested, provide the evidence and prosecute the person. They are not doing that, but sending people home and seeking to extract money from them later on.

Robert Flello: Despite the interjections of the hon. Member for Broxtowe, I am following what my hon. Friend is saying. The situation, as I understand from what he was saying—I would like his clarification on this—is exactly was I was talking about when moving new clause 4. Companies throw their weight around and are quite happy to reach for letters to threaten all sorts of things, whether or not they can do it. What he is talking about is symptomatic of a problem with corporations, which, even if the law is not on their side, they will make up as they go along.

Mr MacShane: It is no accident that the practice, which is quite widespread in America, was unknown in Britain until 1998. It started with the arrival en masse in our high streets of TK Maxx and Superdrug, two American companies. One should congratulate Mrs Lambert in Nottingham for having realised what a wonderful little earner that is.

I have no problem with making any shoplifter or anyone who steals anything face the legal consequences. What is wrong, in my judgment, is for Schillings to be suing the CAB—my goodness! I think all hon. Members will accept that in every one of our constituencies, the CAB is having to shed staff and operate on a reduced basis due to financial constraints. To make it undertake the responsibility of defending a worrying set of defamation writs from Schillings, acting on behalf of the Retail Loss Prevention company and some of the most powerful corporations in our land, is a grotesquely unfair and improper abuse of existing defamation law.

That is why I hope hon. Members on both sides of the Committee will accept the new clause tabled by my hon. Friend the Member for Stoke-on-Trent South. It would not stop the bullying in toto, but it would at least send a much clearer signal to big companies such as TK Maxx, Tesco, Primark, Superdrug and Boots, and to Retail Loss Prevention that their little game is over. If they find someone who has committed a valid shoplifting crime, they should call the police and bring the people before the courts. They should not use that underhanded way to achieve their aims and use Schillings, a defamation lawyer, to put pressure on the great and good organisation that is the CAB to stop it raising the issue in public.

Tom Brake: Is the right hon. Gentleman as concerned as I am about the following aspect of the letter? It is the suggestion that the company has encountered substantial financial losses as a result of a small number of postings on a website that I think is relatively obscure.

Mr MacShane: Once again, we have the bullying side of defamation writs. CAB is probably the best known of those threatened by Schillings. On the whole, it is big enough, old enough and reasonably resourced enough to look after itself. We have, thank goodness, lots of wonderful little consumer groups producing websites,

and maybe here and there getting a techie bit wrong, that are terrified out of their wits when big bully Schillings sends in a letter on behalf of Mrs Lambert in Nottingham.

I hope that all parts of the House will consider this. I think the Minister himself when the matter was debated on Adjournment—I do not know if the Minister would like to listen to me *[Interruption.]* From a sedentary position, we have the courtesy we are used to from the party two years into power. The Minister said in the debate that he hoped that there would be a test case and I appreciated his words. People concerned about the matter felt he was on their side. Therefore, I hope he will be prepared to accept my hon. Friend's new clause and allow the pro-consumer groups around the world to carry on their business without fear of defamation writs from Schillings.

Ben Gummer (Ipswich) (Con): The hon. Member for Rotherham—

Mr MacShane: Right hon.

Ben Gummer: I apologise. The right hon. Member for Rotherham raised an important point that deserves consideration. I wish he had spent some time with me queuing overnight for private Members' Bills, because I am sure one on this topic would have been very popular in the House. However, it is not one that necessarily finds its place in the Defamation Bill. The right hon. Gentleman appealed to the Committee; in turn, I appeal to Opposition Members to think carefully before they vote on this new clause.

It is difficult to know where to start with the new clause, as it is such a jumble of assertion and assumption, with general principles drawn from anecdotes. I will look at one or two aspects where hon. Members might feel—*[Interruption.]*

The Chair: Order. A little decorum, please.

Ben Gummer: Thank you, Mr Havard. I want briefly to draw out a few points on which the Opposition might want to reflect before they say aye to the new clause. Proposed subsection (1) says,

"Before bringing a claim for defamation, the body corporate shall obtain the permission of the court."

One of the considerations is to "demonstrate an arguable case". That would be the first time in English law since Magna Carta that somebody would have to prove to the court before the case is heard that the facts and the argument are admissible. Clause 40 of Magna Carta says that the state should not

"refuse or delay right or justice",

or access to justice in any form. Yet here for the first time, for some reason, a corporation, no matter how good or evil, must show it has an arguable case before the court will even hear it.

Robert Flello: Will the hon. Gentleman give way?

Ben Gummer: I shall finish my comments quickly. The hon. Gentleman spoke at great length. I just want to make a few points that I wish his colleagues to listen to. This would be the first time that this has been in English law. Consider that for a moment.

Proposed subsection 4(c) would exclude loss as a consequence of a fall in share price. I put this hypothetical but not completely unrealistic proposition to the Opposition. Imagine a hostile takeover position of a company that might have a significant employee trust that holds shares in the company, where a significant part of the pension fund of that company's employees holds shares in the company. Imagine that a defamatory comment is made that changes the company's valuation on the eve of the sale, and that the hostile takeover therefore happens at a lower price than would otherwise have been obtained. The people who lose are not the evil shareholders, or the evil management of the big, bullying corporations that the shadow Minister seems to think exist without any employees or owners, but the employees, the shareholders, some of whom will be very small. They will be the people on low incomes with investments in pension funds that hold shares in the company, and the employees in the employee trust. They will lose out because of the new clause and will not be able to take action to correct the defamation. Those companies are not just the evil Schillings, and the rest of them; they might be Marks and Spencer, Debenhams or the Co-op, which exists to make a profit, albeit that it disburses that profit to its owners. *[Interruption.]* No, I will not take an intervention. I will conclude my comments.

Proposed subsection (5) excludes from this bizarre new clause organisations that exist not to make a profit, including, I presume, charities.

5 pm

Robert Flello: The hon. Gentleman should read the new clause. It excludes charities.

Ben Gummer: The new clause says that

"it does not extend to charities",

but it also says that it does not apply to bodies not trading for profit, so the Church of Scientology, which is keen to take defamation actions, as Opposition Members know, would still be able to take action as a body corporate, but not the Co-op, Marks and Spencer, or Tesco, which employs 350,000 people in this country—far more people than are represented by any trade union on its own. Is that right? Is it right that Tesco and all its employees, and the families and people whom it supports, should be exempted, but not the Church of Scientology?

Opposition Members should think carefully before supporting the new clause. They should think about what the new clause says about their party. The new clause blows their cover. They care about profit, not the many hundreds of thousands of people whom businesses employ, and whose jobs depend on the good reputation of their company. If that reputation is destroyed, their jobs are at risk. Opposition Members should remember that before they vote for this new clause.

Helen Goodman: I listened carefully to the hon. Gentleman, and I will speak in support of new clauses 4 and 7 in the name of my hon. Friend the Member for Stoke-on-Trent South, which is not to say that the drafting of new clause 7 could not be improved. The hon. Member for Ipswich made some pertinent points about the Magna Carta, but our concern is that in the public debate on defamation in this country, the most significant and well known problems involve small people, however defined, and large corporations. The Bill's lacuna in not addressing large corporations is striking.

[Helen Goodman]

My hon. Friend the Member for Stoke-on-Trent South talked about a large number of cases, but he did not talk about the Trafigura case, which I thought was the most well known. Those of us who laboured on the Legal Aid, Sentencing and Punishment of Offenders Bill know that Trafigura is adept at using and abusing the law in every respect. First, it had to defend claims made by people in Ivory Coast. Then, in May 2009—this is relevant to the Bill—it sued the BBC over allegations made on "Newsnight" that the hazardous waste dumped by Trafigura in Ivory Coast caused deaths and miscarriages. In December 2009, the BBC settled out of court, with Trafigura paying £25,000 to charity and issuing an apology. It has been reported that the reason behind the BBC's decision to settle was the fear that Trafigura's lawyers, Carter- Ruck, could run up legal bills of £3 million, for which the BBC would be liable if the case did not go its way. My hon. Friend the Member for Newcastle-under-Lyme will no doubt talk about the injunctions that were issued.

Paul Farrelly: I tabled a parliamentary question on Trafigura because of the substantial concerns raised about public interest. If I catch your eye later, Mr Havard, I will not talk about that, but I do want to put on record my sadness that the BBC settled that case when it had the wind of public interest in its favour, given that *The Guardian* and other organisations had stood up to Trafigura.

Helen Goodman: I am grateful for my hon. Friend's insight into that case.

We should also be concerned about another large organisation, Atos, given the huge involvement it now has in the delivery of our public services, and how it had the Carer Watch web forum taken off the internet. It made no direct contact with Carer Watch but instead went straight to the web hosts, who removed the forum. Notwithstanding the strong feelings of the hon. Member for Ipswich, we need to address imbalances of power. I am surprised that the Government have ignored the Joint Committee, which looked thoroughly at the matter and recommended that the Bill incorporate provisions along the lines of those proposed by my hon. Friend the Member for Stoke-on-Trent South, and I would like to hear an explanation from the Minister. I have raised the issue of from whom representations have been heard. As the right hon. Member for Carshalton and Wallington said—I hope he will vote for the new clauses—it is significant that public bodies may not bring defamation cases. In the case of public bodies, however, the general public have, through the ballot box, the possibility of changing their management and governance. They do not have that opportunity with large private corporations, yet the influence that such corporations can wield in our society can sometimes make them just as significant. The hon. Member for Ipswich made a point about the amount of jobs they create; that illustrates their power, influence and significance, and actually makes the opposite case. The fact that they make a major contribution to the British economy is not a reason not to have the power to look at their activities.

I assume that my hon. Friend the Member for Stoke-on-Trent South—he will no doubt correct me if I am wrong—has taken up the point made in the Joint Committee report that trade associations should be covered. Otherwise, there would be a legal loophole: private corporations would simply create trade associations.

