OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 12 June 2018

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 12 June 2018

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JUSTICE COMMITTEE
18th Meeting 2018, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*George Adam (Paisley) (SNP)
*Maurice Corry (West Scotland) (Con)
*John Finnie (Highlands and Islands) (Green)
*Jenny Gilruth (Mid Fife and Glenrothes) (SNP)
*Mairi Gougeon (Angus North and Mearns) (SNP)
*Daniel Johnson (Edinburgh Southern) (Lab)
*Liam Kerr (North East Scotland) (Con)
Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Campbell Deane (Bannatyne Kirkwood France & Co)
Rosalind McInnes (BBC)
John Paul Sheridan (Law Society of Scotland)
Gavin Sutter (Queen Mary University of London)
Nik Williams (Scottish PEN)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 12 June 2018

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Margaret Mitchell): Good morning, and welcome to the 18th meeting in 2018 of the Justice Committee. We have received apologies from Ben Macpherson.

Agenda item 1 is a decision on whether to take item 3, which is consideration of our work programme, and item 4, which is consideration of a draft report on remand, in private. Are we agreed?

Members *indicated agreement.*

Defamation

10:01

The Convener: Item 2 is a round-table evidence-taking session on defamation. Earlier this year, the committee received a briefing from the Scottish Law Commission on its report and draft bill on defamation. The purpose of today's round-table session is to discuss in more detail the commission's recommendations and other issues relating to the reform of defamation law in Scotland. I refer members to paper 1, which is a note by the clerk, and paper 2, which is a private paper.

I welcome the witnesses to our round-table discussion. Although it will be informal, allowing a better and freer interchange of views, this is still an evidence-taking session. We will have introductions right round the table. I am Margaret Mitchell, the convener of the committee.

Gael Scott (Clerk): I am a clerk to the committee.

Stephen Imrie (Clerk): I am also one of the clerks to the committee.

Jenny Gilruth (Mid Fife and Glenrothes) (SNP): I am the MSP for Mid Fife and Glenrothes.

Campbell Deane (Bannatyne Kirkwood France & Co): I am a partner of Bannatyne Kirkwood France & Co solicitors.

Rosalind McInnes (BBC): I am the principal solicitor for BBC Scotland and the author of "Scots Law for Journalists".

John Finnie (Highlands and Islands) (Green): Madainn mhath. I am an MSP for the Highlands and Islands.

John Paul Sheridan (Law Society of Scotland): I am from the Law Society of Scotland.

Liam McArthur (Orkney Islands) (LD): I am the MSP for Orkney.

Liam Kerr (North East Scotland) (Con): I am an MSP for the North East Scotland region.

Maurice Corry (West Scotland) (Con): I am an MSP for the West Scotland region.

Gavin Sutter (Queen Mary University of London): I am an academic at Queen Mary University London, but I am originally from Northern Ireland. I have been interested in defamation reform for a long time. Thank you for giving me the opportunity to come and talk about it.

Mairi Gougeon (Angus North and Mearns) (SNP): I am the MSP for Angus North and Mearns.

George Adam (Paisley) (SNP): I am Paisley's MSP.

Nik Williams (Scottish PEN): I am the project manager of Scottish PEN.

Daniel Johnson (Edinburgh Southern) (Lab): I am the MSP for Edinburgh Southern.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I am the MSP for Strathkelvin and Bearsden, and I am the deputy convener of the committee.

The Convener: I start with a very general question. The law of defamation in Scotland has not been updated since 1996. What are the panel's views on why there is a need to update it now?

Nik Williams: How we communicate and express ourselves has changed drastically since then. There are obviously new media and social media, but there are also changing realities around newspaper and more conventional media. Huge issues were brought up in England and Wales in 2013, which necessitated reform. Scotland needs to take the lead not just for harmonisation but to ensure that people are protected, whether that is on Twitter, in a letter to the editor or any such thing.

Campbell Deane: I do not disagree with what Nik Williams has said. The law has not changed and the principles of law tend to be based on cases that go back to the mid to late 1800s. Arguably, those principles are transferable to modern-day scenarios, but it involves an element of contortion to get there. On that basis, it may well be advisable to look at the matter afresh.

Rosalind McInnes: On the basis of law reform in general, which is what the Scottish Law Commission is for, I endorse what Nik Williams and Campbell Deane have said. There were also bits of Scots law emerging in this area that were a bit of a dog's breakfast, to be honest, such as the verbal injury element. From the point of view of reform to make the law more coherent and, particularly, more comprehensible to lay people, the draft bill is a really good idea. It will not deal with the contentious stuff, but it is important.

Gavin Sutter: The two words that spring to mind are "the internet". There have been tremendous revolutions. The internet has twice revolutionised communication in terms of its availability and cross-border communication, and it has internationalised everything. That is a huge issue. There is also web 2.0 and a lot of user-generated content now. There are various questions about the liability for that content and the ease with which much of it arises in a context in which bloggers, for example, pump out stuff that is not thought through or passed through a duty solicitor as it would be with the traditional media.

As Rosalind McInnes says, historically, law has evolved over time that is maybe not the best. There is a chance to clarify, amend and address issues that are problematic not necessarily because of the web.

John Paul Sheridan: We are very supportive of the amendments and the aim of bringing the law up to date, for the reasons that others have given.

The Convener: I thank those who sent submissions in advance of this round-table meeting. They are immensely helpful to the committee in teasing out recommendations and issues relating to defamation. It has been said that there is not a level playing field, that there can be a chilling effect on public debate and that we do not quite know the boundaries for investigative journalism. Will you comment on the idea of defamation law having a chilling effect on public debate in Scotland?

Rosalind McInnes: I see that every day—I suppose that that is in the nature of what I do. I hope that most journalists are reputable professionals who do not want to sail too close to the wind, but there are certainly stories. The case of Jimmy Savile is very close to home. There are a lot of lawyers round this table but we are not all necessarily media lawyers, and it is always difficult to know whether we will win or lose a case. The stakes are always pretty high once the matter has become litigious. Given the way in which defamation law has evolved, lawyers are on the back foot when speaking out. Often, it is easier to kill or restrict a story than to run it.

Nik Williams: It is important to note that it is not just journalists who publish content that could be in the public interest. Independent bloggers, social media users and some publications do not have in-house legal support or legal guidance.

Some of the reforms that the SLC has proposed, such as the serious harm threshold and the public interest defence, are vital to ensuring that people know how the law protects them or may threaten them and what protections are available. That is why we need comprehensive, up-to-date law.

Currently, a public interest defence that is based on the Reynolds defence is far too narrow, as it is still very much framed around journalism and there is uncertainty about how the protection may work for other people. The on-going case involving Andy Wightman is a perfect example of the need for a public interest defence. Without that, and without a serious harm threshold, the possibility of vexatious or frivolous cases, or of cases being brought just to silence criticism, can still have an undue impact on freedom of expression. We know

that from talking to editors, journalists, bloggers and some of our members. We need to look at that case.

The Convener: You have brought up issues that we will go back to and discuss in more detail, such as the Savile case, defamation of the dead and the public interest. We will have more questions about those issues.

Campbell Deane: I have formed a different view. I have acted for newspapers and publishers for 20-plus years, and I am not aware of scenarios portrayed as vexatious cases involving the man with money raising proceedings purely to prevent free expression. I do not believe that such cases exist in Scotland to the extent that they exist down south. That is partly because the jurisdictional basis down south means that proceedings are more likely be raised there than in Scotland.

I take on board Nik Williams's point that bloggers do not get legal advice, which is one reason why there needs to be reform. I absolutely get that, but the argument that vexatious and frivolous defamation cases are being raised in Scotland is news to me.

