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Defamation Bill Committee Stage Report

Bill No 51 2012-13

RESEARCH PAPER 12/49 31 August 2012

This is a report on the House of Commons Committee Stage of the *Defamation Bill*. It complements Research Paper 12/30 prepared for Commons Second Reading. The date for Report Stage and Third Reading has yet to be announced.

Significant areas of debate at Committee Stage included: the treatment of operators of websites; the public interest defence; actions in respect of deceased persons; and, potential restrictions on corporations bringing actions for defamation.

The only substantive amendments to the Bill were to the provisions relating to commencement and territorial extent. Significantly, the amendments extend provisions relating to certain defences (peer review and privilege) to Scotland. Other than minor consequential amendments, the remainder of the provisions would only apply in England and Wales.

Alexander Horne

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Research Paper 12/49

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Summary

This is a report on the House of Commons Committee Stage of the Defamation Bill. It complements Research Paper 12/30 which was prepared for the Second Reading debate in the House of Commons. The date for Report Stage and Third Reading has yet to be announced.

The Government has said that the Bill is intended to ensure a "fair balance" between freedom of expression and protection of reputation. All main political parties have indicated that they are in favour of reforming the libel laws.

The Bill would make a number of substantive changes to the law of defamation, but is not designed to codify the law into a single statute. Proposed changes include a requirement for claimants to show that they have suffered serious harm before suing for defamation. Under the law as it currently stands, a claimant does not have to prove the words they are complaining about have caused them actual damage.

The Bill would remove the current presumption in favour of a jury trial and would introduce a defence of "responsible publication on matters of public interest". It would also provide increased protection to operators of websites who host user-generated content, provided that they complied with the necessary procedure to enable the complainant to resolve any dispute directly with the author of the material concerned. It would introduce new statutory defences of truth and honest opinion to replace the common law defences of justification and fair comment. The Bill is also designed to limit what has been described as 'libel tourism.' It introduces a single publication rule and extends the scope of absolute and qualified privilege.

The Bill does not address issues relating to parliamentary privilege (and the reporting of Parliament) which the Government has indicated will be dealt with through a separate consultation (which was published on 26 April 2012). Nor does it make any specific provision in respect of corporations bringing defamation proceedings. This latter issue was a significant area of debate during the Committee stage. Other issues which attracted debate in Committee included the treatment of operators of websites, the public interest defence and actions in respect of deceased persons.

The only substantive amendments to the Bill in Committee were to the provisions relating to commencement and territorial extent. Significantly, the amendments extend provisions relating to certain defences (peer review and privilege) to Scotland. Other than minor consequential amendments, the remainder of the substantive provisions would only apply in England and Wales.

1 Introduction

The *Defamation Bill* is designed to reform aspects of the law of defamation. Proposals to reform the defamation laws have a long history. Currently, defamation is governed mostly by the common law. The Government committed to reform the defamation law in its Coalition Agreement in which it agreed to "review libel laws to protect freedom of speech." While the Bill would make a number of substantive changes to the law of defamation, it is not designed to codify the law into a single statute.

A draft Bill and consultation paper were published in March 2011 and were subject to pre-legislative scrutiny by a Joint Committee of Parliament. The Joint Committee published its report on the 19 October 2011 and the Government responded in February 2012.

The *Defamation Bill* was presented on 10 May 2012. A Research Paper setting out the background to the introduction of the Bill was published prior to Second Reading and is available from the Parliament website. Amongst other things, that paper provided a clause by clause analysis of the Bill and noted where the Government's proposals diverged from the recommendations of the Joint Committee. This Research Paper will not rehearse that material and will instead provide details of the Second Reading debate and amendments made in Committee.

