Social Action, Responsibility and Heroism Bill: Progress of the Bill

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Section Home Affairs Section

This is a note on the progress through both Houses of Parliament of the *Social Action, Responsibility and Heroism Bill* (the Bill). It complements Library Research Paper 14/38 prepared for the Commons Second Reading.

The Coalition Agreement included a commitment to encourage volunteering and involvement in social action. The Government intends that the Bill will help to fulfil this commitment by reassuring volunteers (and others) that the courts will consider the context of their actions in the event that they are sued for negligence or breach of statutory duty. The Bill is one of a number of initiatives being pursued by the Government to tackle the perception of a "compensation culture" which, among other things, may deter people from volunteering or getting involved in activities of benefit to the community.

The Bill was not amended in the House of Commons. Two Government amendments, one to **Clause 3** and the other to **Clause 4**, were agreed in the House of Lords. The House of Commons is due to consider Lords amendments on 2 February 2015.

Contents

1 Introduction and background

1.1 The Bill

The Bill, as amended in the House of Lords, would require the court, when considering what steps the defendant should have taken in a specific case, to have regard to whether:

- the alleged negligence or breach of statutory duty occurred when the defendant was acting for the benefit of society or any of its members;
- in carrying out the activity in the course of which the negligence or breach of statutory duty occurred, the defendant had demonstrated a predominantly responsible approach towards protecting the safety or other interests of others;
- the alleged negligence or breach of statutory duty occurred when the defendant was acting heroically by intervening in an emergency to assist an individual in danger.

The Government's Explanatory Notes published with the Bill provide detailed commentary on the clauses. Further background and information about the Bill's provisions is included in Library Research Paper 14/38, which was prepared for the Bill's Second Reading in the House of Commons.

The Bill would extend to England and Wales. The Explanatory Notes state that the provisions in the Bill relate to non-devolved matters in Wales and do not affect the powers and responsibilities of Welsh Ministers.

1.2 Bill stages

The *Social Action, Responsibility and Heroism Bill* (the Bill) was introduced in the House of Commons on 12 June 2014 as Bill 9 of 2014-15. It had its Second Reading on 21 July 2014,[1] and was considered by a Public Bill Committee in three sittings between 4 September and 9 September 2014. At its third sitting, on 9 September 2014, the Public Bill Committee conducted a line-by-line consideration of the Bill.[2] Three further scheduled sittings were not used. The Bill was reported without amendment. Report and Third Reading in the House of Commons took place on 20 October 2014;[3] no amendments were agreed.

The Bill was introduced in the House of Lords on 21 October 2014 as Bill 47 of 2014-15. Second Reading was on 4 November 2014,[4] and the Bill was considered by Committee in a single sitting on 18 November 2014.[5] The Bill was reported without amendment. One Government amendment was agreed at Report stage on 15 December 2014.[6] The Bill had its Third Reading in the Lords on 6 January 2015 when another Government amendment was agreed.[7] The House of Commons is due to consider Lords amendments on 2 February 2015.[8]

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1 HC Deb 21 July 2014 cc1187-1213
2 PBC Deb 9 September 2014 cc57-86
3 HC Deb 20 October 2014 cc682-705
4 HL Deb 4 November 2014 cc1545-78
5 HL Deb 18 November 2014 cc377-422
6 HL Deb 15 December 2014 cc13-48
7 HL Deb 6 January 2015 cc252-62
8 *Bill 148 2014-15 Lords Amendments to the Social Action, Responsibility And Heroism Bill*

2 Second reading debates

2.1 House of Commons

At Second Reading, Chris Grayling, the Lord Chancellor and Secretary of State for Justice, set out the purpose of the Bill and said that it aimed to send a signal to judges rather than to rewrite the law in detail:

> The Bill is about bringing back common sense to a part of our society that week in, week out frustrates many of us; about restoring balance to the health and safety culture that all too often goes beyond what is necessary to protect individuals; about tackling a culture of ambulance chasing that all too often is about generating opportunities to earn fees, rather than doing the right thing; about ensuring that people who do the right thing are confident that the law is on their side when they do so; about trying to protect those who act in the interests of our society; about protecting those who go out of their way to take the responsible approach; and about protecting those who take risks to try to help those who are in trouble. It does not rewrite the law in detail or take away discretion from the courts, but it sends a signal to our judges and a signal to those thinking about trying it on—by bringing a case in the hope that it will not be defended—that the law is no longer on their side.[9]

He said that the Bill was about "deterring spurious claims" and that it would also send a message to those outside the courts:

> It is about the decisions to sue that may or may not be made. It is about the small business that gives way to a spurious claim, believing that there is a risk in defending it. The Bill is designed to send a powerful message, inside but particularly outside the courts, that if someone is going to take legal action, there is clear visibility of the law, and the law will clearly not be on the side of a person who is trying it on. That is what we are trying to achieve.[10]