The Convener: I have no doubt that we will get into that a little further, but I first want to hear examples from all the panellists. Liam Kerr and John Finnie also want to ask supplementary questions. Does anyone else want to talk about the chilling effect and perhaps give some examples of it?

Gavin Sutter: It is very easy to raise the spectre of the bully who wants the press not to publish, but one point that is often forgotten in the debate—it certainly was in England a few years ago—is that, sometimes, the press can bully the little person who cannot afford to sue. It can cut both ways. There may be a question of plurality in that some media organisations are better placed to advance themselves than others—for example, the press can editorialise—which can create an imbalance in the wider media picture. That may be an academic concern of a separate nature, but there is possibly a butterfly effect there that is often not thought of.

The Convener: It is not necessarily all about the pursuer; the defender and the media can be fairly powerful, too.

Gavin Sutter: Yes, I think so.

The Convener: That is interesting.

John Paul Sheridan: The Law Society generally takes a neutral view on the issue because we do not have a substantial body of evidence, other than anecdotal evidence, to say where the power lies in these things.

In response to Gavin Sutter's point about the little guy's ability to sue the papers, I would say that the Parliament has recently taken steps to address that issue through the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, which has just come in and which, in the right circumstances, will give greater access to justice to such individuals as well as funding options that were not available last month.

The Convener: That addresses the David and Goliath scenario.

John Paul Sheridan: Yes.

Nik Williams: My response to Campbell Deane's point is that the challenge has been about where we see the chilling taking place if cases do not come to court. One case that we followed was that of the National Collective when it reported on donations during the independence referendum, in 2014. It sourced a lot of its material from publicly accessible documents and previous newspaper articles, but it was issued with a legal letter that required it to take down its website for a few days. It was only through pro bono legal support that the National Collective was able to establish a sure legal footing. Following that, one of the more conventional press organisations—I believe that it was *The Herald*—covered the story. It was able to ensure that legal due diligence was carried out and it did not have to remove or take down anything.

That goes back to the inequality of arms. Without legal representation, people may be more cautious than they need to be. There is also the idea that people may target small organisations. Similar threats have been made to other bloggers because it is known that they are less likely to defend themselves.

The Convener: A number of members want in. As always, I will give priority to panellists so that we can hear their views. However, Liam Kerr, John Finnie and Daniel Johnson have all indicated that they want to come in.

Liam Kerr: I would like John Paul Sheridan or Campbell Deane to walk me through a couple of points about costs. If I believed that I had been defamed and I wanted to run a claim, what cost estimate would you give me at the start? If I was the defender, what cost estimate would you give me to defend the case all the way? Ultimately, who would pay for that?

Campbell Deane: It would depend on various things. You could do it on a speculative fee basis, but that would happen only if, after you had given a solicitor the facts and circumstances, they said that there was a reasonable prospect of success. Only then would a solicitor be likely to advise you to take that approach. If your case went to debate in Scotland at the sheriff court level without the involvement of counsel, there would be an argument as to whether the article or whatever

had been said was capable of bearing a defamatory meaning—that would be the test. If you succeeded in that particular point at debate, it is likely that the defender would throw in the towel, because, if you were able to show at that point that what had been written or said about you was capable of defaming you, convention has it that the defender would be unlikely to go to proof unless they had a cast-iron defence.

10:15

I would estimate the cost of going to debate at roughly £7,500, or maybe slightly more. If counsel was involved, you could double that figure. The cost of proof would really depend on how long the claim was going to run. However, from point A to final determination by a sheriff, you would be looking at a cost of about £25,000.

Liam Kerr: For the avoidance of doubt, is it correct to say that, because of the reforms that came in last month, as John Paul Sheridan pointed out, the pursuer would get that money back?

Campbell Deane: The pursuer would probably get two thirds of that money back. There is always a non-recoverable element.

John Finnie: I have a question for Campbell Deane. You said that you were not aware of proceedings being raised in a way that would prevent free speech. Is the issue not—as is the case with the public sector and its fear of litigation by corporations—that the threat alone is sufficient to deter people from speaking out?

Campbell Deane: It can be—I am not going to deny that. As far as a chilling effect is concerned, as Nik Williams said, there is always the possibility of getting pro bono advice. There is always the option of picking up the phone and speaking to a solicitor who specialises in that particular field, saying to them, "I've had this threat of legal action against me in relation to our publication of the following—what is your advice?"

That need not be expensive. In many cases, it is done pro bono. I regularly have people on the phone who want five or 10 minutes of advice. They will say, "The following has happened—what do you think we should do?" I regularly do not charge for such advice but give it pro bono.

Daniel Johnson: I want to test the point regarding equalisation just a little bit. I understand that if you raise the threshold at which someone can claim that they have been defamed, that could take a section of stories out of the scope of defamation law. However, at the end of the day, wealthy people and organisations will always be able to lawyer up and pursue a claim. To what extent will a change in defamation law, and in particular the threshold of serious harm, level things up?

The Convener: We will come on to the serious harm threshold later, but could you answer that question briefly? You mentioned that you have to prove that it is defamatory but the serious harm threshold will be a new way of looking at it.

Nik Williams: I am working with my colleagues in English PEN on the libel reform campaign. They have already documented a significant downtick in cases being brought in England, which they can equate to the serious harm threshold. Obviously, that is still a legal parameter that is being tested and it is still establishing its footing, as we saw recently with the Monroe v Hopkins case. For us, it is significant—we are not for harmonisation for the sake of harmonisation, but a serious harm threshold is significant in dissuading vexatious claims or claims that are there just to silence criticism.

That stifling can take place before the matter comes to court, because the receiving of legal letters may be enough to dissuade someone who knows that there is no serious harm threshold from further publication or to make them withdraw. At the moment, there is growing evidence that it is establishing a significant road block.

Campbell Deane: One of the reasons why the English reforms were brought in and the Defamation Act 2013 was passed was to stop that particular problem of vexatious claims. The threshold was raised to try to deal with that. My point is that we do not have the level of vexatious claims that they have in England. We have very few defamation cases in Scotland. Absent the vexatious claims, where is the necessity to harmonise?

The Convener: Is it just a case of harmonising, or is it a better test?

Campbell Deane: It is a hurdle that did not exist before. An onus is being put on a pursuer, in Scotland, or a claimant, in England, to get over a hurdle that they previously did not have to get over. It is being made harder for a pursuer to raise a case.

There is a case in England called Lachaux v Independent Print, and much of what we are talking about with regard to whether the test is a hurdle or something else will depend on what the Supreme Court decides in that case. I do not want to go into too much legal detail on that but, ultimately, the question is whether the issue of serious harm is an extension of the test, and the defamatory allegation or statement still remains in play, or whether it is a serious hurdle that needs to be got over. In relation to the Court of Appeal decision in Lachaux, the issue is being approached as a matter that can be looked at by

way of inference. It would be beneficial if that were the case in Scotland.

John Paul Sheridan: The Law Society has no evidence that there has been any problem with vexatious litigation of this nature in Scotland. In our response to the Law Commission, we specifically said that we were interested to see what evidence there was of the necessity to bring in the provision in Scotland. Certainly, the discussion paper and the report make no specific mention of any particular problem.

Like Campbell Deane, we think that the provision represents an additional hurdle for litigants that might prevent them from getting access to judgments even though they might have a legitimate claim.

The Convener: Do you have any outcomes that we could look at to back up what you are saying?

John Paul Sheridan: How do you prove a negative? We are not aware of any issue in relation to this—

The Convener: Are there any outcomes of cases that are being brought under the current rule, whereby the statement refers to someone and is defamatory?