2 Second Reading Debate

The *Defamation Bill* had its Second Reading on 12 June 2012.[1] The Lord Chancellor and Secretary of State for Justice, Kenneth Clarke, indicated that he shared the "mounting concern of recent years that our defamation laws are becoming out of date, costly and over complicated, and that they are at risk of damaging freedom of speech."[2]

He described the clauses relating to the internet as the "most innovative and difficult part of the Bill" and recognised concerns that the threat of "lengthy and costly proceedings" had sometimes been used to "frustrate robust scientific and academic debate." Nonetheless, he also accepted that not everyone would be happy with the Bill, noting that the Government was averse to moving towards an American model where free expression always trumps other considerations.

One of the provisions of the Bill (**Clause 11**) would have the effect of restricting (but not prohibiting) jury trials of defamation actions. David Davis (Conservative) asked the Lord Chancellor to explain the criteria that would be used to trigger a jury trial, instead of a judge only trial, if the provision was enacted. The Lord Chancellor responded that the decision was left to the discretion of the judge, but that one could conceive of:

> a few exceptional cases whereby the whole thing depends on a question of the veracity of two teams of hard-swearing witnesses, and whereby the judge is persuaded that, because of the particular nature of the case, he would be helped by the judgment of a range of men and women from a variety of backgrounds, who would bring their collective wisdom to deciding which side to believe.[3]

He added that where the whole thing turned on an "elaborate argument about the application of the defamation laws to the particular circumstances of the publication of a scientific journal, for example, that would be a wholly unsuitable case to leave to a jury."[4]

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1 HC Deb 12 June 2012 c 177
2 *Ibid*
3 HC Deb 12 June 2012 c 187
4 *Ibid*

Sadiq Khan, the Shadow Justice Secretary, indicated that the Opposition welcomed "a Bill that seeks to modernise our outdated libel laws" and noted that the "House is in a position of near unanimity in supporting the principle behind the Bill" which was "very much built on the groundwork done under the previous Government.**"**[5] He indicated that this was "not a partisan issue but a problem that needs rectifying."[6]

Sadiq Khan said that there were a number of issues to be dealt with in Committee, including the definition of "serious harm" in **Clause 1** of the Bill. He argued that the "use of defamation laws by corporations has a chilling effect, especially given the inequality of arms" and suggested that this issue might be "teased out and clarified in Committee."[7] In relation to the statutory defences set out in **Clauses 2-7** of the Bill, he raised a number of concerns. In particular, he noted that the Libel Reform Campaign[8] was "unhappy" with **Clause 4** (which would abolish the common law Reynolds defence[9] and instead codify the factors that the court could consider when judging whether there had been a responsible publication on matters on public interest). He also noted complaints that the current defence required defendants to "clear a series of complex hurdles to gain legal protection" and that the clause might "freeze the Reynolds defence at the current point in time."[10] While supporting the aim of **Clause 5** of the Bill (which relates to the liability of operators of websites) he warned that:

> It is important that this well intentioned clause does not inadvertently lead to a website being required to disclose the identity of a whistleblower when they are the source of a post on a website, or to websites being easily censored by casual threats of litigation against their operators.[11]

Sadiq Khan also raised concerns about access to justice and the cost of defamation proceedings.[12] He concluded that the Opposition believed that "more can and should be done to make the Bill fit for the challenges ahead" and that it would be looking to introduce new clauses to address omissions.[13]

A number of Members, including Nadine Dorries (Conservative), Steve Rotheram (Labour) and Helen Goodman ((Labour, Shadow Minister for Culture, Media and Sport) and Ian Paisley (DUP) raised the issue of 'internet trolling' and bullying on social media. Some speculated as to whether Clause 5 of the Bill might be amended to deal with abusive postings on social media.

3 Committee Stage

The Public Bill Committee had five sittings between 19 and 26 June 2012. The Committee also received a number of written submissions, which have been published on the Parliament website.