The other issue that stands out in the cases that have come to public attention is how many of them are about scientific matters. I fear that clause 3 will not be adequate, because it refers to scientific journals. We have heard, however, that it is when attempts are made to communicate with the general public through ordinary newspapers—to popularise opinions, and to explain to the ordinary citizen what is going on—that large corporations use existing defamation law in such an oppressive way. Even if the Minister does not like the drafting, I hope that he will go away and think about the matter, and return on Report with something that he believes will work.

Simon Hughes (Bermondsey and Old Southwark) (LD): I apologise because I had to go out during some of the debate, but I was here at the beginning.

The Chair: I understand, Mr Hughes.

Simon Hughes: I rise to speak on the issue that lies behind the new clause. I have initiated Adjournment debates in the House on Retail Loss Prevention, and have worked with colleagues in the Lords on the matter, and I have had several meetings about it over the years with Richard Dunstan of Citizens Advice.

I remain concerned that power is abused by large retail outlets, which use a regular set of solicitors to protect their interest. They pursue normally young and often vulnerable people for small amounts of money, and lead them to believe that other consequences will flow if they do not pay, even though that is not true under the law. Effectively, retail outlets often get large sums from such individuals. If, for example, someone has left a store with a comb or a tube of toothpaste, they are told that unless they pay considerably more than the value of the property—£100 or sometimes £1,000, which accumulates very quickly—they will be guilty under criminal law.

Of course, retailers have to protect stores and the goods in them; I understand that. It is perfectly reasonable for stores to have security people, as long as they act reasonably. There is a real issue here, however, and there is a social malaise in how such companies pursue their interests. Some quite reputable companies are involved, as well as some disreputable ones.

It is clear from correspondence that Schillings, which has written about the case, is trying to represent Mr Dunstan as someone who is on a frolic of his own, pursuing something disreputably, obsessively and almost paranoically. He has been doing a job for a highly reputable organisation, Citizens Advice, with which I have worked over the years and on behalf of which I once sponsored somebody to work with me here. We all know from experience in our constituencies that Citizens Advice has at heart only the best interests of those who come through its doors. I simply want to ask how we stop the big boys and girls attacking the little boys and girls with the back-up of lawyers, who intimidate them and misrepresent the legal position.

In answer to the hon. Member for Bishop Auckland's challenge to my right hon. Friend the Member for Carshalton and Wallington and me, I am not persuaded that the new clause is the right way to deal with the

problem, although I understand absolutely that we must do something. I would be interested to hear what the Minister says. I am aware of previous debates on the issue in consideration of the draft Bill, but I certainly do not think the right solution is to make companies go through a separate doorway and an entirely different process that does not apply to individuals. I am keeping an open mind about that.

Mr MacShane: Is it not a fact that, as we speak, across the range of civil laws and torts, companies may be in front of judges, asking for urgent applications, injunctions or hearings? In the hypothetical case of a company that was about to be taken over when something grossly defamatory was said, clearly the company would go to a judge, who would instantly acquiesce to the necessary action being taken. The new clause does not prevent that, but it says to Tesco, Superdrug, TK Maxx and Mrs Lambert that they should not seek to silence genuine concerns about what they are up to by using defamation threats and Schillings.

Simon Hughes: I understand the right hon. Gentleman's argument. I am a lawyer, and I know the process of judicial review: one first goes before a judge to get off first base; the judge decides whether there is a case; and then one goes on to make the substantive case later. That is available to anybody who applies for judicial review. It is not discriminatory or available only for a corporate applicant or local authority, as opposed to an individual. I am not saying that there cannot be a process, and I am not resisting the argument that something is needed to ensure that intimidatory libel actions are not taken. I am just expressing an open view about how we get to the result we want to achieve, understanding the point of principle made by my hon. Friend the Member for Ipswich, which is that suddenly to create a divide that says "corporate applicants this way" and "individual applicants that way", with the first group having to play a preliminary or first round and the second having a bye to the second round, may not be the right way to do it.

5.15 pm

I will listen to the Minister. We have a concern, and if there is an opportunity of addressing it in the Bill, that would be a good thing, particularly in relation to this issue, as people are still being intimidated by companies and their lawyers. We need to try to solve a problem that, to my knowledge, is producing great distress and considerable concern up and down this country, if not the UK.

Paul Farrelly: I, too, want to speak to new clause 4 and its kid brother—or shorter sister—new clause 7. I am really glad that we have had this extensive debate—and I am glad to extend it. The Bill is silent on corporations, and I welcome the fire and brimstone contribution by the hon. Member for Ipswich, and what I would call the very responsible use of privilege by my right hon. Friend the Member for Rotherham and the right hon. Member for Bermondsey and Old Southwark. It is entirely responsible to highlight in this debate the aggressive activities of lawyers such as Schillings, how they use the libel laws to chill, very often on behalf of behalf of corporations in so-called reputation management, and how they deploy those weapons against organisations such as Citizens Advice.

The Select Committee on Culture, Media and Sport considered corporation defamation, including many of the issues in new clauses 4 and 7, in our report, "Press standards, privacy and libel", in February 2010. In that report and its recommendations, we had regard to existing limitations regarding bodies—rather than actual people of flesh and blood—who in law can, or cannot, sue for defamation. The seminal case was Derbyshire *v.* Times Newspapers in 1993. We also considered the seminal case in the United States, where there are fundamental protections. The result of New York Times Company *v.* Sullivan in 1964 was that McLibel would have been highly unlikely in the United States.

One of the significances for the hon. Member for Spelthorne about the McLibel case was that it reaffirmed the rights of corporations to sue in this country. That right has more recently been reaffirmed in the seminal case of Jameel *v.* Wall Street Journal Europe. In both those cases—and unlike in the Derbyshire case, where restrictions are put on local authorities, trade unions and other unincorporated bodies—the courts have said that with regard to corporations, rather than taking the decisions themselves, they look to Parliament to make that change. That is why it is important for us to consider the issue in the Bill.

We also considered another very unequal case, in terms of the financial resources that the parties could deploy: the case of Tesco Stores Ltd *v*. Guardian News and Media Ltd in 2008. I want to come to that later. We also considered representations from people with the opposite view, the hon. Member for Ipswich will be glad to hear. There were representations to the effect that companies also had a reputation to maintain. In our recommendations, we commended the Government's measures to cut costs, speed up libel cases and strengthen the defence of responsible journalism, which we hope will reduce the inequality of arms.

We also recommended that the Government perhaps look at a new tort of corporate defamation where proof of actual damage was required before an action was brought. Again, that is relevant to new clause 7, as is our recommendation that the Government look at the possibility that corporations can sue only where they can show malice or recklessness. We also asked the Government to consider reversing the burden of proof as part of the new tort of corporate defamation, to look at developments in Australia, and to consult widely, which they did.

The issue was explicitly addressed by Lord Lester in clause 11 of his private Member's Bill, which set down the test that appears in the new clauses and which requires companies to show likely and substantial financial loss. The issue was considered by the Joint Committee on the draft Defamation Bill in response to the Government's consultation on the subject, and it recommended looking at Australia. It cited the difficulty of complying with the European convention on human rights—an issue that the Australians do not have to grapple with—and recommended that companies should not lose altogether the right to sue, while recognising the issue of inequality of arms. However, it explicitly favoured the Lester approach, which is embodied in the new clauses, of "substantial financial loss". The benefit

[Paul Farrelly]

of new clause 4 is that it includes the clarification of the phrase, "substantial financial loss", that was recommended by the Joint Committee.

The Joint Committee recommended a further hurdle, which again finds a place in new clause 4, that corporates should first have to obtain the permission of the court. That addresses a serious problem in libel law connected court procedures and costs. In libel, all someone needs is a lawyer, usually, and a rubber stamp in order to issue a writ. Defending a writ, however frivolous or malicious, puts the defendant in the position of having to commit costs and time and file a defence. Without a defence, a court can find against the claimant. That is all part of the intimidatory and chilling effect of the existing system.

There was a further recommendation from the Joint Committee, which was ably chaired by Lord Mawhinney, that its proposals cover trade associations that represent for-profit organisations. The case of Simon Singh, and the quirks that enabled the British Chiropractic Association to bring a case because it was incorporated, are echoed by the comments of my right hon. Friend the Member for Rotherham on the Chartered Institute of Journalists, which could bring a case against him because it, too, by a quirk of organisation, was an incorporated body. New clause 4 very helpfully clarifies the position to remove any uncertainties or ambiguities in the law, and deals with which bodies may or may not sue. New clauses 4 and 7 do not seek to prevent corporations suing, but seek to present reasonable hurdles for them to surmount and reasonable tests that they have to pass.

Turning to the Government's response to the Joint Committee's recommendation, the Government considered that all the concerns about corporates were satisfied by clause 1, which deals with serious harm. On page 26 of their response, they said that

"in order to satisfy the serious harm test in Clause 1 a corporation would in practice be likely to have to demonstrate actual or likely financial loss".

The phrase "would…be likely" suggests that there is no certainty about that. Indeed, if there were certainty, everyone who has been raising concerns about corporates throughout discussions on the Bill would have been told that their concerns were entirely misplaced and that they were effectively wasting their time. The explanatory notes are entirely silent on corporations or on any definition of serious harm in relation to them. After all the consultations, the Bill is silent on corporations, full stop. The Government also rejected the additional permission stage by the court that was recommended by the Joint Committee, favouring instead a reliance on early resolution procedures. Again, we do not have the details of the early resolution procedures that the Government plan to pursue.

I want to consider two cases. In the first, the procedures failed and in the second, the courts acted speedily but other measures to speed up the resolution, including those in the Defamation Act 1996, did not bite early enough to stop costs escalating enormously, and inequality of arms had its day.