John Paul Sheridan: There will be an additional hurdle for the pursuer to get over. The serious harm test will make it more difficult for someone to prove their case, because they will have to prove not only that the comment was defamatory but that it led to serious harm to their reputation or financial standing.

Rosalind McInnes: There is a more general point than serious harm, which goes back to what John Finnie said. It is misleading to look at Scottish defamation law in terms of how many cases are raised. It is true that not many cases are raised. The issue involves the chilling effect, which I deal with every day. In this forum, I cannot share information that is confidential to the people for whom I act, but speaking as the person who legalled "You've been Trumped" when it showed on BBC television, I think that the chilling effect is a real and present danger for investigative journalists in Scotland. It arises every week, if not every day.

The Convener: Liam Kerr has a question about the serious harm test.

Liam Kerr: A couple of matters arise. Why are there fewer vexatious claims in Scotland, notwithstanding the lack of a serious harm test at the moment?

John Paul Sheridan: I do not know for sure, but my guess would be that Scottish law awards much lower levels of damages and has much lower recoverable fees. Some of the awards in courts in England and Wales and the costs that are able to be recovered are eye watering, relative to what happens in the Scottish courts. If people can select which forum to sue in, they will not choose to sue here.

Liam Kerr: Is that a fair answer, Campbell?

Campbell Deane: Yes. In Lord Pentland's article in the *Journal of the Law Society of Scotland*—I do not know whether that is in the papers before you—he referred to a case called Kennedy v the National Trust for Scotland and noted that, in that case, Sir David Eady had rejected a forum argument by saying that the correct place to raise the action was in Scotland.

I have a slight advantage over Lord Pentland, in that I act for the defendant in that particular case. The case is going to the Court of Appeal in England in July this year. A hearing to establish whether Scotland or England is the correct place to hear the case will cost each party a six-figure sum. In Scotland, that decision would involve a one-day debate and then one day in the inner house, with a cost of around £20,000. It is a night-and-day difference.

Liam Kerr: Does the panel think that we need a serious harm test in Scotland? Nik Williams said in his submission that we definitely do, so perhaps he would like to lead off.

Nik Williams: This is one of the key things that we are looking at in the context of harmonisation, and, more broadly, the tenets of free expression. It takes us back to what Rosalind McInnes said: court cases are an imperfect measure of how effective the law is. In the absence of a threshold, pursuers can send a legal letter with relative ease, and we have seen the impact of that on individuals. For example, a building developer brought a case against a Facebook group moderator in Strathaven.

A serious harm test would require an extra demonstration of harm. Without that, cases can be brought vexatiously or in an attempt to stifle criticism, and defamation becomes a devalued tool that is used to control the narrative and not necessarily to protect reputation.

The current situation very much prioritises the pursuer over the defender. A serious harm threshold would put the onus on the pursuer to set out the facts of the case in a far more robust manner, which would be of significant benefit to the law in Scotland.

Daniel Johnson: John Paul Sheridan said in response to the convener that if the threshold is raised some cases will not be brought. I understand that, but will you tell us what sorts of case will no longer be able to proceed, although

they have merit, if the law is changed? Will you bring that to life for the committee, please?

John Paul Sheridan: I am not sure that I can give a hypothetical example. All I can say is that in our experience there is no particular problem with vexatious claims and that, as a general legal principle, if someone suffers a loss or element of damage as a result of a defamatory statement, they should be entitled to a remedy. The proposed approach would create a higher threshold: suffering a loss would not be sufficient and the person would have to suffer serious damage. I am not aware of other areas of law in which that is the case.

Ultimately, it is for the Parliament to make a political determination as to whether the chilling effect is sufficient to justify raising the threshold. For my part, I am not aware of vexatious claims in the past and I see no particular problem. It might be that other people on the panel have far more experience in that regard. Ultimately, it is a political question.

Gavin Sutter: Aside from the questions whether raising the threshold is necessary and whether there are vexatious cases in Scotland, there is the question whether the so-called hurdle that would be presented would actually be a threat. One thing that has come through all the English cases that have been approved at every level—I would be fairly confident about putting money on the Supreme Court not disturbing this in Lachaux—is the approval of what Mr Justice Bean said in Cooke and Midland Hart v MGN. Mr Justice Bean said:

> "Some publications will be so obviously likely to cause serious harm that no evidence will be necessary—for example if a national newspaper wrongly accuses someone of being a terrorist or a paedophile."

In Lachaux, although it is the mechanism that is in dispute, Mr Justice Warby's basic decision is about what reaches the level of serious harm. There is also the Monroe v Hopkins case, which was about the defacing of a war memorial.

I am far from convinced that serious harm is a standard that presents any detriment to anyone who has a genuine case, based on what we have seen thus far. That is more the issue in question. At the risk of using a somewhat debased phrase in politics, I will say, "I agree with Nik" on the usefulness of serious harm as a basic test of what defamation is ultimately about.

The Convener: It is good when harmony breaks out.

10:30

Liam McArthur: I should respond to that, if only to defend my colleague. Is the definition of serious harm and the question of how it is being interpreted more about avoiding a situation in which incidental or fairly negligible damage could give rise to a claim or an action? To the layperson, serious harm has connotations of something far more serious and dramatic. However, what you have described suggests that the definition is about distinguishing it from fairly incidental, low-level impacts on an individual following something that might appear in a blog or a news article, or which could relate to something that someone says.

Gavin Sutter: It is simply about making sure that someone has a genuine complaint rather than whether they can contort something and say that it has damaged their reputation. There is some of the same thinking in the old Byrne v Dean case. That case, which was on a different point, was about golf club members thinking less of a guy because they thought that he had reported the illegal, unlicensed one-armed bandit in their clubhouse. The issue in that case was who the general audience is. However, in terms of the meaning and whether something has a genuine impact on a person and their legitimate reputation in society at large, or whether they can contort that into a perceived slight, that goes back to the old idea of the difference between something that is genuinely defamatory and something that is merely vulgar abuse. That is an important line to draw.

Nik Williams: I concur. The serious harm test would not establish a process that is any more onerous than is the case if someone were called a terrorist or a paedophile. I do not want to devalue the bill, but it is for the more trivial cases and would enable a more robust process for the marginal cases.

We are talking about a threshold or a test that needs to be met. We have always considered that proving serious harm requires a stronger evidential basis. I do not want to use the term "flabby" in relation to the working definition of defamation but, as Gavin Sutter says, it can be contorted. The definition in the bill would require the pursuer to state in clearer terms whether it is a person who has caused serious harm or whether that has been caused by a non-natural person and resulted in serious financial loss. That extra step may dissuade people from bringing cases if they cannot make the necessary case as to why it is serious harm. That is a better standpoint for the law, from a free speech or freedom of expression point of view.

Gavin Sutter: It might also help to prevent a case that could theoretically go all the way and result in damages of £1, because the court could ultimately decide that a person was defamed but that it was not that big a deal. That would be a

colossal waste of the court's time. However, the bill, through the serious harm test, has a built-in hurdle, which could discourage somebody from pushing such a case, rather than a court having to use nominal damages as a warning or deterrent to other such cases.

Rosalind McInnes: I will give you examples of cases in which Scots law dealt with the issue that might be significant. While the cases were dealt with promptly, a lot of legal expenses would have been paid out on both sides. First, the journalist Angus Macleod sued a newspaper for a diary piece in *The Scotsman*, which called him the greatest Scottish inventor since John Logie Baird. Most people who read it considered it to be a comic light-hearted piece about a political prediction that Angus Macleod had made that did not come off. He took the piece very personally, which is how many of us take things that are said about us. If he had gone to one of the media lawyers around this table and had said to them that he had to show serious harm before bringing the case, they would probably have said that most people would consider the diary piece to be a bit of a joke.