The only substantive amendments to the Bill were to the provisions relating to commencement and territorial extent. Significantly, the amendments extend provisions relating to certain defences (peer review and privilege) to Scotland. The remainder of the

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5 HC Deb 12 June 2012 c 188
6 HC Deb 12 June 2012 c 189
7 HC Deb 12 June 2012 c 191
8 The Libel Reform campaign described itself as a libel reform coalition which brings together English PEN, Index on Censorship and our partner organisation Sense About Science to campaign to reform the libel laws of England and Wales
9 A public interest defence which stems from the case of *Reynolds v Times Newspapers Ltd* which was subsequently affirmed in 2006 in the case of *Jameel v Wall Street Journal Europe* [2006] UKHL 44
10 HC Deb 12 June 2012 c 191
11 HC Deb 12 June 2012 c 193
12 HC Deb 12 June 2012 c 195-6
13 HC Deb 12 June 2012 c 196

provisions (save for consequential amendments) would only apply in England and Wales. These actual amendments are discussed in detail below. In addition, this paper also addresses a selection of the other amendments that were proposed in the Committee, but not taken forward.

3.1 The Serious Harm Test

Clause 1 of the Bill introduces a new "serious harm" test. It provides that: "A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant." Robert Flello (Labour, Shadow Minister for Justice) introduced a probing amendment, on the basis that the Law Society had raised concerns that the measure "could create an unreasonably high threshold to overcome and cause costly pre-action work."[14]

The Parliamentary Under-Secretary of State for Justice, Jonathan Djanogly, indicated in response that the amendment would change the new test so that it would read: "A statement is not defamatory unless the extent of its publication has caused or is likely to cause serious harm to the reputation of the claimant." He contended that this would narrow the effect of the clause by focusing on one aspect of the publication, namely its extent. He went on to state that the current clause:

> ... takes the existing case law, which sets out what is sufficient to establish that a statement is defamatory, and raises the bar to a modest extent by requiring that the harm to reputation must be serious.[15]

As to the question of whether a particular publication has caused (or is likely to cause) serious harm, the junior Justice Minister stated that this will "be a matter for the courts to determine in the light of the individual circumstances of the case". He recognised that the introduction of the test might lead to "some front loading of costs" but indicated that "we believe that it is better to resolve that at an early stage so that only cases involving serious harm proceed."[16]

Actions in respect of deceased persons

Helen Goodman (Labour, Shadow Minister for Culture, Media and Sport) moved an amendment to Clause 1 that would have allowed the close relatives of a potential claimant to bring defamation proceedings, where the person had died "within the year prior to the defamatory statement being made."[17] She illustrated the remarks with a number of examples, including the case of Stephen Gately, who (she argued) had been subject to something amounting to a "homophobic attack" in the press following his death.[18] Jonathan Djanogly said in reply that a long established principle of common law is that a deceased person cannot be defamed because reputation is personal. He added that:

> The Government believes that there would be significant difficulties with attempting to allow relatives to bring defamation actions on behalf of deceased persons, even to the limited extent proposed in the amendments.

He noted an objection in principle: that it would create a precedent for further extensions (which could create difficulties for those involved in historical analysis and debate) and some practical difficulties, namely that: "it would be unfair to bar the defendant from using the defences that exist for a defamation action and that could result in arguments over the truth

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14 PBC Deb 19 June 2012 c 4
15 PBC Deb 19 June 2012 c 14
16 PBC Deb 19 June 2012 cc 15-17
17 PBC Deb 19 June 2012 c 21
18 PBC Deb 19 June 2012 c 22

of the allegations about the deceased's character, which would inevitably be distressing for the family."[19] Ben Gummer (Conservative) went on to indicate a further difficulty, suggesting that the amendment would fundamentally unbalance justice, since the deceased would not be in court and so their evidence as to the untruthfulness of the allegations could not be tested. The amendment was defeated on a division (by 11 votes to 5).