The first case is of Dr Peter Wilmshurst, who was sued by NMT Medical of Boston, Massachusetts. I do not want to repeat what has been said about that case, and I hope that other provisions in the Bill would help to prevent such a case arising in future. It is easy to conjure circumstances, however, in which reasonable people, such as medics, scientists and professionals, make comments very responsibly over the reliability of trials, the effectiveness of devices and other issues of public interest, but can be sued. There are other cases involving Dr Ben Goldacre, a responsible journalist and medic, who has written a science column in *The Guardian.*

The more widely applicable feature of the Wilmshurst case is that it went on for four years, until NMT Medical collapsed. The consultant paediatrician was sued in 2007, and the case was allowed to continue until December 2010, until a High Court master said that it would be struck out finally if the complainant did not lodge £200,000 as surety for costs. The company did not do that, of course, and used delays all the way through. Those delays and the prospect of further costs and aggravation were an attempt to silence not only Dr Wilmshurst but other critics. In March 2011, after the Court master's decision, it issued a fourth writ against Dr Wilmshurst. The whole thing only stopped when the company went bust.

Even in that case, an administrator would be entitled to bring a case; dead people cannot sue, but it is foreseeable that dead companies might. The case is an example of procedures being spun out and costs being increased in an effort to stress the defendant, to chill him and others, and to take them out of the game, with no reasonable hurdles to pass.

Time permitting, we may come on to an additional feature of the case in this debate, but if not, we will certainly do so on Third Reading. Dr Wilmshurst was defended with a conditional fee arrangement, but the likelihood of him being able to do so in today's circumstances is much diminished because the protections of CFAs are gone. Because NMT Medical went bust, the lawyers defending Dr Wilmshurst with a CFA could not recoup their costs. Dead companies cannot pay.

The second case—Tesco Stores Ltd *v.* Guardian News and Media Ltd. and Alan Rusbridger—involved the courts acting speedily. It started in April 2008, when Tesco, the biggest supermarket group in the UK and one of the biggest retail groups in the world, issued no fewer than four writs against *The Guardian.* Two were for libel and two were for malicious falsehood, the latter against both the newspaper and the editor.

The case was about an article on Tesco's tax affairs written by two award-winning journalists. I will declare that one of them, Ian Griffiths, is a very good friend, with whom I worked at *The Independent on Sunday.* Ian is a former business journalist of the year and a qualified accountant, and he wrote the seminal book, "Creative Accounting" in 1986. It was an account of how companies could flatter their profits and balance sheets.

Mr MacShane: Not about journalists' expenses.

Paul Farrelly: Not about journalists' or anyone else's expenses. That was published years before a better known book by Terry Smith from 1992, called "Accounting for Growth". I mention Mr Smith and the background of those publications for a very good reason—before you interrupt me, Mr Chairman.

Terry Smith, a colourful City figure, plays more than a cameo role in the debate, because between 2003 and 2006 he sued the *Financial Times* for £230.5 million in

damages. It would have been a record for libel. The case was about articles from 2003, and was brought in the name of his company, the stockbroker Collins Stewart, because the share price had allegedly plunged. As to the circumstances raised by the hon. Member for Ipswich, I can tell him that the court struck out the claim for damages based on the fall in the share price. That issue is referred to in the new clauses.

To return to the Tesco case, having looked at the circumstances, I cannot see that there was any prospect that Tesco would be able to prove malicious falsehood against journalists and an editor of such distinction.

Helen Goodman: I remember that there was a dispute between Tesco and *The Guardian* but will my hon. Friend remind us what it was about?

5.30 pm

Paul Farrelly: I am just about to come to that, after this short preamble.

Tesco brought the case for malicious falsehood simply because it could. In doing so it alleged that as well as libelling the company the journalists and editor deliberately printed a story they knew to be untrue. The article was about a complex series of property deals, via jurisdictions such as the Cayman islands and Jersey, whereby Tesco allegedly sought to save more than £1 billion in tax. Tax avoidance is as hot a topic today as it was then.

The principle mistake made by *The Guardian*, which it afterwards admitted, was that it identified the wrong tax. It alleged that the saving was of corporation tax, whereas in fact it was of a more obscure but still important property tax called stamp duty land tax. At the time, in solidarity, *Private Eye* launched its own investigation and found that Tesco was using elaborate schemes, legally, to avoid corporation tax too. Tesco, as has been tried before under our libel laws, sought the exclusion of that evidence from *Private Eye* in court, but in that case the judge refused. Although we were critical of him in our report, in that case Mr Justice Eady was the hero of the hour.

Essentially, therefore, the thrust of the story was true. Tesco had entered into complex arrangements of avoid paying large amounts of tax—more than £1 billion—to the Exchequer. *The Guardian* issued two corrections of its mistakes. I remember an extensive double-page spread of admissions and clarifications. Never, as far as I can see, has a newspaper apologised or clarified so much, no doubt under the incentive of Tesco's firepower. It issued two apologies.

In defence of the reporters, I would say that the trail was very complex, even for an experienced accountant, and Tesco did not exactly help *The Guardian* to follow it; but mistakes were made and apologies were given. There was certainly no malice involved, but Tesco pressed on regardless, aided and abetted by perhaps the country's most aggressive libel lawyers, alongside Schillings, Messrs Carter-Ruck.

In mid-May 2008, some weeks in, *The Guardian* made another attempt to settle the case, making use of the offer of amends procedures introduced in the Defamation Act 1996. That was a previous attempt by Parliament to provide a means to settle cases swiftly and therefore cheaply. Tesco and Carter-Ruck, however, were having none of it. In offers of amends, the procedure works only if an offer is either accepted or rejected. They neither accepted nor rejected the offer, preferring to ponder it while they pressed on and racked up even more costs.

I will give an example of such costs, because they are central to how corporations can and have used the law in ways that new clauses 4 and 7 seek to correct. The costs are in dollars, because I have taken them from a good description of the case by the editor of *The Guardian*, Alun Rusbridger, which was published in *The New York Review of Books*. I commend the article to the Minister; it is clearly not unbiased, but it is a factual account of what happened.

Roughly by the stage of the offer of amends, some seven weeks in, *The Guardian* had racked up $500,000 of costs. By week nine, Carter-Ruck had presented a bill for more than $800,000, plus other costs. Let me give some examples of how ridiculous the situation became. As part of those costs, the accountants Ernst and Young wanted $173,000 for advising Tesco's lawyers, Carter-Ruck, about Tesco's own accounts, and the specialist tax lawyers Berwin Leighton Paisner billed Tesco for $361,000 for explaining Tesco's own tax structures to its board and libel lawyers.

Had the case gone the full distance, *The Guardian* might have been liable for all those costs, and for more costs had it lost. In total, if the case had gone beyond the High Court to the Court of Appeal and the House of Lords, the estimated bill for the whole case would have been £5 million, even though the newspaper apologised, clarified the matter and sought to take advantage of the measures brought in by this House in the form of the 1996 Act. Had Tesco lost, £5 million would clearly have been neither here nor there for such a huge multinational corporation; for *The Guardian* or any smaller newspaper, it would have had a substantial impact.

That is another case in which damages would have been insignificant. The courts acted speedily—the much-criticised Mr Justice Eady was the hero of the hour in trying to speed up the case—but the early resolution procedures did not work and did not keep down costs. In September 2008, *The Guardian* agreed to settle and to issue a correction and an apology that had been agreed with Tesco. However, because of confidentiality, we do not know how that apology differed from earlier ones or what sum was paid by *The Guardian* to a charity of Tesco's choice in order to settle the case. There would also have been arguments about costs, but I do not know how they were resolved.

The likes of *The Guardian* can take on such cases, but it did not want to go all the way in that case because of the size of the bill it might have faced. Not every defendant is *The Guardian*, *The New York Times*, *The Wall Street Journal*, or Times Newspapers Ltd—backed by News Corporation—which took the Flood case to the House of Lords. The point that new clauses 4 and 7 seek to address is that huge multinationals, by pursuing such actions, achieve their aims even if they lose, because they demonstrate the huge costs, time and effort that are involved. Such a chilling effect spreads from local newspapers to the rest of the media, publishing and non-governmental organisations, as we have seen in the example of citizens advice bureaux.

The Committee will be glad to hear that I am nearing my conclusion. New clause 4, like the alternative new clause 7, seeks to address such problems. It is not by any

[Paul Farrelly]

means a panacea. The proposed reforms of court procedures are vital, as is the Bill as a whole, and they are important in ensuring that existing procedures, such as offers of amends, actually work.

Ben Gummer: I feel that one of the correspondents of "Private Eye" has revealed himself in this speech. I feel almost as if I had read next week's copy without having to pay for it. This has been a brilliant exposition of a series of cases. It is true that it demonstrates the need for reform of procedure.

To return to new clause 4, will the hon. Gentleman answer something before he supports it, if he does? For some companies, such as Coca-Cola, a large part of their balance sheet rests on brand value. The size of the loss as a result of reputational damage can be quantified only at the point of crystallisation when the company is sold, so it is unlikely to be seen. Significant loss of reputation could occur while sales remain the same. Such companies would fall foul of this clause; there would be considerable damage and harm to the company, but it would not be seen in the underlying sales figures. How would they find remedy for the damage to their reputation and to their ability to employ people and grow prosperity?

Paul Farrelly: I am pleased to answer the hypothetical case put by the hon. Gentleman. I have advised on the corporate financing on takeovers, and I do not think that any corporate financier or corporate finance lawyer worth his salt would advise a company to proceed with a sale at that particular point.

The serious point that the hon. Gentleman makes is whether share prices, which go up and down, can be used to establish real loss of reputation. I am afraid that real loss of reputation is demonstrated by an effect on the underlying business. If there is no such effect, in the medium and long run—or the very short run—share prices recover. Nestlé suffered grave damage to reputation in the milk powder situation. Where companies genuinely suffer, it can be seen in their profit and loss and sales. That is where the case must be made.