There was another case, the facts of which were very different, in which the late George Robertson sued a newspaper over what was essentially its apologia for why it had settled a defamation claim. The article included a photograph of a newspaper cover that referred to George Robertson suing over Dunblane lies. The central allegation that he sued over originally was very serious; it was suggested falsely that he had been involved in the Dunblane shootings. What he sued over was the repetition of a photograph in a newspaper, in which the newspaper was explaining the legal basis on which it had settled the defamation action.

A lot of media lawyers probably spend quite a lot of time talking down clients who want to raise defamation actions, because they have taken something a bit harder than a judge or juror would have done. In such cases, a serious harm test would make a difference. I do not feel passionately about that issue, because my concerns regarding the chilling effect are less about people raising silly-season claims and more about people putting pressure on serious investigative journalism. However, I still think that a serious harm test might make a practical difference in the sort of cases that I have described. It would have been better all round if such cases had never been brought.

The Convener: Liam, do you want to pursue the serious harm test or have you exhausted your questions?

Liam Kerr: I have not exhausted my questions.

If we accept that the serious harm test could make it more difficult or less attractive to run a defamation case in Scotland, and if we accept that Scottish defamation law is significantly less developed than defamation law south of the border, could bringing in the test hold back the development of Scots law in this area and make it more difficult for defamation law to develop as we would want it to?

Campbell Deane: I suspect that, if there is harmonisation between England and Scotland in relation to the serious harm test, litigation will flow down south. There is a juridical advantage in going down south, because there is a much more experienced media bar, there are media courts and conditional-fee arrangements are in play, notwithstanding the fact that Scotland will have a variant of such arrangements under the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. My view is that we could lose cases that we might have had in Scotland, and that the law will therefore not develop in Scotland. We would, for all intents and purposes, become the clerk to England's Queen's Bench Division, because the cases will go down south, where there is knowledge of such cases.

Interestingly, in the Kennedy v the National Trust for Scotland case, the discussion paper on the working reforms of defamation was held up by the claimant's agent as a prime example of why the case should not be heard under Scots law and why England was the more appropriate forum for it to be heard in, because Scotland did not know what it was doing in defamation cases. That is what we are up against in relation to the English bar: the English court likes the general rule that it should hold on to litigation—in particular, libel litigation.

Liam Kerr: Does anyone disagree with that answer?

Rosalind McInnes: Yes. Having been involved in litigation on both sides of the border because of the nature of the BBC's broadcasting, I know that it is much more expensive to litigate in defamation down south. Campbell Deane has much more experience of such cases from the pursuer's perspective than I do, but I would have thought that the costs would be a serious deterrent.

It is about the quality of the litigations. If there is no comparative jurisprudence on what "serious harm" means, and if there is no difference, that can prevent the law from developing because there would be less case law coming from anywhere. Forum non conveniens is a pretty flexible legal tool. If the Queen's Bench Division wants to hang on to defamation cases, I am not sure that we can stop it from doing so.

Campbell Deane: I take Rosalind McInnes's point on forum non conveniens. However, under that, we cannot argue the juridical advantage or conditional-fee arrangements. It is not interested in that; we can look only at the facts and circumstances of every case.

In relation to cost, it is almost insulting to argue that we are selling our services in Scotland on the basis that we are cheap as chips, which is really what the argument comes down to: "If you go to England it would be an awful lot more expensive, so you should stay in Scotland because we're cheap".

Rosalind McInnes: Speaking as someone who defends with public money, I say that the question of costs is very important.

Nik Williams: The Andy Wightman case is a perfect example, because it is a £750,000 claim, which is more than three times the current record in Scottish law. There are, in addition, legal costs that are already significant. If the case were to be held in England, where there is a serious harm threshold, it could be argued that that threshold could be met by the allegations against him.

We have not seen enough evidence that cases would go to England if a serious harm threshold were brought in. Our position is twofold: first, that is not a strong enough argument to weaken what we see as a vital protection of free speech in Scots law; and secondly, a benefit of the draft bill is that it might strengthen the legal process and make such a process economically viable in Scotland. However, we also need to look at the current law for what it is, which is a law that impacts on free expression and public accountability, and which raises transparency issues. Holding on to such litigation in Scotland is not significant enough justification for pushing back against reform and leaving the law as it is.

Rosalind McInnes: I agree with the philosophy behind Nik Williams's point, but I will introduce the grubby voice of commerce. Channel 4 is currently deciding where it wants to set up its headquarters outside London. The question is whether, for an organisation that has a choice of places to set up, the attractive choice is somewhere where it can still be sued 10 years after a broadcast, and where it cannot count on certain defences, given that there is not much case law.

It is pre-eminently a matter for Parliament and not one to which a lawyer can add a lot of value, but I would have thought that the commercial issues that are in play are quite complex.

Daniel Johnson: The argument seems to be that we do not want to alter the law because the Scottish courts might experience a loss of market share—for want of a better expression—in defamation litigation. How good is that argument and what would we lose by losing such cases? The converse of that relates to what Rosalind McInnes has just said, which is that if all that we are doing by having slightly different laws in Scotland is making it easier for lesser-order cases to be brought to court, is that not a form of arbitrage that is no better than our losing market share? I am playing devil's advocate, slightly.

Campbell Deane: I do not deny that there is an element of self-interest—I will hold up my hand and say that. If the litigation is allowed to flow down south, the Scottish bar in the field of defamation will be gone. Next to no defamation cases would be raised in Scotland and such cases would end up being handled at the sheriff court—which would be fine, but not the same as the binding cases down south.

The opening premise is that the purpose of bringing the substantial test into play is to stop vexatious and frivolous actions, but we are saying that such actions do not exist, so we must ask why we should bring in such a test.

The Convener: Is that really the premise or is it simply a better test? Rosalind McInnes referred to the damages of £1 in a case that was not necessarily vexatious, and was so insignificant that the award of damages was merely a token. Gavin Sutter referred to the costs of bringing that case.

Campbell Deane: In principle, I agree, but point me to a case in which an award of damages of £1 has been made in a case in Scotland.

I have an interest in the Andy Wightman case because I am acting for Andy Wightman in it. A large part of the claim is not the solatium element, but the economic loss: it is to do with the fact that the pursuer claims to have lost, through his company, substantial amounts of money. That is not the same as saying that the award would be three times the level of the highest award in Scotland. In theory, the amount would be, but on a completely different footing.

10:45

The Convener: I issue a small warning, as I did previously. We can refer to the blog and we can refer to the on-going Andy Wightman case, but not in any detail, because it is sub judice.

Rosalind, did you refer to George Robertson, the former MP?

Rosalind McInnes: That is right.

The Convener: I think that you said "the late George Robertson". I hope that that is not the case.

Rosalind McInnes: I am sorry.

The Convener: Having stood against Mr Robertson in Hamilton in the 1992 general election—it was not unduly pessimistic to believe that I had absolutely no chance of winning—I have great affection for him. I am delighted to clarify that he is not "the late George Robertson".

Nik Williams: I dispute Campbell Deane's case that there is no evidence. The question is at what point do we count the chilling effect. For us, that has been way before a court case. A lot of the discussion is hovering around the idea of Scotland becoming a libel haven, in the same way that low-tax policies are established in some places to encourage people to go there. The law in question is vital for people who express themselves, who include bloggers and social media users as well as journalists. I do not think that Scots law should remain unreformed in this area in an effort to secure that status. That might be a crude analogy, but I think that it has some relevance.

The Convener: We will move on to Liam Kerr—I am sorry. I meant Liam McArthur. It is just my luck to have the two Liams out of 129 MSPs on the same committee.