3.2 The defence of truth

Clause 2 of the Bill relates to the defence of truth. There was a debate about whether a provision dealing with single allegations with different shades of meaning should be included in the Bill. Jonathan Djanogly said that such a clause would not be appropriate: the effect of such a clause would be that a defence would not fail where one or more of the imputations made against the defendant were not shown to be substantially true provided that the imputation would not materially injure the claimant's reputation in the light of what the defendant has otherwise shown to be substantially true. Mr Djanogly said:

> We are concerned that allowing the defendant to succeed where he or she is unable to establish that the meaning of the allegation is substantially true would undermine the clarity of the defence and create uncertainty over what the defendant must prove to succeed.[20]

3.3 Honest opinion

Clause 3 of the Bill relates to the defence of honest opinion. The clause would abolish the defence of fair comment and replace it with a new defence. Robert Flello sought to move a drafting amendment, to add the word "or" before sub paragraph (b) of the clause. The Minister responded that:

> Under the subsection, one of the conditions that must be satisfied for the defendant to succeed in a defence of honest opinion is that they must show that an honest person could have held the opinion either on the basis of any fact that existed at the time the statement complained of was published, or on the basis of anything asserted to be a fact in a privileged statement published before the statement complained of.
>
> I can confirm that the defendant will succeed in the defence if they can show that either of the limbs is satisfied; they do not have to show that both are. That will be the effect of the subsection as drafted, and we do not therefore consider the amendment to be necessary. On that basis, I hope that the hon. Gentleman will agree to withdraw the amendment.[21]

The amendment was withdrawn. Robert Flello also sought to introduce an amendment to ensure that the defence would fail in circumstances where the claimant could show that the defendant had acted out of malice. The Minister rejected this amendment arguing that the current drafting of the clause was sufficiently clear. Robert Flello withdrew the amendment, which he described as a probing amendment, but complained that he was disappointed that the Minister had not used the opportunity to expand upon the matter and provide clarity in the Bill.[22]

3.4 Responsible publication on matter of public interest

Clause 4 of the Bill introduces a defence of responsible publication on a matter of public interest. Robert Flello sought to move a series of amendments to the clause. In particular,

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19 PBC Deb 19 June 2012 c 26
20 PBC Deb 19 June 2012 c 30
21 PBC Deb 19 June 2012 c 36
22 PBC Deb 19 June 2012 c 38

he argued that the clause appeared to have been drafted prior to the judgement in the case of *Flood v The Times Newspaper Ltd.*[23] He therefore contended that the tests contained in the clause "do not reflect the existing common law."[24] He cited the Libel Reform Campaign in support of this view. They had submitted that "Clause 4 is not a new public interest defence. It is the codification of an out-of-date version of the 'Reynolds Defence' of responsible publication." Paul Farrelly (Labour) expanded upon this point.[25]

Mr Flello went on to suggest that the purpose of some of the suggested amendments was to "reverse the burden of proof – of irresponsibility – for the Reynolds defence by putting it on the claimant, who, under the proposals would have to show that the publication was made irresponsibly."

Helen Goodman further argued that the clause should set out, for the guidance of the courts, an indication of what the Minister believed the public interest to be, questioning whether he agreed with the definition offered by the Press Complaints Commission (PCC).

Jonathan Djanogly responded that the Government considered that to put the onus on the claimant to prove that the publisher had acted irresponsibly would "unfairly tilt the balance against the claimant" who (under the terms of the proposed Bill) would already be obliged to show that the statement complained of was defamatory and that he had suffered serious harm as a result of publication.[26] Moreover, the Minister suggested that it would be difficult for the claimant to adduce evidence demonstrating irresponsibility since he would not know what information the defendant had before publication. In respect of the case of *Flood v The Times Newspaper*, Mr Djanogly indicated that while the decision came after the draft Bill had been published, the Government had "considered its impact in terms of clause 4" and did not believe that a specific amendment was necessary or appropriate.[27] He said that the Bill "is intended to and does reflect the current case law." When pressed on the point, the Minister agreed to "consult further" and to "hear further points."[28]

As to a definition of the public interest, Mr Djanogly said that he believed that in the context of defamation, this should be a matter for the courts to decide, in all the circumstances, rather than seeking to apply definitions used in other contexts by the PCC code or Crown Prosecution Service guidance.[29] On a vote, the clause was ordered to stand part of the Bill (by 11 votes to 6).