To conclude, what we had in the case of Tesco was a determined, deep-pocketed litigant for whom money was no obstacle, with aggressive lawyers who had an incentive to spin out the case, racking up costs and thus their own remuneration. There was no interest in settling. Many of the procedures assume that parties wish to settle, but the difficulty is when there is inequality of arms and a corporation's intention is to teach the other person a lesson. That is apparent in the Wilmshurst case and others, where the intention was to chill reporting. In the Tesco case, strangely enough, no one picked up the parallel *Private Eye* investigation, no doubt because they were fearful of being sued as *The Guardian* was being sued. The intention was to take reporters and organisations out of the game.

The real test of the Bill, including how it addresses corporations, is how cases such as those cited would have been affected. Would the Bill have made a difference? It fails because, despite all the consultations, Lord Lester's Bill and the Joint Committee's recommendations, the Bill is still entirely silent on corporations. I urge the Government to table amendments and clarifications on Third Reading regarding how the law of defamation should apply to corporations.

5.45 pm

The Parliamentary Under-Secretary of State for Justice (Mr Jonathan Djanogly): Hon. Members have debated the new clauses at some length, so I shall do my best not only to explain the Government's position but to provide some background for how we got there. The clauses relate to the ability of corporations and other non-natural persons to bring an action for defamation.

New clause 4 focuses on corporations and would have the effect of restricting a corporation's right to bring an action. It seeks to do so in two ways. First, it would require a corporation to obtain the court's permission before bringing a claim. It specifies a number of particular matters that the court might wish to consider in reaching that decision. Secondly, it would require a corporation to demonstrate that the statement being complained of has caused it, or is likely to cause it, substantial financial harm. It sets out a number of matters that the court must consider when determining that.

The Government recognise the concerns of the Joint Committee and others in the area, and we are aware of the arguments that have been made in favour of restricting corporations' right to sue for defamation. However, we believe that there is a difficult balance to be struck. Clearly, businesses are sometimes powerful, and it may be undesirable for them to be able to bring, or threaten to bring, claims simply in order to stifle debate. Equally however, as my hon. Friend the Member for Ipswich indicated, the vast majority of businesses are small and not cash-rich. Many have genuine reputations to protect, and they can be subject to unfounded or spiteful allegations, harming not just the management, but shareholders and employees. While corporations are therefore not mentioned in the Bill, we think the correct approach is generally to raise the bar to trivial claims, and the Bill's new test of serious harm, with clearer defences, will apply equally to companies.

Corporations are already unable to claim for certain types of harm, such as injury to feelings. In order to satisfy the serious harm test, a corporation would in practice be likely to have to demonstrate actual or likely financial loss in any event. Given the potential effect on shareholders and management, we see no reason why there should be no redress for a defamatory action that has caused a fall in share price.

I listened to the significant description of the impact of cost from the hon. Member for Newcastle-under-Lyme, but I do not necessarily see that to be an argument against corporations. However, as my hon. Friend the Member for Ipswich pointed out, it goes to procedural reform. In addition, the serious harm test and other measures, such as the new procedure for determining key preliminary issues, should help to reduce the cost and length of proceedings, and therefore reduce the likelihood of attempts being made by corporate or wealthy individual claimants to intimidate defendants with limited resources.

We do not consider the introduction of a permission stage for corporations to be appropriate. As part of the new preliminary procedure, the court will be able to deal with the key issues in dispute at the outset and

make detailed provisions in relation to cost control and the future management of the case in light of issues that remain to be resolved. A permission stage for corporate claims in addition to that new procedure would almost certainly add to the cost involved.

New clause 7 would restrict the circumstances in which non-natural persons may bring a defamation action. They would be permitted to do so only if they can show either that the publication was published with malice or that they had suffered actual or likely financial harm. Hon. Members have to appreciate that the new clause would go beyond just restricting the ability of trading corporations to bring a claim, and would affect the rights of all non-natural persons. That would include a wide range of bodies, including charities, non-governmental organisations and companies operating on a not-for-profit basis.

The intention of the new clause may be to reflect the Libel Reform Campaign's call for restrictions to be focused on non-natural persons who perform a public function. The hon. Member for Stoke-on-Trent South mentioned Derbyshire County Council *v.* Times Newspapers Ltd, on which we had a significant discussion. We sought views in our consultation on the suggestion that the principle from the case should be put in statute and extended to a wider range of bodies that exercise public functions. A clear majority of responses considered that to be inappropriate and took the view that that would represent a significant restriction on the right of a wide range of organisations to defend their reputation.

Paul Farrelly: When the Minister repeats the Government's response to the Joint Committee, that corporations will be likely to have to show substantial financial loss under clause 1 and the serious harm test, will he consider how he could bring more certainty to that as the Bill goes through, so that he does not have to use the word "likely"?

Mr Djanogly: The position is based on case law and it would be for the courts to decide, depending on circumstances. We share the concerns shown throughout the consultation. We believe that it is much better for the courts to develop the Derbyshire principle as they consider appropriate in the light of individual cases.

The hon. Member for Stoke-on-Trent South took the point further, asking why the Derbyshire principle should not be extended to corporations. We believe the same arguments apply. The Derbyshire case considered the position of local authorities alongside that of corporations. Lord Keith identified that the most important feature distinguishing a local authority from a corporation was the fact that it was a governmental body. He clearly stated,

"It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism."

In the case of McDonald's Corporation *v.* Steel and Morris, the courts again recognised that corporations were

"constitutionally in a quite different position".

We agree with that position.

The hon. Gentleman also expressed his desire that private corporations exercising public functions should not be able to sue. The current law in the area is capable of being developed by the courts. The courts have in fact already shown themselves alive to the flexibility of the law in using the rule to prevent the British Coal Corporation from suing in defamation. That is not a direct analogy but we believe that it is preferable for the courts to be able to develop the law in this area as they consider appropriate in the light of all the circumstances of individual cases.

Paul Farrelly: I hope the Minister appreciates that we are now in a position where the courts have said it is for Parliament to change the law and the Minister is effectively saying it is for the courts to change the law.

Mr Djanogly: The courts will interpret the law and, in the case of the Derbyshire principle, develop existing case law.

I have just been speaking about corporations exercising public functions under contract. That is a much narrower question than whether corporations more widely should fail in defamation action under an extension of the Derbyshire principle. I will, however, look more closely at the particular observation of the court case to which the hon. Gentleman refers. I remain of the view that it is not appropriate to single out companies in the way proposed.

The Government believe that the Bill takes the right approach and that the serious harm test and other measures, such as the new procedure for determining key preliminary issues, should help to reduce the cost and length of proceedings.

Simon Hughes: I am grateful to the Minister for the clear statement on where the Government are in general. I hope he may come specifically to issues raised about how to deal with abuse by Retail Loss Prevention, comparable companies or their solicitors, and their big position against small players.

Mr Djanogly: I think I have addressed that in my remarks. The Government's position is that we do not think that corporations should be included in the Bill.

The Government believe that the Bill takes the right approach, and the serious harm test and other measures, such as the new procedure for determining key preliminary issues, should help to reduce the cost and length of proceedings. That in turn should reduce the ability of corporate claimants and other non-natural persons to intimidate defendants with limited resources. On that basis, I hope that the hon. Member for Stoke-on-Trent South will withdraw new clauses 4 and 7.

Simon Hughes: The Minister came to a more specific point about the particular concern that we have. I heard what he said, but I ask him to go away and reflect on the matter. He could ask colleagues in his Department to dig out the past Adjournment debates and questions in both Houses. Perhaps they could put together a briefing about this specific series of abuses and the civil penalty and Retail Loss Prevention story, and perhaps some of us could talk to the Minister, before Report stage, about how it could be dealt with. It is an issue of wide social concern as well as a narrow legal point.

Mr Djanogly: I am happy to do that.

Robert Flello: On a point of order, Mr Havard. Am I required to move the new clause formally?

The Chair: No, I put the question.

Question put, That the clause be read a Second time.

The Committee divided: Ayes 7, Noes 11.

Division No. 5]

AYES

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

NOES

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

Question accordingly negatived.

New Clause 5

CIVIL PROCEDURE RULES

'Strict enforcement of the Pre-Action Protocol governing defamation proceedings shall be adhered to, and the following alternatives to court proceedings should first be considered before a party is permitted to commence court proceedings—

'(1) A presumption that mediation or neutral evaluation will be the default position shall apply.

(2) In the event that mediation or neutral evaluation is deemed unsuccessful, voluntary arbitration should be sought.

(3) If the claim has not been settled, court determination of key issues will be permitted.'.—*(Robert Flello.)*

Brought up, and read the First time.

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

The new clause relates to pre-action protocol. It is intended to reflect the findings of the Joint Committee and to improve the Bill, so that it is more in line with the good work that was done. The new clause talks about

"Strict enforcement of the Pre-Action Protocol governing defamation proceedings"

and suggests alternatives:

"A presumption that mediation or neutral evaluation will be the default position...In the event that mediation or neutral evaluation is...unsuccessful, voluntary arbitration should be sought...If the claim has not been settled, court determination of key issues will be permitted."

This is a probing new clause. Last Tuesday, at approximately 11.30 am, the Minister said to the Committee:

"Alongside the Bill, we intend to introduce proposals for a new procedure aimed at resolving key preliminary issues".

He went on to say that the Government would look to

"support the strengthening of the defamation pre-action protocol".–[*Official Report, Defamation Public Bill Committee,* 19 June 2012; c. 17.]

The purpose of the new clause is to draw the Minister on what work has been carried out in this area, and when we can expect to see the types of resolution proposed by the Joint Committee on page 11 of its report.