Liam McArthur: I will follow on from the discussion about serious harm. On the proposals on reducing the time limit with regard to secondary and subsequent publication, Campbell Deane referred to the fact that there is not a lot there for pursuers. The purpose of the reform was discussed in response to the convener's question. Is it about providing an appropriate balance, or is it driven more by advances in technology and use of the web for publication of articles and the like? On the face of it, it looks as though there is recalibration that is more in the interests of defenders than it is in the interests of pursuers. I would welcome comments on that.

Gavin Sutter: First, I will address the point about recalibration, which I think is necessary. I feel that the Defamation Act 2013 was a recalibration in favour of a more even balance between the two parties rather than a recalibration in favour of defendants.

In England and Wales, the limitation period has since 1996 been one year, and I am not aware of that having posed any significant problem. My feeling all along has been that, if it really is the case that serious harm has been done to someone's reputation, they will try to do something about it in much less than a year. There is a great role for the Limitation Act 1980 in any difficult cases. In that context, I refer to Steven Morrissey's case against the *New Musical Express*. The case was settled out of court, but the High Court found in his favour and decided to exercise its discretion to hear the case three years later—in other words, well outside the limitation period—on the basis that he satisfied the court that he could not afford to pursue the case any earlier, largely because he had been too busy being successfully sued by other members of The Smiths over unpaid royalties. That case shows that a shorter time period does not present a difficulty with regard to obtaining justice, and I am sure that any number of other cases could be cited. I think that the reform that is proposed in that area is very sensible.

In the context of the web, the fact that online publication and modern media have rapidly speeded up the cycle makes a strong case for a tighter time period.

My understanding is that, under defamation law in France, people have a limitation period of four months in which to bring a case for something that is published in a newspaper, and a period of 12 months for something that is published in a book. I am not suggesting that we go down that road and complicate things with multiple limitation periods. However, a 12-month period is quickly becoming a fairly universal standard, which I do not think is a problem.

Liam McArthur: So, it is a limitation with discretion in particular cases.

Gavin Sutter: Yes. Discretion is important. It would have answered the issue in the Loutchansky v Times Newspapers Ltd and Others case, in which the action was launched 15 months after original publication. That could easily have been allowed on a discretionary basis, rather than the multiple publication rule being applied, as was the case.

Nik Williams: Scottish PEN supports the period being reduced to one year. It is important to note that the year is from when the pursuer became aware of the publication, and not necessarily one year from publication. That gives the defender a bit of flexibility.

I agree with Gavin Sutter on the anecdotal idea that, if something is causing someone significant harm, they will want to deal with it sooner rather than later.

Liam McArthur: There is an overall impression that, as part of the reform, we need a tilting of the scales in favour of defendants.

Nik Williams: Again, I agree with Gavin Sutter. It is not about tilting in favour of defendants; we need more equality between the parties. At present, things are incredibly skewed towards the pursuer, so any movement—

Liam McArthur: It sounds to me as though you are saying the same thing. At the moment, there seems to be an imbalance in that things are tipped too far in favour of the pursuer, either through the mere threat of litigation or through litigation itself. You are talking about providing more equity and balance.

Nik Williams: Yes. I guess that if we think about it as a spectrum, the situation is closer to that. I would say that we need more equal distribution between the pursuer and the defender.

All that skirts around use of the multiple publication rule or the single publication rule. The SLC's suggestion in that area is one of the most important reforms, because the multiple publication rule does not function accurately or effectively in relation to online coverage. If a person retweets something or shares a link, that can create another window of liability; that could, in principle, continue ad infinitum. That is one of the most antiquated aspects of Scots law, along with its not requiring third-person publication. It is somewhat baffling that that still exists.

However, it is interesting that the SLC has gone in a different direction from England and Wales in relation to online responsibility and liability, how content is deemed to be defamatory, and the obligation of the website operator. In our experience from talking to people down south, it is an interesting development that section 5 operates more of a take-down notice culture than something that actually—

Liam McArthur: We will come on to discussing the internet. My question is more about the issue between the defender and the pursuer.

I think that I cited Campbell Deane's view earlier when I said that there seems to be a shift in direction towards the defender. There does not seem to be any dispute that that is a necessary reform.

Campbell Deane: With my pursuer hat on, I note that I have said in the past that there is nothing in it for the pursuer. The proposal is a recalibration of a law that gives nothing to the pursuer and puts extra hurdles in their way.

On the abolition of the triennium and the move towards a period of one year, I have no particular issue with that. The only case in which I have been involved in which a litigant from down south who had been time barred came north of the border to sue was a case called Kennedy v Aldington, but the pursuer was entitled to sue only for the losses that he had sustained in Scotland. That loophole—I suspect that it was a loophole—will now be gone.

However, the argument is not just that if an individual believes that he has had serious harm occasioned to him, he will raise an action within a year. I have formed the view that, if the person believes that he has had harm raised against him, he will raise an action within a year. The harm does not have to be serious. You are not going to hang on and not litigate in that 12-month period to see whether the harm becomes more serious. If you have been harmed, you will raise there and then, or as quickly as possible thereafter.

Rosalind McInnes: Nik Williams's draft and Campbell Deane's draft would both look very different from the Scottish Law Commission's draft. Lord Pentland, who when he was at the bar was the most experienced media law silk in Scotland, acted for both sides, and he has said that he does not see it as a rebalancing. It is a question of how one looks at it. It has already been said this morning, and said truthfully, that in most causes of action the person does not have to show that they have suffered serious harm. Also, in most causes of action the onus of proof is not on the defender, but so often in defamation cases that is how it is.

If the BBC were to run an investigative piece that said that a person was a fraudster, and our position was that the investigative piece was true, the onus of truth would be on the defender. There is at the moment a presumption of falsity, a presumption of malice and a presumption of damage, so the only way to actually rebalance defamation law in favour of the pursuer in Scotland would be to introduce criminal libel, which has never been part of our law. It could not get an awful lot worse for the defender, as I see it, although my view is obviously partisan, in its own way.

The Convener: We touched on the internet, which is a very interesting area. Jenny Gilruth has some questions about that.

Jenny Gilruth: I would like to pick up on some of Gavin Sutter's written evidence. You note that the approach taken to online content in the draft bill is "unnecessarily complicated", and you state:

> "No-one, of course, wishes to make life extremely difficult for online hosts or to cause a chill on freedom of expression via an environment in which distributors, especially online, become over-cautious."

Are there gaps in the draft bill in relation to online content? For example, there is a notice and take-down procedure that exists in England and not in Scotland.

Gavin Sutter: My issue with the draft bill is essentially with sections 3 and 4, where it takes the approach of saying, "You're not allowed to take proceedings against these guys unless they get put on a list by somebody in the Executive." I do not see the need for that approach. I think that the approach in the 2013 act is sensible and, unlike some in the broader reform camp on libel, I do not agree with completely immunising the service providers in the way that the United States did. That was done by accident in the US, and I can give you the full history on that another time. What has been achieved in the US by completely immunising service providers for third-party

content is that, ultimately, the content stays there and they sit back and say, "Nothing to do with us," and it gets messy.

What the 2013 act did—and this is the approach that I think Scotland should adopt—was to say, first, that you cannot go after the service provider if you can go after the real source. Section 10 of the act says that you should fight the real enemy. You can go after the service provider only if you cannot realistically go after the source, so that makes life easier. The section 5 defence and the associated regulations provide a clear notice and take-down procedure that effectively means that, if you comply, you do not end up in trouble and you are not, as a service provider, put in the position that was always the difficulty, from 1996 onwards, where you have to ask, "Do I take this down and squash somebody's legitimate expression, or am I more afraid of the big corporate interest that has threatened to sue me over this blog? And now that I'm aware it's there, if I don't take it down, I've called it wrong." We all saw what happened to Demon Internet back in the 1990s.