3.5 Operators of websites

Clause 5 of the Bill deals with the operators of websites. The clause as drafted provides website operators with a defence against a defamation action in circumstances where they did not themselves post the statement complained about. The Minister indicated over the course of the debate that Members had been provided with a note on the proposed procedure which would be the subject of regulations under the clause. Several amendments were proposed. Some of these sought to place on the face of the Bill the process that website operators should follow if they wished to avail themselves of the defence. In particular, one amendment sought to require the operator of a website to publish a notice of complaint, alongside the material complained of, within seven days of receipt of a complaint. Mr Djanogly responded to this proposal by saying that when officials met with internet

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23 [2012] UKSC 11. The Supreme Court considered the elements necessary for a successful claim of 'Reynolds privilege'
24 PBC Deb 19 June 2012 c 57
25 PBC Deb 19 June 2012 cc 71-73
26 PBC Deb 19 June 2012 c 77
27 PBC Deb 19 June 2012 c 78
28 PBC Deb 19 June 2012 c 80
29 PBC Deb 19 June 2012 c 81

organisations, they found that there could be "significant practical and technical difficulties with posting a notice of complaint alongside defamatory material."[30]

A new clause and amendment were proposed which sought to create a mechanism whereby a claimant could apply to the court for an order to remove allegedly defamatory material posted on a website, without actually requiring the claimant to bring defamation proceedings. The Minister rejected this for two reasons. First, he argued that "it would be likely to have significant resource implications for the courts" since complaints were received by website operators on a regular basis. Second, he contended that there were questions about the extent of the evidence that the court would require to reach a decision on whether material should be taken down and that the risk was that if the court were too cautious, it would order removal in the majority of cases (which would not provide any further protection to freedom of expression).[31]

In a note circulated to the Committee, the Minister stated that website operators would be encouraged to set up and publicise a designated e-mail address to receive notices of complaint as a matter of good practice. He added that it was the Government's view that "website operators will act responsibly and adopt designated e-mail addresses as good practice, which is preferable to forcing them to do so."[32]

The Minister also explained that:

> Under the system that we are proposing, if the author indicates to the website operator that he does not wish his name and contact details to be released to the complainant, the website operator must inform the complainant. If the complainant wishes to take further action he will then be able to seek a court order for the website operator to release the name and contact details that it has in relation to the author. We consider that that strikes the right balance: it provides a quick and easy way for the claimant to obtain the necessary details where the author has no objection to providing them, but then places the responsibility back on the claimant to secure a court order where the author is unwilling.[33]

The Minister also made plain that while the Committee had been provided with the abovementioned note on the principles that would be followed, that this note was "provisional" and that the Government was willing to take the views of "stakeholders – internet organisations, claimant lawyers and the libel reform campaigners – on the terms of the draft regulations."[34]

Finally, an amendment was proposed which would mean that the affirmative resolution procedure would have to apply to regulations made under the clause. Currently the negative resolution procedure is proposed. This amendment was defeated on a division (by 11 votes to 6). There was a division that the clause stand part of the Bill (agreed by 11 votes to 6).

3.6 Peer reviewed statements in scientific or academic journals

There was a consensus in support of **Clause 6** which creates a new defence of qualified privilege for peer reviewed material in scientific or academic journals.

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30 PBC Deb 21 June 2012 c 91
31 PBC Deb 21 June 2012 c 118
32 PBC Deb 21 June 2012 c 109
33 PBC Deb 21 June 2012 c 110
34 PBC Deb 21 June 2012 c 107

3.7 Reports protected by privilege

Robert Flello moved a probing amendment seeking to add to the list of reports that would attract the defence of qualified privilege. He sought to include the reporting of the contents of a press release (following the case of *McCartan Turkington Breen v Times Newspapers Ltd*.) The Minister responded that the Government did not see that such a provision was necessary since the clause was designed to reflect the law as it stands and that the courts had already recognised that fair and accurate reports of a press conference fall within the scope of a public meeting and that a report based on material that was handed out at a press conference was still a report of the proceedings at that meeting.[35]

3.8 Single publication rule

Robert Flello moved a probing amendment and questioned why **Clause 8** of the Bill (which relates to the single publication rule) only protected re-publication by the same person who published the first statement.[36] A further amendment sought to gain specific protection for papers originally published in scientific journals which are subsequently made available as open access documents on the internet.