I am conscious that time is pressing on, and there are other extremely important new clauses still to be discussed, so I shall just draw the Committee's attention to a couple of quick points. First, as we heard in a previous debate, libel action is incredibly far beyond the means of most people, who certainly do not have anywhere near the £5 million that *The Guardian* may well have had to stump up. Also, points were made by the Joint Committee on the strength or otherwise of case management—an issue on which there are frequent complaints. I look forward to hearing the Minister speak about new clause 5.

6 pm

Mr Djanogly: New clause 5 contains a number of provisions intended to strengthen the use of alternatives to court proceedings in defamation cases and to provide for stricter enforcement of the defamation pre-action protocol. It is unclear whether the intention of the new clause is to make the use of mediation and other forms of alternative dispute resolution compulsory before court proceedings commence, or merely to require the parties to consider their use. It is also unclear whether additional powers are envisaged in relation to enforcing the pre-action protocol in addition to the current ability of the courts to penalise non-compliance through costs orders.

The Government are firmly committed to reducing the costs of defamation proceedings, and to resolving legal disputes by dispute resolution techniques other than litigation wherever possible. The overriding objective of the civil procedure rules puts the onus on courts to encourage and facilitate the use of alternative dispute resolution, and the defamation pre-action protocol requires parties to consider some form of ADR, including mediation or early neutral evaluation. This is an area that can be addressed through procedural changes, without the need for primary legislation; we do not consider it appropriate to put such provisions in the Bill. We do, however, intend to give further careful consideration, alongside the passage of the Bill, to the need for further procedural steps to ensure that parties are more strongly encouraged to use alternative dispute resolution in defamation proceedings, and to support the strengthening of the pre-action protocol.

In this context, it will also be important to consider any recommendations that may emerge from Lord Justice Leveson's inquiry about the potential role of a successor body to the Press Complaints Commission in providing a dispute resolution service. It would therefore be premature to reach firm conclusions about the best way forward at this stage. However, I can reassure the Committee that we are fully engaged with the issue and will be considering what procedural changes may be appropriate in the light of all recent developments. On that basis, I hope that the hon. Gentleman will agree to withdraw the new clause.

Robert Flello: I am grateful for the Minister's comments. In light of what he has said, more work needs to be done on the clause's wording. I beg to ask leave to withdraw the clause.

Clause, by leave, withdrawn.

New Clause 8

STRIKE-OUT PROCEDURE

'(1) The court must strike-out an action for defamation unless the claimant shows that—

(a) its publication has caused or is likely to cause serious harm to the reputation of the claimant; and

(b) there has been a real and substantial tort in the jurisdiction.

(2) For the purposes of subsection 1(b), no real and substantial tort is to be regarded as having occurred in relation to the claimant unless the publication in the jurisdiction can reasonably be regarded as having caused serious harm to the claimant's reputation having regard to the extent of publication elsewhere.

(3) Subsection (1) does not apply if, in exceptional circumstances, the court is satisfied that it would be in the interests of justice not to strike out the action.

(4) A order under subsection (1) may be made by the court of its own motion or on an application by any party to the action.

(5) Subsection (1) does not limit any power to strike-out proceedings which is exercisable apart from this section.'.—*(Robert Flello.)*

Brought up, and read the First time.

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

This clause deals with a number of points that came out of Lord Lester of Herne Hill's Bill, and broadly relates to strike-out. It is intended to make clause 1 more effective at preventing trivial and/or vexatious claims, and protecting defendants from having to pay to fend off what I might call predatory claims. In a previous discussion, the Minister talked about the serious harm test being effectively tested by litigation in the context of corporations. My concern is that without new clause 8, things may well continue unchecked, and the measures with which the Minister tried to reassure the Opposition on the issue of corporations may be ineffective.

Once again, I am drawn to the Joint Committee report, which has shown us throughout Committee that it is good to have a draft Bill and consideration by a Joint Committee. That said, I am somewhat disappointed that all the ideas proposed by the Joint Committee after consideration of the important parts of the draft Bill were rejected. Hopefully, however, the Minister will look more favourably on the new clause, although so far I am not satisfied that he will. There is still time; there is still another 50 minutes or so of Committee in which the Minister could impress Opposition Members and accept what was in the Joint Committee report. I take it from the crossing of his arms that he feels otherwise.

The Joint Committee said that weak case management was a frequent complaint in the evidence it received, with a lack of determination on the part of judges—and, often, other parties—to seek swift resolution being a contributory factor. In my researches, and in the evidence that I have obtained in preparing for the Committee, I have heard similar complaints. The purpose of the new clause, therefore, is to get an early answer to the fundamental question of whether the action is genuine. I have a couple of examples showing why that is so important. I know that Government Members will probably raise an eyebrow at this, but I have a report entitled "Libel victory for Labour bloggers":

"Some good news from the high court where the bloggers Alex Hilton (formerly of Recess Monkey and Labourhome) and John Gray (John's Labour blog) have had the libel case against them struck out. Both faced bankruptcy if the three-year case proceeded to jury trial.

The case was brought by Johanna Kaschke, a blogger and a remarkable political cross-dresser",

which is an interesting analogy. The report continues:

"in the space of 12 months she defected to George Galloway's Respect from Labour, then joined the Communist Party and finally settled in the Conservative Party",

so it sounds as if she has found a good home. *[Interruption.]* I am being tempted to cross the Floor—I hope that is the suggestion—but I would rather do most other things than that. It is very kind, however, of the hon. Member for Daventry to offer me that interesting course of action.

I am sure that you would like to bring me back to what I was saying, Mr Havard. The report continues:

"Jack of Kent, who provided legal assistance to Hilton and Gray, has a long and detailed summary of the background to the case on his blog"—

you will be delighted, Mr Havard, to hear that I shall not give that detailed summary, but

"for those who haven't been following the story, the case revolved around the fact that Kaschke was once falsely suspected of being a member of a criminal gang.

Kaschke took exception to Gray's decision to refer to the Baader-Meinhof Gang by name (preferring the euphemistic 'criminal gang'), despite previously mentioning them on her own website. As Jack of Kent writes, Kaschke was challenged by the presiding judge to explain the reputational difference between:

1) being arrested on suspicion of being a member of Baader-Meinhof, the terrorist group that carried out bombings, robberies and murder…and

2) being accused of being a member of a criminal gang with the aim to commit terrorist offences (a statement which the claimant herself adopts as the position).

She was unable to do so persuasively. That…case…ended in a victory for free speech and common sense…But that it was allowed to proceed for so long is"

an important reminder of the need to reform the law.

That is the problem that the Opposition are concerned about, and why we tabled new clause 8. Vexatious claims happen, despite the costs involved, and that is an example of a vexatious claim by an individual. We have heard in detail about a whole catalogue of vexatious claims that corporations have brought, and I will not even consider repeating any of that detail. The important point is that without a provision such as new clause 8, clause 1 may not be sufficient.

I hope that the Minister will explain in great detail—*[Interruption.]* The Minister is incredulous at that suggestion, but one of the problems that we have had throughout the Committee is that he has given only an overview of the Government's position, without providing the detail that would allow us forensically to examine his argument and the evidence on which it is based. I appreciate that it is difficult for him to answer in detail when officials are passing papers forward to him, but the record will show that I have implored the Minister to ensure that responses from officials be sufficiently detailed to allow us to get to the heart of the Government's thinking. I fear that we have not seen such detail so far. Many amendments have been withdrawn because it was felt that it would be better to test them again at a later stage, and new clauses have been withdrawn because

[Robert Flello]

they needed further work, but by responding so incredulously to my request for detail the Minister misses the point: we need to examine the Bill properly and forensically.

The new clause would establish early on whether a person has genuinely been defamed, whether their reputation has been sullied, and whether their feelings have been injured. A claimant might bring a case for other reasons—to chill scientific debate, to throw their corporate muscle around, or to protect their reputation through any means possible—but we cannot continue to allow people to bring trivial, vexatious cases. With the greatest respect to the Minister, clause 1 does not have the necessary bite. He said a moment ago that serious harm will be tested by litigation, but I thought the whole point of the Bill was to narrow such points down and make a strong legislative framework that allows us to move forward.

Simon Hughes: I am sympathetic to the new clause. I pay tribute to, among others, our colleague Lord Lester. He was the genesis not only of the proposal but the whole Bill, and he has provided the thought behind the whole process. I hope that the Minister will respond positively and constructively. Although new clause 8 links to our previous debates, it offers an early chance to get rid of a case that has little merit, so I believe it has some value, unless we can be satisfied that that is adequately provided for elsewhere.

6.15 pm

Mr Djanogly: I have unfolded my arms and listened carefully, and I will do my best to provide the detail that the hon. Member for Stoke-on-Trent South has demanded. New clause 8 would require the court to strike out a defamation action unless the claimant can show that the publication has caused or is likely to cause serious harm to his or her reputation, and that there has been a real and substantial tort in this jurisdiction. The new clause links back to the serious harm test, which we debated at some length last week in our consideration of clause 1. As I indicated in that debate, the serious harm test will provide a higher hurdle for bringing a claim, and will provide an effective means of discouraging trivial and vexatious claims.

The new clause's main purpose is to require the courts to strike out claims unless they are satisfied that the serious harm test is met or the interests of justice require otherwise. That is unnecessary. As I have indicated, we are currently working to develop a new early resolution procedure to ensure key preliminary issues are determined as early in the proceedings as possible. Where the question of whether the claimant has suffered, or is likely to suffer, serious harm is disputed, that would be one of the issues considered by the court under the new early resolution procedure. Where a claimant's statement of case discloses no reasonable grounds for bringing a claim, or where the court considers that the claim is an abuse of process, the court can already strike out the claim using its existing power under rule 3.4 of the civil procedure rules.