I do not see any need to take an alternative approach to that, or to say, "That's the position for some people we nominate but other people will be immunised," because that raises its own problems.

Jenny Gilruth: I would be interested in the rest of the panel's views.

Nik Williams: A lot of our work down south has been done with English PEN and the libel reform campaign, and their view of section 5 of the 2013 act is that, although it establishes a process that the web host or web operator can undertake to insulate itself from liability, in practice it is still seen as a take-down process. If the web operator is unwilling to go through the process, it will take down the content, and by taking it down it is positioning itself as a lawyer, in a sense, without knowing what defence that commenter might have in their back pocket. That is why we are a bit worried about section 5. Also, section 5 discourages the use of anonymity. Anonymity is vital for a lot of internet users and should not be considered something to be fought against so that the web operator can protect itself if it receives a complaint about content on its website.

11:00

We are largely in favour of the SLC's position on defining roles and responsibilities and how they manifest themselves online and off. There are aspects in its proposals that are problematic. Sections 2 to 4 outline the criteria for membership of a public authority and define "author", "publisher" and "editor". Any regulations made under those sections are subject to the affirmative procedure, which is good, but our gut feeling is always to encourage changes to primary legislation to ensure that it continues to represent Scots law on defamation in its entirety so that people know what their responsibilities are and which category they fall into.

There are also certain more technical issues that we are concerned about. We are not wild about the definition of "editor", whereas the definition of "publisher" is pretty robust. The definition of "editor" still leaves a lot of uncertainty for online activity, especially retweeting or sharing content on social media as opposed to writing original, organic content. We appreciate that that is an incredibly complex aspect that the law is running to catch up with. Even section 5 of the 2013 act in England and Wales, which is only five years old, is now starting to become out of date; there is always that need to catch up. The SLC talked about the possibility of a review of internet intermediaries but decided that that would need to be United Kingdom-wide, not just in Scotland. I respect and appreciate that tension. That aspect will always be hard to write into any reform but, to be frank, anything would be better than what we have now.

The Convener: In your submission, you made the point that affirmative procedure gave a "level of accountability" but not the level of independent scrutiny that you think is necessary.

Nik Williams: There is also the idea, which Rosalind McInnes touched on, of the law being comprehensible to the layperson. The affirmative procedure is far better than the negative procedure, which I think was in a previous suggested draft, but changes to primary legislation are always better because they allow an extra level of scrutiny and public awareness that the change is happening or at least being discussed.

The Convener: That is a fair point.

John Paul Sheridan: We are generally supportive of Gavin Sutter's point. We are talking about investigative journalism and the public interest, for example, but the reality is that a lot of the cases are much more down to earth than that. The typical complaint that will come in is about an adverse review for a small bed and breakfast or restaurant on TripAdvisor or a similar website in which somebody says something outrageous. At the moment, it is very difficult for the pub or restaurant owner to get the content taken down, especially if it is from an anonymous blogger and the website is hosted in southern California. It would be problematic from a practical point of view to give an absolution to the website host or internet service provider because it is almost impossible to work out who the true person who posted the content is. At that point, there should be some liability on the host so that, at least, there can be a take-down procedure. The difficulty at the

moment is that the website—TripAdvisor or whoever it is—will just say that it is not its problem.

The Convener: So the situation is much more straightforward if the poster is anonymous. The content should just be taken down and no questions should be asked.

Nik Williams: I reiterate the point that anonymity has an importance that we should consider. It is a pain in circumstances such as those that we are discussing, but many people will not exercise their right to free expression online if they cannot post anonymously or under a pseudonym. That should not be dealt with lightly or solely as a nuisance for website operators or the law more broadly.

The Convener: What about the TripAdvisor-type scenario in which the post is perhaps malicious? The person might have gone to the establishment, had an argument and just decided to give it a bad review knowing that it will have huge consequences for that small hotel or whatever the business is.

Nik Williams: I do not know how many people set store by a sole TripAdvisor review on top of a number of other reviews. Other defences are potentially available, such as that it is their honest opinion or that they may be able to prove the fact. I have never run a hotel, but I imagine that it is not pleasant to receive negative reviews. However, any process that does not enter into discussion of the core nature of a review might ignore the fact that there could be a sound basis for that review. It becomes a sort of reputation management process as opposed to acknowledging that there might be a genuine—if robustly argued—point. Free expression in a modern democracy is messy and it can be unpleasant at times. It is noisy imperfection, as opposed to silent perfection. Frankly, I think that we need to realise that that is part of the expression landscape that we are signed up to.

Gavin Sutter: I have comments on a couple of points that have been raised. One is that perhaps the section 5 issue could be firmed up. I suspect that the Digital Millennium Copyright Act in the United States was the model for that provision. That act is very clear on exactly what the position of a service provider is.

It is important that anonymity is valued, but we need to be very careful to defend against the abuse of anonymity online. My impression from the libel cases that I have seen that relate to the internet is that an awful lot of them started off with somebody who had not thought it through thinking, "It's only the internet and nobody knows who I am—I can say what I like." I am wary of balancing out considerations of legitimate free expression against abuse of expression on that front.

The other point that I think is significant is on dealing with links or likes or sharing content that is moveable. There may be an argument for a distinct provision that deals with that issue, which might be based on what the person was aware of at the time they shared something. That might merit further exploration and be dealt with separately.

Daniel Johnson: Following up on that point, the imprudent posting of things on the internet by somebody who did not think it through is one element of the way in which anonymity is used, but in recent months we have all become aware of the use of anonymity for corporate and state interests. Although the implications of that are much wider than simply defamation, do you have any thoughts on that and on its interactions with the topic of anonymity?

Gavin Sutter: Certainly, there are a lot of dangers as well as bonuses if there is anonymity and we do not know who we are dealing with. What if a competitor, such as the hotel down the road, is posting those reviews on TripAdvisor rather than a genuine customer? That possibility cuts across a lot of areas.

I agree, but we need to be careful. There have been important cases on privacy, such as the case on the Nightjacker blog, which have addressed the idea of the validity of anonymity in the context of online expression. In the defamation context, I think that we need to be very careful that the law guards against those who would abuse anonymity to further a deliberate defamation, as distinct from somebody using a pseudonym because they do not want the kids they teach to google them and find them in Rocky Horror costume, as a wild example.

Nik Williams: On how anonymity is used, I have friends who are teachers who use pseudonyms online when they talk about political issues. A whole host of other people use them, such as immigrants, refugees and asylum seekers, and survivors of domestic abuse use them to ensure that their abusive partner is not aware of what they are communicating online. I do not want anonymity to be seen as a trivial issue or as something that is only a tool for the malicious or the nefarious.

Also, as for state interests, it is not anonymity itself that is making foreign interference an issue; it is slack regulation and lack of transparency in how these platforms and processes work. The issue cannot be laid solely at the door of anonymity. Facebook has its much-maligned real-names policy, albeit that it is pretty flawed, and Facebook is still a target for what are to date unknown actors. Anonymity itself is not the necessary and sufficient facilitator of evil.

We also have a problem with what the SLC's draft bill has to say about the court's power to require removal of a statement. We think that the power should be much narrower. We appreciate that the court can and should order the removal of content, if it is deemed to be defamatory, but what is removed should be the line, paragraph or link that was argued about; there should still be editorial control over whether the overall piece can stand without that line or paragraph.

We are also very worried about the SLC's view that

"the court should be given power at any stage of defamation proceedings ... to order removal or cessation of distribution etc. In an appropriate case such an order could be granted at an interim stage, before the final outcome of the proceedings has been determined."