Jonathan Djanogly said that the Government did not believe that extending the single publication rule to third parties would provide adequate protection for claimants. In respect to open access publication, the Minister indicated that there may be circumstances where making a previously subscription-based journal article freely available could "significantly increase the extent of publication and cause harm to the claimant."[37] Accordingly, the Government took the view that such matters should be left to the courts.

3.9 'Libel tourism'

Clause 9 of the Bill seeks to address the issue of 'libel tourism'. Amongst other things, an amendment was proposed which would have had the effect of applying the clause to cases in which the court was satisfied that the words or matters complained of had been principally published outside the UK. This would have meant that, in all cases where the court considered that principal publication occurred outside the UK, it would have to be satisfied that the UK was the most appropriate place for the claim to proceed. Jonathan Djanogly said that such an amendment would conflict directly with the core principle in article 2 of the Brussels I regulation, under which the court generally has no discretion to refuse jurisdiction in cases where the defendant is domiciled in England and Wales.

3.10 Secondary publishers

Clause 10 of the Bill gives protection from potential liability to persons who were not the author, editor or publisher of the statement complained of, unless the court is satisfied that it is not reasonably practicable for an action to be brought against the author, editor or publisher. The clause is designed to address concerns that there should be greater protection for secondary publishers such as booksellers. An amendment was proposed to seek to remove website operators from the operation of the clause. Paul Farrelly argued that unless this were done, it would render the "sensible" clause 5 notice procedures redundant.

Jonathan Djanogly said that if a website operator failed to follow the clause 5 process and then sought to rely on the fact that they were not the author, editor or commercial publisher

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35 PBC Deb 26 June 2012 c 141

36 Generally, an action for defamation must be brought against a publisher within a year of publication. Under the current law, each publication gives rise to a separate cause of action, so subsequent publication resets the clock. In relation to websites, each hit on a webpage is deemed to create a new publication, resulting in potential liability. The Clause as drafted provides a single publication rule to protect subsequent publication by the same publisher

37 PBC Deb 26 June 2012 c 144

of the material "it would be for the court to decide whether the fact they had failed to follow the process set out in clause 5 meant that it was not reasonably practicable for the claimant to pursue the primary publisher."

The Minister did indicate that further consideration would be given to the situation where a secondary publisher did not remove defamatory material (despite a successful claim having been brought against an author, editor or secondary publisher who could not himself remove the statement).[38]

3.11 Trial without a jury

Robert Flello asked for assurances that **Clause 11** (which removes the presumption in favour of a jury trial in defamation cases) would not narrow the discretion of the court to "in the wider sense of justice, take the case before a jury." Jonathan Djanogly responded that it would be for the courts to decide.[39]

3.12 Government amendments on territorial extent

Jonathan Djanogly moved 3 amendments which had the effect of extending certain provisions in the Bill to Scotland. He said that this was at the request of the Scottish Government:

> The civil law on defamation is generally a devolved area, and the Bill reforms the law in relation to England and Wales only. However, we have been requested by the Scottish Government to extend certain specific provisions to Scotland, and these amendments are intended to fulfil that request. The Scottish Government have confirmed that a legislative consent motion will be put before the Scottish Parliament on a timely basis following these amendments being moved in order to secure their consent.
>
> Amendment 3 amends the provisions on extent in clause 16 of the Bill to provide for the provisions on peer-reviewed material in scientific and academic journals in clause 6 of the Bill, and the provisions in clause 7(9) extending qualified privilege to fair and accurate reports of scientific and academic conferences, to extend to Scotland, together with clause 14, clause 15(5) and clause 16 for consequential reasons. I understand that the request stems from the desire of the Scottish Government to make available in Scotland the protections that the provisions offer against the harmful effect of current libel law on scientific and academic debate. Amendment 3 also provides that the commencement of the relevant provisions in Scotland will be by order of Scottish Ministers. The other two amendments deal with consequential and drafting points. The Government believe that it is appropriate to accede to the Scottish Government's request.