Paul Farrelly: The Minister is coming to the exact point. The powers are available to the court, but so often, as we have seen, the court does not use them for whatever reason. That is why the new clause replicates word for word clause 12 of Lord Lester's private Member's Bill. Lord Lester has been advising the ministerial team on the Bill; has he changed his mind?

Mr Djanogly: Not that I am aware, although the measure did not come up as a primary issue in our most recent meeting. That does not mean that the measure is not a primary issue, but it did not come up as such.

The hon. Member for Stoke-on-Trent South has discussed serious harm, and other right hon. and hon. Members have done so, so I will address that point. Libel is currently actionable without proof of actual damage, which means that if a statement can be shown to be defamatory—broadly, if it tends to lower the reputation of the claimant in the estimation of right-thinking members of society—it is presumed that the claimant has suffered damage as a result of the publication. He or she does not need to prove that that is the case.

In the case of slander, unless the slander falls within certain specified categories, some special damage must be proved to have flowed from it. The courts have considered, in a series of cases over the past century, the question of what is sufficient to establish that a statement is defamatory. A recent example is Thornton *v.* Telegraph Media Group Ltd, in which an earlier House of Lords decision on Sim *v.* Stretch was identified as authority for the existence of a "threshold of seriousness" in what is defamatory. There is also potential for trivial cases to be struck out on the basis that they are an abuse of process because so little is at stake. In Jameel *v.* Dow Jones and Company, it was established that there needs to be a real and substantial wrong. In Jameel, the Court of Appeal identified as a form of abuse of process cases where it can be demonstrated that the benefit attainable by the claimant is of such limited value that the game is not worth the candle, and the cost of the litigation would be out of all proportion to the benefit. The new clause aims to encapsulate the tests applied in those and other cases, while raising the bar to a modest extent by requiring actual or likely serious harm to be shown.

The hon. Member for Stoke-on-Trent South asked whether the test is just a hurdle to be overcome at the outset of a claim, or whether the test can be used to reject a claim at a later stage. The serious harm test is primarily intended as a threshold test that is to be satisfied to enable a claim to be brought. It would be open to the defendant, as it is now, to apply to the court at any stage for a claim to be struck out, which would be a matter for the court. A court at trial may decide that, given what both parties have been able to prove, the claimant had not suffered serious harm.

The hon. Gentleman went on to ask what difference the test would make in practice and how much it would raise the bar. Of course, the courts will determine exactly how the new tests are interpreted. We believe, however, that a serious harm test will raise the bar in a way that ensures that trivial and unfounded actions do not proceed.

Finally, the hon. Gentleman asked whether a substantial amount of evidence would be required to show serious harm. In many cases, the existence of serious harm will not be a matter of dispute. Where it is, some evidence will have to be provided. We believe that it is better for that to be resolved at an early stage, so that only cases involving serious harm proceed. If the court decides

that the serious harm test is met, or that it is not possible at that stage to reach a decision on the evidence available, the case will be allocated. That strikes the right balance. The new clause would go further: the court would effectively be required to make a preliminary judgment on the very issue that it would need to try, should a full hearing be decided on. That would simply front-load cost and effort.

In developing the new early resolution procedure, we will, of course, ensure that any new rules that are needed to support it dovetail with the existing civil procedure rules and the pre-action protocols linked to them. On that basis, I hope that the hon. Gentleman will agree to withdraw new clause 8.

Robert Flello: I hear what the Minister says. I look across the Committee Room to the right hon. Members for Carshalton and Wallington, and for Bermondsey and Old Southwark, and point out to them that this new clause has the fingerprints of Dr Evan Harris all over it.

The Chair: I am not sure that that is not defamation, Mr Flello.

Robert Flello: I was relying on privilege, Mr Havard. All I can say is that the Libel Reform Campaign was founded by Dr Evan Harris.

Simon Hughes: If the hon. Gentleman has only just found fingerprints on the clause, he is a bit slow in his Cluedo activity. My right hon. Friend the Member for Carshalton and Wallington and I have tried to take a constructive attitude. We will look at the whole debate in the round after Committee. We will talk to the Minister, who has said that he will meet us, to the hon. Member for Stoke-on-Trent South, and to other colleagues. There is further work to do. We may not be able to go over the line with Dr Harris at this stage in proceedings.

Robert Flello: I somehow knew that the right hon. Gentleman was going to say that. When it comes to Cluedo, I usually win most games. *[Interruption.]* Professor Plum, indeed. All I can say to the right hon. Gentleman is that the fingerprints of Dr Harris, or the Libel Reform Campaign, were there for all to see from the beginning. I pay tribute to that campaign for what it has done. I will seek a vote on this new clause, because I am not satisfied that the Bill does what it is supposed to do.

Question put, That the clause be read a Second time.

The Committee divided: Ayes 7, Noes 9.

Division No. 6]

AYES

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

NOES

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

Question accordingly negatived.

New Clause 9

REMOVAL OF ALLEGEDLY DEFAMATORY MATERIAL

'The removal of allegedly defamatory material from a website and the publication of apologies and corrections shall not prevent a claimant from bringing an action for defamation.'.—*(Helen Goodman.)*

Brought up, and read the First time.

Helen Goodman: I beg to move, That the clause be read a Second time.

The new clause is pretty easy to understand. I tabled it at the same time as some amendments to clause 5, which is why it refers particularly to websites, but the wording means that it would cover allegedly defamatory statements in newspapers as well.

My major concern is that it would be wrong if the removal of material and/or the publication of an apology meant that later a person could not sue and get financial recompense. That would have a perverse effect, because in the small set of clearest, open-shut cases—where the defendant immediately realises that they what they did was defamatory and is prepared to issue an apology—the offended person could not then subsequently pursue financial redress. That is all the new clause aims to address.

Robert Flello: I commend my hon. Friend for proposing the new clause. Is it not also true that although the person operating the website could take the material down immediately, damage could already have been done to a reputation as a result of the material, whether it was there for six months or just a couple of weeks?

Helen Goodman: That is absolutely right. When the Minister summed up the debate on clause 5, I took him to say that the removal of material put on websites would not preclude people from taking a libel action, but as the new clause covers a wider area, will he confirm that point? Will he also explain the position in relation to newspapers when apologies are made or notices given, and how that relates to clause 12 and the PCC's successor?

Mr Djanogly: New clause 9 provides that the removal of allegedly defamatory material from a website and the publication of apologies and corrections shall not prevent a claimant from bringing an action for defamation.

As the law stands, there is nothing to prevent a claimant from bringing a defamation action in relation to material that was posted on a website, even after it has been removed, in respect of the damage to reputation that was caused while the material was available. I confirm to the hon. Lady that there is nothing in clause 5 or elsewhere in the Bill that will change that position in relation to bringing an action against the author of the defamatory statement. Clause 5 will provide that as long as the website operator did not post the statement in question and has followed the process as prescribed, it will be protected from liability. We think that that is the right approach.

New clause 9 also refers to the publication of apologies and corrections. It conflicts with the offer of amends procedure set out in sections 2 to 4 of the Defamation Act 1996, which provides an effective means of resolving

[Mr Djanogly]

matters where the publisher accepts that he is in the wrong. Under that procedure, a person who has published an allegedly defamatory statement can make an offer of amends in the form of a correction, apology and, where appropriate, a payment of compensation. Section 3 of the 1996 Act provides that if a person accepts an offer of amends, he cannot bring or continue defamation proceedings about the publication in question against the person making the offer. He can, however, seek a court order to require the person making the offer to fulfil its terms, if that proves necessary.

The new clause is in direct conflict with the provisions in the 1996 Act, as it provides that a claimant can bring an action regardless of the fact that an apology and correction have been provided. There is broad consensus that the offer of amends procedure is working well and does not need alteration. We therefore do not think that a change along the lines proposed by the hon. Lady is necessary or appropriate. On that basis, I hope that she will agree to withdraw new clause 9.

Given that this is probably the last time that I am going to speak in the Committee, Mr Havard, may I—

Chair: Your expectation should be that you will speak again.

Mr Djanogly: Well, the hon. Member for Hammersmith is yet to speak.

Chair: Exactly.

Helen Goodman: I am grateful to the Minister for his explanations. I did not know about the amends procedure, but in the light of what he said, I am happy to withdraw the motion.

Clause, by leave, withdrawn.

New Clause 10

Disapplication of Legal Aid, Sentencing and Punishment of Offenders Act 2012

'Sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 shall not apply in relation to civil actions for defamation, malicious falsehood, breach of confidence, privacy or publication proceedings.'.—*(Mr Slaughter.)*

Brought up, and read the First time.

Mr Slaughter: I beg to move, That the clause be read a Second time.

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

New clause 11—*Limitation of success fees*—

'(1) Section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 shall not apply in relation to civil actions for defamation, malicious falsehood, breach of confidence, privacy or publication proceedings.

(2) Section 58(4)(c) of the Courts and Legal Services Act 1990 is amended to add at end the words "except in defamation, malicious falsehood, breach of confidence, privacy or publication proceedings where that percentage must not exceed 50 per cent.".'.

New clause 12—*Moratorium on application of Legal Aid, Sentencing and Punishment of Offenders Act 2012*—

'Sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 shall not be brought into force in relation to proceedings relating to defamation, malicious falsehood, breach of confidence or privacy until the relevant Secretary of State has—

(a) carried out a review of the findings and recommendations of all four Modules of the Leveson Inquiry into the culture, practices and ethics of the press;

(b) established a body to replace the Press Complaints Commission following the review of the findings of the Leveson Inquiry;

(c) carried out a review of the impact and effectiveness of the body set up to replace the Press Complaints Commission;

(d) carried out a review of the impact of this Act; and

(e) published a report of the conclusions of the reviews referred to in this section.'.

New clause 13—*Recovery of costs*—

'Costs ordered against a party in a civil action for defamation, malicious falsehood, breach of confidence, privacy or publication proceedings shall not exceed the amount (if any) which is reasonable having regard to all the circumstances of the case, including—

(a) the financial resources of all the parties to the proceedings, and

(b) the conduct of the parties in connection with the dispute to which the proceedings relate.'.