That is incredibly problematic, largely because there is nothing in the bill or the explanatory notes that establishes the mechanism by which such an order can be reversed if the complained-of statement is deemed not to be defamatory. The removal of something before a judgment has been made on it is problematic, in our opinion.

The Convener: I want to tease out something before we leave the issue of the internet. The single publication rule could skew things against a pursuer. Under the proposed new rule, only the person who initially put up the comment would be subject to a defamation claim. Other people could repeat the comment again and again, but they would not be liable. I think that it was Mark Twain who said that a lie can be halfway round the world before the truth gets its shoes on. How can we stop such a situation, which goes very much against the pursuer's interests? The internet spreads things so quickly and so widely, but there would be no redress for people.

Nik Williams: The single publication rule allows for liability to follow from republication, if it can be proved that the original statement has significantly changed. It allows for that sort of flexibility.

The multiple publication rule is based on a fundamental misunderstanding of how the internet operates. A hyperlink is published when it is published on the blog or website—it is not republished every time someone copies and pastes it into a tweet and shares it. As I said, the single publication rule allows for flexibility if it can be proved that someone has changed the statement significantly to the effect that it is a new statement.

The Convener: However, there is no remedy if the defamatory comment has not been changed and people keep repeating it.

Nik Williams: That is the idea that, for example, I have three followers on my Twitter account and I tweet something that someone else has published, and then someone with a high follower base—a celebrity, for example—retweets it and it goes to millions of people. The single publication rule allows for a process whereby the pursuer can prove that the statement has changed significantly enough to warrant further potential liability—

The Convener: But what if it is not changed and is just repeated?

Nik Williams: If it is just repeated, it is the original publication that should stand. In the internet age, the multiple publication rule enables liability to run on almost ad infinitum, because we can never be sure where a hyperlink will end up.

Rosalind McInnes: The Scottish Law Commission's wording in the draft bill is:

"In determining whether the manner of the subsequent publication is materially different from the manner of the first publication, the court may have regard to—

(a) the level of prominence that the statement is given,

(b) the extent of the subsequent publication, and

(c) any other matter that the court considers relevant."

The proposal is for quite broadly textured discretion, which might be the answer to the concerns that you expressed, convener.

The Convener: So we might rely on the court.

My next question is about when one intervenes. Under the proposed new approach, how soon can defamation proceedings start? I think that there are various points at which they could start. The issue was raised in a submission—I cannot remember whether it was from Nik Williams or Gavin Sutter.

Nik Williams: I said earlier that a case is actionable when the pursuer is aware of the statement. I do not think that I submitted a comment on that in written evidence; maybe Gavin Sutter did.

Gavin Sutter: Will you clarify your question, please, convener?

The Convener: I cannot remember exactly where I read the comment. It was about whether things start when the statement is made or when it is repeated—there are various times when things could start.

11:15

Gavin Sutter: In that context I was talking about section 1 and the serious harm issue, which is a significant question. If you want to go back to that, I am happy to address it.

The Convener: No. We will move on. Liam Kerr has a question.

Liam Kerr: How confident can we be regarding the date of the original publication? If I have heard it right, every time the hyperlink is copied over into a new form, it is substantively the same thing. Could there be any ambiguity as to what is the original publication date? Would a one-year limitation not leave open a scenario in which I launch proceedings towards the end of my one-year limitation but it turns out that there was an original publication two months prior to what I thought and I am therefore out of time? Is that possible?

Nik Williams: Again, something is actionable only once you are aware of its publication; the limitation time starts from that point, not from the point of the original publication.

Liam Kerr: Ah! It starts from the point of awareness.

Nik Williams: I am not a tech guy, but I know that, when a post is published, it is in the metadata on the website and most things are identified by when they are published. That is a very hard thing to fictionalise. However, I have to defer to someone with more tech background than me on that.

Gavin Sutter: That might also go back to the serious harm issue in that if there was a complete lack of awareness of it, we might argue that there has not been serious harm to reputation as a knock-on effect. I would imagine that most people who find that they are suffering the effects of something like that would start to ask questions and work backwards.

Liam Kerr's example might also be a case where the court could be petitioned to exercise its discretion under the statute of limitations to hear the case anyway, in the interests of justice. I would see that as a natural fit to mop up any awkwardness in that sort of situation.

Rona Mackay: I want to ask the witnesses about the codification of the common law, particularly with regard to the definition of "public authority". The draft bill bans public authorities from suing for defamation, but the term "public authority" could cover a wider spectrum and bring in universities or housing associations and the like, which might need to protect their reputation from time to time. Are you happy that the draft bill does a good job of codifying the law in that area?

Campbell Deane: Section 2(5) states:

"For the avoidance of doubt, nothing in this section prevents an individual from bringing defamation proceedings in a personal capacity".

I struggle to understand what that means. If, heaven forbid, an MSP or an MP has an adulterous relationship in Parliament, they are acting in a personal capacity. It is not defamatory to accuse someone of having an adulterous relationship. However, theoretically, if you were litigating in that situation and the accusation was not true, you would argue that the sting of it is the hypocrisy angle—that if the person accused of having an adulterous relationship behind their partner's back is a member of a political party that had a general principle of family values, you would sue on the basis of the hypocrisy angle. Where is the "personal capacity" aspect of that? I do not see how an MP or MSP could raise proceedings on the basis of that circumstance.

Nik Williams: It is one of the more complicated aspects and it has that element of vagueness. Let us say that someone is in control of a council's finances and an allegation has been put to the council that is deemed to be incorrect and potentially defamatory. Although the council would not be able to bring an action, if the allegation could be personally linked to an individual in that authority, that individual could try to bring an action.

It raises some concerns. There was a case in England—I cannot remember the name—where someone in a council who brought an action was bankrolled by the council to do that. That could be seen as undermining the Derbyshire principle via the back door. We think that that is problematic.

I know that the Faculty of Advocates raised an interesting question around where the public aspect stops and the private aspect starts in relation to individuals such as MSPs, MPs or councillors. Where is the grey line between public and private? I acknowledge that there is an inherent complexity to that.

Rona Mackay: Let us say that a constituent complains about a housing association, and they go to the press about it and name an individual who works there. If that individual is absolutely destroyed in the press, that housing association would have no redress under the draft bill.

Nik Williams: Our reading—others on the panel may have a different view—is that the housing association would not have any redress, but an individual in the association who was identified could seek redress as a private individual.

John Paul Sheridan: From my point of view, the drafting leaves a lot to be desired, in terms of both the recourse that the individual has and the wider question about the definition of "public authority". Does it cover universities and housing associations?

Section 2(5) was added in following initial feedback. The draft bill that is in the SLC report is different from the original draft. Section 2(5) states that,

"For the avoidance of doubt",

a person can still sue in a private capacity. That is intended to deal with the issue, but I do not think that it does.

Everyone is aware of the historic case of Jonathan Aitken MP—sorry, I mean the case of Neil Hamilton, who was accused of taking cash for questions. He was an MP—he was performing a public function—and was accused of abusing that public function by taking cash to ask questions in Parliament. He is entitled to sue under that rule in a personal capacity but in what sense is any of it to do with his personal capacity? In my reading of the provision, there would be no entitlement to sue for defamation as an individual in those circumstances, which I do not think can possibly be the intention.

Equally, the phraseology used could cover all sorts of people who exercise a public function—senior civil servants, people in the national health service, or other people who perform a public function.

The way that the test is set out is to do with the way in which something is funded and what the functions are. That is potentially very wide, and I am not sure that that is the intention.