These amendments were agreed.

3.13 Corporations

The ability of corporations to bring proceedings for defamation is not directly addressed by the Bill; however, it was an area of significant debate at Committee Stage.

Robert Flello tabled a new Clause 4 to deal with the issue (a new Clause 7, dealing with some of the same issues was also tabled and is discussed further below). The effect of this would have been to restrict the ability of corporations to bring defamation proceedings. Mr Flello justified tabling the new clause by citing a number of examples suggesting, for

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[38] PBC Deb 26 June 2012 c 157
[39] PBC Deb 26 June 2012 c 166

example, that "a company might bring a case instead of engaging in scientific debate"[40] or, that the threat of libel proceedings could impact on "scholarly review."[41] Paul Farrelly (Labour) gave a number of additional examples and referred back, amongst other things, to the well known "McLibel case."[42]

Tom Brake (Liberal Democrat) argued that:

> 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.

He contended that there was often a "David and Goliath" scenario, and concluded that:

> 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.[43]

In response, Jonathan Djanogly indicated that he would explain how the Government had reached its position on the subject. He argued that:

> 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 [...] 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.
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> 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

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40 PBC Deb 26 June 2012 c 183

41 PBC Deb 26 June 2012 c 185

42 *McDonald's Corporation v Steel & Morris* [1997] EWHC QB 366 is commonly referred to as "the McLibel case". It was an English lawsuit filed by McDonald's Corporation against environmental activists Helen Steel and David Morris over a pamphlet critical of the company. The case was notorious (amongst other things) for its length (it lasted approximately ten years). Although McDonalds were successful in the libel proceedings, the case also resulted in a subsequent finding against the UK Government by the European Court of Human Rights. The Strasbourg court did not address the merits of the original decision of the UK courts, but rather the failure to provide the defendants with legal aid or other resources to enable them to challenge the case against them. The case resulted in criticism of what were seen as "oppressive" libel laws

43 PBC Deb 26 June 2012 c 191

> 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. [...] 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.[44]

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.

The Parliamentary Under-Secretary of State for Justice said:

> 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, nongovernmental 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."[45]

New Clause 4 was defeated on a division (by 11 votes to 7).

3.14 Mediation

Robert Flello (Labour) tabled a new Clause 5, which would have had the effect of introducing a presumption that parties would first undergo mediation (or if unsuccessful, voluntary arbitration) prior to commencing legal proceedings in the courts. He admitted at the outset that this was a probing clause, which was designed to reflect the findings of the Joint Committee on the Draft Defamation Bill. In response, the Minister, Jonathan Djanogly, responded that these changes could be made without the need for primary legislation:

> 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

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[44] PBC Deb 26 June 2012 cc 206-7
[45] PBC Deb 26 June 2012 cc 207

> 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.[46]

3.15 Strike-out procedure

Robert Flello moved a new Clause 8, which would have had the effect of requiring the court to strike out a new defamation action unless the claimant could show that the publication had caused, or was likely to cause serious harm to his or her reputation and that there had been a real and substantial tort in this jurisdiction. Jonathan Djanogly argued that the new clause was unnecessary, since the Government was "working to develop a new early resolution procedure to ensure key preliminary issues are determined as early in the proceedings as possible." The Minister also contended that where the claimant's statement of case disclosed no reasonable ground for bringing a claim, or the claim was an abuse of process, the court was already empowered to strike it out under rule 3.4 of the Civil Procedure Rules.[47] There was a division on the proposed new clause (which was defeated by 7 votes to 9).

[46] PBC Deb 26 June 2012 c210
[47] PBC Deb 26 June 2012 c213

Appendix 1 – Membership of the Committee

Chairs: Mr Christopher Chope, Mr Dai Harvard

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

Committee Clerks: Sarah Thatcher, Eliot Barrass