6.30 pm

Mr Slaughter: It is a great pleasure to be here under your chairmanship, Mr Havard, although I have to put aside my severe irritation at having so little time to address this ingenious and entertaining set of new clauses. I address them willingly, albeit with a little bit of self-denying ordinance whereby I will leave five minutes at the end for the Minister to respond.

We have heard some excellent speeches today, including that from my very good friend the Member for Bishop Auckland. I will not be able to better that, so perhaps it is good that I have little time. In any event, my hon. Friend the Member for Stoke-on-Trent South tells me that the Government Whips initially offered us four sessions for the entire Bill, and we will not complete the business that we wanted to complete in six sessions. I suppose either I should be grateful or the Government Whips should learn a lesson from that and not be so parsimonious in future. I am sure they never will be so again on any other Bill Committee.

This is the final debate of our proceedings, so I should like to make one or two general comments. Over our three days of consideration, we have preserved the consensus that the law of defamation needs to be updated. Certain abuses have come to light recently, particularly in relation to scientific endeavours and other specialist subjects that are dealt with in various clauses of the Bill. There is an imbalance in current defamation law, and it should not be allowed to be used as a means to curtail free press or free speech in any way.

The areas of disagreement have centred on poor drafting and insufficient protection for injured parties. We spent a long time talking about clause 5 and the internet, but this set of new clauses deals with the most serious omission from the Bill—the position of citizens

who have been defamed or who are being pursued for what are said to be defamatory acts, but who lack the means to obtain redress through law. There are three reasons why I describe that as an omission. First, the Government said that they would address the matter. However, when we debated the subject during our consideration of the Legal Aid, Sentencing and Punishment of Offenders Bill in Committee, the Minister dealt with it in a rather summary fashion—summary rather than summery. The other place has a more dignified and sedate way of dealing with things, so there was a good debate on the issue, on an amendment moved by the former Deputy Prime Minister, Lord Prescott. He said:

"I have benefited from the current no-win no-fee arrangement in pursuing my case against the Murdoch press and the Metropolitan Police. I would not have been able to pursue that case without such an arrangement because, quite simply, I would not have been able to afford it. This Bill strengthens the media's case by reducing their costs, even if they are found guilty and damages are awarded against them. However, not only does it reduce their costs but it transfers the costs to the successful complainant. However one looks at it, it is not justice for the person who wins the case to be penalised by further costs."

The response from the Minister in the other place, Lord McNally, was very clear:

"I give noble Lords as full an assurance as I can. Bills have to go through Cabinets and Cabinet committees, et cetera, but they also have to go through two Houses of Parliament, where this issue is extremely live. I cannot imagine that the kind of issues that the noble Lord, Lord Prescott, has raised tonight will not be dealt with fully in that Defamation Bill."

Of course, the former Deputy Prime Minister is not only a very humble man, as shown by his limited means, but also a very wise man, and anticipating that, he said:

"The Minister is talking about whether this can be put into the Defamation Bill. If it is right to put it in that Bill, why wait? I fear that when the Defamation Bill is debated it will be all about defamation costs but there will be very little about privacy breaches, which is what the amendment is concerned with…To duck behind the Defamation Bill and say that it will be dealt with then is frankly not giving the issue the justice that it is entitled to. I am saying that we should side with the weak in this case, not the powerful. Let us have justice. That is what this place is about."—[*Official Report, House of Lords,* 27 March 2012; Vol. 736, c. 1324-32.]

I wish I could make speeches like that. He actually overestimated the capacity of the Government, because they have not brought forward anything, effectively, on the issue of costs.

Secondly, because we are rebalancing defamation law in favour of the defendant, we need to give particular scrutiny to the position of claimants, particularly claimants or defendants of limited means. An impartial observer might say that we are being either very far-sighted or very foolhardy by spending our time, in the wake of the revelations that led to Lord Leveson's inquiry, in handing more power to media groups.

My third point is that, whatever one's view on that, we are in the middle of a number of separate reviews, of which Leveson is the primary one, that will all have a bearing on these matters. For that reason, we have to revisit LASPO, even though the ink is hardly dry. If that is objected to, I would say to the Government that they have already revisited LASPO. They revisited it on 24 May, only three weeks after enactment, to amend the provisions for insolvency proceedings. That was something else we lectured them on throughout the various stages of the Bill.

Of course, in the course of ping-pong, the Government were forced to concede the issue of mesothelioma cases, which is still being hotly debated in a Westminster Hall debate this afternoon, as the Minister will know. He could not attend because he was in the Committee, although I was able to get down there. The Government are constantly changing its position on that. Clearly LASPO is not—*[Interruption.]* The Minister shakes his head, but tomorrow he should read what his colleague said in that debate. I am surprised he is not aware of it.

We have heard a lot about the chilling effect of libel actions, but what about the chilling effect of costs? The proposals that the Government say will be in place by next April—if that happens—mean that claimants and defendants may well be prevented from getting adequate representation, because lawyers will not be in a financial position to take on cases. They may be deprived of a large share—possibly the entirety—of their own damages, because they will have to pay them by way of success fees, and they are at risk of costs. Qualified one-way cost shifting, even if it works—we know nothing about it thus far—will not apply to defamation actions. Therefore, having knocked back other attempts, including the new clause, if we debate it this afternoon, that are designed to limit costs and make proceedings simpler, it behoves the Government, in my submission, to look again at the costs and the effect of the LASPO provisions.

The four new clauses are designed to give the Government a range of options. New clause 10 would exempt defamation and similar courses of action from the chilling effect of sections 44 and 46 of LASPO and ensure that the present rules on recovery of costs, success fees and ATE premiums remained.

Robert Flello: New clause 10 enhances new clause 3, which I originally tabled and then withdrew. New clause 10 refers to

"civil actions for defamation, malicious falsehood, breach of confidence, privacy or publication proceedings".

Did my hon. Friend intend to cover just that narrow grouping?

Mr Slaughter: If my hon. Friend reads the Committee proceedings on LASPO—I am sure he has done so several times already—he will see that we went through a whole series of different types of civil action that we believe are adversely affected, perhaps sometimes unintentionally, by the changes brought in primarily to address personal injury claims and, within that group, road traffic claims. In relation to this Bill, I intended solely to address defamation, but it seemed logical to address defamation-style actions, which is why the new clause is phrased in those terms. If the purpose of LASPO was to save money for the NHS, the Ministry of Defence and other Government agencies or their insurers, it is difficult to see why it should extend to defamation. There is no saving to the public purse from the changes being made.

If the Minister is not with me on that, I suggest that he look at new clause 11, which is a mitigated form of the same provisions; it involves severe curtailment of success fees. Equally, new clause 13 is not designed to restore ATE premiums, but would introduce QOWCS for defamation cases, using the legal aid Act formula, because the Government have not said what formula

[Mr Slaughter]

they intend to use for QOWCS. Clearly, the intention, the objective, of new clauses 11 and 13, which are probing—I wish that we had time to press new clauses 10 and 12 to a vote—is to suggest to the Government a way forward that is supported by a number of organisations, including the Libel Reform Campaign. It is a mitigation of the existing cost rules, without throwing the baby out with the bathwater.

New clause 12 is a milder version and replicates, in the context of defamation cases, what the Government have already conceded following their defeats in the other place in relation to mesothelioma. In other words, given what is happening with Leveson and other related issues such as privacy, it seemed sensible to do what the Government have done with insolvency and types of industrial disease—to wait and see the effects and what remedies will be available before introducing matters of that kind.

I would like to give one or two case examples, but first I shall summarise the central argument, which could apply to any of the new clauses. It is for the Government to judge how far they want to go, if they want to go any way at all. The reason why I would like to leave the Minister time to respond, apart from allowing him to thank everyone, is to see whether we can get any indication from him, because we will undoubtedly return to these issues at later stages of the Bill here or in the other place, as to whether there is any room for movement on them. I hope that we can get a fairly succinct answer.

Let me give a short history of how we got to this position. *[Interruption.]* The Minister sighs, but if it were not for his guillotine, the shortlist would be a couple of hours long, so he is very lucky.

Mr Djanogly: It is an agreed programme.

6.45 pm

Mr Slaughter: It is the agreement of a chained man.

Before the Access to Justice Act 1999, there was no access to justice for ordinary citizens for claims against the media. No legal aid has ever been available for such cases, yet such litigation has always been complex and, therefore, expensive, balancing the right for people not to be defamed with the right to free speech and reporting. Therefore, when threatened with a claim of defamation, any media owner's first thought was not whether the claim was justified, but whether the claimant could afford to pursue and lose litigation. That effectively left all but the wealthy claimants with no remedy other than a complaint to the Press Complaints Commission.

The failings of the PCC are many and infamous, and it did not offer any real remedy. It was therefore open to media owners to use their financial might to force claimants to abandon their meritorious claims, simply because claimants could not afford the cost of litigation, in particular the adverse cost if such litigation were lost.

The situation changed with the introduction of the principle of recoverability of success fees and ATE premiums in the 1999 Act. Claimants could now benefit from having their case conducted on a no win, no fee, conditional fee agreement, where the ordinary and success fees and the ATE premium would be recoverable and payable by the media owners if the case succeeded.

Unsurprisingly, media owners deeply resented the use of such mechanisms, as they were now accountable to many more claimants and needed to be careful about the accuracy of their reports, at a time when their own profitability was being challenged by the growth and speed of reporting on the internet. Without any sense of irony, media owners complained about the cost of the litigation with which they were now faced, conveniently forgetting their own use of costs as a weapon in the defence of their conduct. The great idea they hit upon was to argue that the costs had a chilling effect on what they were able to report and how they behaved. That in turn was a threat to freedom of speech, which they argued was essential to any free democracy.