Rona Mackay: What would you suggest to improve or alter the provision? Does the whole area need to be looked at again?

John Paul Sheridan: Our view is that it needs to be looked at again. "Public authority" is defined in various pieces of legislation on all sorts of things. I see that the Law Commission has referred back to the human rights test, but we need to be very careful about that because the specific instance here is to do with reputation and protecting reputation from harm.

The Law Society of Scotland had specific feedback from the university sector, which is an important sector for the country as a whole. The universities are concerned that their reputation could be damaged, but they would not be able to do anything about it. That is a legitimate concern.

Rosalind McInnes: That problem is already here. It is a real problem. Whether it is from the pursuer's perspective, where you have overlapping public functions and questions of personal integrity, or from the defender's perspective, where there is a concern that a powerful corporation could subvert public discourse by putting an individual victim's face on an action, the problem is already here under the Derbyshire principle. It is an existing problem. Maybe this is an opportunity to fix it.

Gavin Sutter: It is a difficult area and, as Rosalind McInnes said, there is an overlap. I would argue that, when an MP is unfairly accused, they have been personally defamed; their party's reputation has been maligned, but the party cannot sue. I do not have a problem with the individual being able to sue now. As Nik Williams said, that has happened. There have been a number of cases in England and Wales in which local councils have funded the individual through the back door on the basis that, although the council cannot sue, when the individual restores their reputation, the council's reputation is, de facto, also restored.

I suggest that we look at the area of privacy law, in which there is some very developed case law on the public figures issue—the Campbells, the Mosleys and so on. That case law covers the distinctions between what is genuinely in the public interest and what is about the private interest—where the various interests fall between the public person and the private person. We could learn a lot from applying that sort of thinking in the defamation context. It is always going to be difficult.

The other area that presents a similar difficulty is when bodies that primarily trade for profit—private bodies—act in a public capacity. We need to bullet proof that, or there will be a danger that a council, for example, may decide to avoid any possibility of being held accountable for decisions by farming them all out and outsourcing them to private interests that may be in a position to sue. That relationship needs to be clarified in a similar way.

The Convener: Nik Williams said that, too. I want to be clear about this. Are we talking about commercial confidentiality being used as a catch-all that prevents information about what is actually being delivered from being provided and probed, with no way of challenging that? That happens all the time.

Gavin Sutter: If a company is functioning as part of the NHS, whether it is a catering company or a company that provides eye tests or whatever, it should be treated in exactly the same way as the NHS on all aspects of legal accountability, including defamation.

Nik Williams: This is a really important issue. The Derbyshire principle has been around for a while, so the draft bill is just codifying it. It is good to have all the relevant law in one place, but that brings inequality. It is almost a lottery: how well protected someone is depends on who delivers their public service.

Let us say that all public services in Glasgow, where I live, are delivered by a public body, but the same public services are delivered by a private company in Argyll. People in Argyll are potentially not protected in the same way that I am, as the Derbyshire principle would protect me from a response from the council, but the situation is not

the same in relation to a corporate body. Scottish PEN is one of the more radical organisations calling for corporations to be removed from defamation law. However, even outside that, the example demonstrates a very problematic tension.

Rosalind McInnes: You will be fed up hearing about the general data protection regulation, but, to pick up Gavin Sutter's point about privacy, living identifiable individuals have accuracy rights in relation to data. That is another route in, when personal integrity is the concern.

The Convener: That is helpful.

Mairi Gougeon: I want to ask about defamation of the dead, which has been discussed a number of times in Parliament; there has also been a petition on it. What are the panellists' views on whether the position in Scotland should remain as it is at present, which is that the dead cannot be defamed? Is that the correct position? I am also interested to hear whether that is the position in other countries or whether there are examples that we should know about?

Nik Williams: We recognise the distress that can be caused by things that would fall under defamation of the dead. However, for us, including such a provision would fundamentally alter the nature of defamation and how it operates across society more broadly.

We supported the SLC's omission of defamation of the dead from the draft bill, for a number of reasons. It could really limit investigative journalism after the fact. Rosalind McInnes mentioned the Jimmy Savile case. During his life, he relied on legal threats against people coming forward, so including a provision on defamation of the dead could continue that chilling effect on scrutiny. Distress can be remedied through the use of press standards, regulations and editorial codes, and existing laws that prevent harassment could also establish a method of recourse for the surviving families or friends. It is one of the more distressing parts of defamation law, but our position is that we support its not being in the draft bill.

11:30

Gavin Sutter: I am completely on board with that. One of the earliest maxims that I learned as a law student was that hard cases make bad law. I am aware of the Watson case in Scotland, which has driven a lot of the debate up here. It is an area that I have been writing about with a colleague—we hope to publish within the next year. My feeling is that including such a provision would extend defamation dangerously. That is partly to do with the Savile case and so on, but defamation itself is about the impact on a living individual or legal person, as it has an on-going negative impact. In cases of defaming the dead, and certainly in the Watson case, it seems to me that it is more about the impact on the parents and the family, and I feel that there are other, better ways of addressing that. From what I have read of the case, a lot of what the Watson family is complaining about might be better dealt with under harassment legislation, rather than by extending defamation.

More broadly, I was involved in an online argument, under a pseudonym, over whether Churchill was a racist and a drunk. It is important and healthy that we should have those debates, and such provisions could only stifle them. I do not feel that it is an area in which we could usefully separate private and public people and say who is fair game. It is very much about the impact on the living relatives who are left behind, and there are better ways to address that than by expanding defamation.

The Convener: You mentioned harassment legislation. Are there any other ways of dealing with that impact?

Gavin Sutter: As Nik Williams said, we could consider press behaviour—all the stuff about public pursuit and the rules on news gathering, and whether there is an invasion of privacy in terms of what is being published. There is obviously stuff that is negative and inappropriate, but there is also a lot of stuff that will be published around such cases that is difficult and unpleasant for the relatives but which is a matter of record and fact; to an extent, it is a freedom of expression issue.

Rosalind McInnes: Probably predictably, I would endorse the view of Gavin Sutter and Nik Williams. It is a matter that has received a lot of careful thought in the recent past, and I do not think that it would be a good idea to revisit it.

In relation to the specific point that Ms Gougeon raised, I am aware that both Malta and Slovenia have defamation of the dead as part of their codes. Those are the only two that I know about, but I have not made an exhaustive study. I think that, even in the civilian law tradition, it would be a bit of an outlier to include defamation of the dead. However, the answer to the question is that some states have it.

Gavin Sutter: I think that there is something in Romania. I know that, about 20 years ago, a descendent of Vlad Țepeș attempted to sue Francis Ford Coppola because he had made a connection between Dracula and Vlad the Impaler. There is also, I am told, something in Chinese law, but Chinese law is a bit of a closed shop to outsiders, unfortunately. As Rosalind McInnes says, including defamation of the dead would be very much an outlier and certainly not the universal standard that we are fast heading

towards. The impact of cases such as Savile militate heavily against it.

The Convener: Clearly, it is a big issue for the Watsons, so the fact that you are suggesting an alternative way to address it, rather than using defamation, may be of some comfort.

As there are no further questions, I thank all the participants for contributing to this useful round-table session on defamation. We were looking at the possibility of bringing the draft bill forward as a committee bill. That rarely happens in the Scottish Parliament, partly because it is a very complicated process, which is another issue. However, having had the discussion and pressed the issue, it now seems that the Government is going to take it forward, which is welcome. I am sure that the Government has found this morning's session worth while, as have committee members.

That concludes the public part of the meeting. Our next meeting will be on the morning of 14 June, when we will take evidence from the Secretary of State for Scotland on Brexit.

11:35

Meeting continued in private until 12:52.

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