Bizarrely, media owners argued that claimant lawyers specialising in the field cherry-picked cases so that they pursued only the claims that had merit. That overlooked the considerable cost that such lawyers had to incur in investigating and ultimately rejecting claims that were not of sufficient merit. As a result of those arguments and the pressures that they were able to bring to bear, changes were made to the rules, and in cases that are settled within 14 days of a letter of claim, the defendant will not be liable to any success fee or ATE premium.

When the Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into effect in April 2013—if it does—it will not be possible to recover any success fee or ATE premium from the paying party. The broad intention of the legislation has changed to enable solicitors to charge a success or contingency fee to their client in consideration for undertaking the case, without charging, or charging at a much reduced rate, during the life of the case. The success and contingency fees will be a percentage of the damages awarded to a claimant. Similarly, under the new regime, any ATE premium will have to be paid by the claimant out of the damages received.

The problem is that in defamation and privacy cases, damages awarded are typically between £10,000 and £20,000. When the costs of such litigation frequently run into many hundreds of thousands of pounds, it is immediately apparent that the damages are insufficient to begin to satisfy any success fee or ATE premium.

Currently, ATE premiums are stepped from modest levels at the outset of the case to high levels by the time of trial, reflecting the increasing risks to the underwriter of the case losing. Further, if the case is lost, the ATE insurer pays the opponent's costs and the insurer's own disbursements, but there is no premium for the insured to pay. The model depends on the insurer using careful risk selection to ensure that more cases are won than lost. It is particularly difficult to make insurers pay in defamation and privacy cases, because there are relatively few claims and they are high risk. Thus, one loss can have a dramatic effect on business, from anyone's viewpoint.

The effect of removing recoverability of ATE premiums to pay part of defamation and privacy cases is to make such cases uninsurable, because there are insufficient damages to pay the required premiums, especially by the time of trial. Further, claimants will ordinarily be unable to pay the level of premiums required from their own resources.

The Prime Minister, in evidence to the Leveson inquiry, remarked that ordinary people, such as the Dowler family, should not be left without redress and at the mercy of the media. However, by removing recoverability

of success fees and ATE premiums, that is precisely what his Government will achieve. Given the evidence from the Leveson inquiry it seems extraordinary that the media should be granted all that they have lobbied for by the removal of recoverability. Heaven forbid there should be any chilling effect on such responsible and morally driven organisations.

It is to be remembered that the most egregious behaviour from certain sections of the media occurred precisely when they complained that they were suffering from the chilling effect of success fees and so on. The chilling effect, one sometimes thinks, is, like the compensation culture, a myth. There is nothing that prevents the media from reporting responsibly and, indeed, the Bill would make it harder to sue the media. Given the way in which certain sections of the media routinely behave, even if there is a chilling effect, what is happening is not merited.

The Prime Minister seems to believe that the Leveson inquiry will produce some new form of quick, cheap-fix remedy for citizens who are subject to the worst excesses of the press. That may happen, but there is no certainty about when, and that is why new clause 12 addresses the issue of delay. What is certain is that when recoverability is removed, after April 2013, the ordinary citizen will be deprived of any effective remedy against the media, which is doubtless music to Mr Murdoch's ears.

In the last two or three minutes that I am going to take up, I want to say that the Joint Committee, the Libel Reform Campaign, which is often seen to be a claimant organisation, and the Hacked Off campaign observed the same thing. Even Lord Justice Jackson in his fall-back position talked about moderated success fees. I do not have time to read now—they have been read out before—the moving letters that have been sent by the Dowler and McCann families to the Prime Minister, which sum up the issue perhaps better than anything else. There was, of course, a round robin letter to *The Guardian* from many aggrieved claimants and defendants, which summed it up. I shall just read from one paragraph:

"Tom Brake MP has tabled an amendment this week which would exclude privacy and defamation cases from the proposed CFA reforms".

Sadly, we did not have a chance to vote on that proposal, and will not have the opportunity today. Sooner or later, the right hon. Member for Carshalton and Wallington will get his opportunity to vote with me on the issue.

Tom Brake *rose—*

Mr Slaughter: I would like to give way; I feel for the right hon. Gentleman and it is a bit unfair that I mentioned him, but I want to finish and I said I would leave the Minister five minutes. I think I am being as succinct as I can be.

I have 50 separate case histories, including quite famous ones such as the McCanns and the Dowlers; but the overwhelming impression from reading them—claimant and defendant cases—is that they generally involve ordinary people, often vulnerable or from minority groups, who are severely abused. I do not have time to read 50 cases. If I did, I would, because it would contradict the impression that the Government want to give, that somehow the issue is a minor one, which does not need to be addressed.

I shall read what people might think is one of the less attractive cases. It proves how important it is that justice be done. It is the case of Sylvia Henry, who was the Baby P social worker, the mother of five children, living in Haringey, who was falsely accused in 80 articles in various newspapers of being negligent, including criminally so, in her care for Baby P. In fact, Ms Henry had intervened 27 times to try to prevent the return of Baby P to his mother.

The Sun in particular published 11 front pages and 36 articles blaming her for the death of the child. More than 3 million signatures were collected and sent to No. 10 Downing street calling for her sacking, and asking that she be never allowed to work with children again, in what *The Sun* characterised as its biggest ever crusade.

The Sun failed completely to respond to allegations, served a spurious defence, not backed by evidence, refused an offer to consider what the claimants described as a sham defence, and used its corporate muscle to make application after application to force the disclosure of documents from third parties, in a desperate attempt to obtain further evidence. Two months before the trial it tried to hype the allegations as criminal incompetence, even though it had no evidence, in a final attempt to browbeat Ms Henry into submission. The case settled a week before trial, after a 16-month legal battle. The allegations were all completely false, but *The Sun* nevertheless put Ms Henry through months of hugely stressful litigation, only to settle before the trial. That is typical of how the media behave in this country.

Ben Gummer: Will the hon. Gentleman give way?

Mr Slaughter: I wish I could, but I cannot.

I urge the Minister, in the time he has available, to say that he will at least consider looking again at the attacks made by massive media corporations on individuals who have no redress and no means.

Tom Brake: I have two sentences. The first is that I understood that access to justice in privacy and libel cases would be addressed in the Bill because it was not addressed in LASPO, so perhaps the Minister will give some ground on that. Secondly, I pay tribute to Evan Harris, whose fingerprints were all over our briefings, and the Libel Reform Campaign for their work.

Paul Farrelly: I, too, have two points, and I will give my thanks on Third Reading. The Justice Committee looked at conditional fee agreements and access to justice issues. It is important to remember that equality of arms applies both ways. I am reminded that one attempt to reform the CFA arrangements, through a statutory instrument that sought to cap success fees at 10% and which was introduced by my right hon. Friend the Member for Blackburn (Mr Straw), was defeated, almost uniquely, in Committee by the combined forces of Labour—his own side—Conservatives and Liberal Democrat Members. I therefore ask the Minister to look at that debate and tell us what has changed. It was never envisaged that success fees would entirely disappear, so what measures will he introduce to redress the balance?

Mr Djanogly: I gave my thanks earlier because I knew exactly what the hon. Member for Hammersmith would do—he always does it, and leopards never change their spots.

Currently, the recoverability of success fees and insurance premiums from the losing side can have the perverse effect of preventing defendants from fighting cases—even when they know that they are in the right—for fear of the disproportionate legal costs involved if they lose. High and disproportionate costs have a negative impact not only because they might deny access to justice, but more broadly because they may lead people to change their behaviour in damaging ways from their fear of claims.

Nowhere is that more true than in relation to responsible journalism, as well as to academic and scientific debate. The judgment of the European Court of Human Rights in January 2011 in Mirror Group Newspapers Ltd *v.* UK, the so-called Naomi Campbell privacy case, found that the existing CFA arrangements—with recoverability, in that instance—were contrary to freedom of expression under article 10 of the European convention on human rights. Editors and journalists have long warned of the chilling effect of the current libel regime and have argued that the huge costs imposed by no win, no fee cases are part of the problem. Defendants are not always rich and powerful newspapers; they are also scientists, non-governmental organisations, campaigners and academics.

The CFA changes are intended to apply to all areas of civil litigation, as was set out in LASPO, from April 2013. The Government believe that any further exceptions to the CFA reforms are unnecessary. Our CFA reforms will ensure that meritorious cases can still be brought, but at a more proportionate cost. I share the concern that individuals who are not wealthy or powerful will sometimes need to bring defamation or privacy cases. Nothing in our proposals should prevent them from doing so where they have a good case. The Government are determined to tackle disproportionate costs across the board, and our CFA reforms seek to do that.

I remind the Committee that just weeks before the last general election, the previous Government attempted, and failed, to tackle the high costs associated with CFA success fees in only one area, namely defamation and privacy. The hon. Gentleman's new clauses therefore represent a U-turn of epic proportions. As I have said, this Government are reducing the impact of success fees in all cases, but I accept that the issue of cost must be reassessed in a balanced and cautious manner in the context of the outcome of this legislation.

The Bill and the procedural reforms we intend to introduce with it are, of course, about reducing the complexity and therefore the expense involved. In order for those aims to be achieved, Lord McNally gave a commitment in the other place on 27 March 2012 that we would look at the rules on costs protection for defamation and privacy proceedings when the defamation reforms come into effect, and I repeat that commitment today.

I thank you, Mr Havard—as well as Mr Chope—for chairing the Committee. I also thank all hon. Members for turning up for what, on the whole, has been an agreed Bill. *[Interruption.]*

The Chair: Order. There is a Division in the Chamber. I propose that we complete our business, so that hon. Members may leave to vote and not have to return, if that is acceptable.

New clause 10 proposed.

Bill, as amended, to be reported.

7 pm

Committee rose.