Chris Grayling wanted people to feel confident about participating in activities that benefit others "without worrying about what might happen if, despite their best efforts, something goes wrong and they find themselves defending a negligence claim". He reiterated that the Bill would not remove the discretion of the court, or prevent a finding of negligence in appropriate circumstances, or deal with criminal liability, but that it would provide reassurance:

> What it does ... is drive out spurious claims, deter health and safety jobsworths and help to reassure good, honest and well-meaning citizens that if they act responsibly, do something for the public good or intervene heroically in an emergency, the law will be on their side. Businesses should not be deterred from providing jobs and contributing to our economy by a fear of opportunist litigation and individuals should not be deterred from helping their fellow citizens by a fear that they will somehow put themselves at legal risk
>
> (...)
>
> I believe that the Bill strikes a fair, proportionate and sensible balance that will provide a clear and valuable reassurance to counter the fears that are proving such a deterrent, putting people off volunteering, and that cause anxiety to small businesses, which worry that they might end up at the wrong end of litigation, while ensuring at the

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9 HC Deb 21 July 2014 c1187
10 HC Deb 21 July 2014 c1189

> same time that those who are genuinely injured through negligence or who suffer wrongs are not prevented from obtaining redress where appropriate.[11]

Sadiq Khan, Shadow Lord Chancellor and Shadow Secretary of State for Justice, expressed support for volunteers but disagreed with the premise of the Bill. He spoke of Ministry of Justice figures which showed that the number of civil cases was going down and said that there had been an increase in volunteering. He questioned whether the Bill would achieve anything:

> When assessing negligence claims, courts already take into account whether somebody is doing something for the benefit of society, as is recognised by the impact assessment of the Ministry of Justice. That is why organisations have insurance. Although they may be defendants in a claim, they would not be financially liable and their insurer would pay out.[12]

Sadiq Khan also queried whether the Bill would do anything not already covered by section 1 of the *Compensation Act 2006*.

Some Members expressed support for the Bill.[13] However, Sir Edward Garnier (Conservative) said that he could not support it and questioned whether the Bill would make any practical difference to the current law:

> If we are to pass or make laws, they must be coherent. Although I entirely agree with all the sentiments that [the Lord Chancellor] uttered this afternoon about reducing the so-called health and safety culture, reducing the easy acceptance of the only answer to a problem being to sue and dissuading ambulance-chasing solicitors from doing this, that or the other, I regret to say that I do not agree that this particular Bill will achieve that.[14]

Sir Edward Garnier considered that legislation should not just send out a message:

> The Bill is more like an early-day motion than a proper statute. I say that because, as the Secretary of State admitted, it is predominantly there to send out a message—a strong signal. ... we should legislate not to send out signals or messages, but to make good black-letter law, so that the courts know what the law is and can apply it, and so that the legal professions know what it is and can advise the public on it.
>
> My concern is that the contents of the Bill have been within the common law and the ambit of the court's appreciation for years and years.[15]

Shadow Justice Minister, Andy Slaughter, thought that the Bill would trigger satellite litigation on the definition of terms in the Bill: "benefit of society", "a generally responsible approach" and "acting heroically".[16] He also questioned how the purpose of the Bill would differ from section 1 of the *Compensation Act 2006*, which, he said, "gives guidance to the court in less ambiguous and florid language than the instant Bill, while retaining discretion".

Closing the debate, junior Justice Minister, Shailesh Vara said that the fear of litigation could force businesses to go further than they needed to when planning and managing for health

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11 HC Deb 21 July 2014 c1194
12 HC Deb 21 July 2014 c1200
13 See for example, Nick Hurd HC Deb 21 July 2014 c1194, Jim Shannon HC Deb 21 July 2014 cc1205-7
14 HC Deb 21 July 2014 c1202-3
15 HC Deb 21 July 2014 c1202-4
16 HC Deb 21 July 2014 c1208

and safety risks, which in turn could have a damaging effect on growth. He also confirmed that the Bill would not prevent an employee bringing a negligence claim against an employer:

> The Bill is not designed to reduce standards of health and safety in the workplace or to leave workers without a remedy where they have been injured by the negligent actions of an irresponsible employer. It will, however, provide valuable reassurance to employers who have taken a responsible approach to safety, but end up in court when, for example, an employee suffers an injury that simply could not have been foreseen by any reasonable person. The Bill will send the powerful message that the courts will always consider the employer's general approach to safety in the course of the activity in question before reaching a decision on liability.[17]

2.2 House of Lords

Justice Minister, Lord Faulks, introduced the Bill at Second Reading in the House of Lords, saying that the Bill formed part of a much wider programme of measures designed to "tackle unjustified and dubious claims and reduce fears of litigation".[18] He said that the Bill went further than section 1 of the *Compensation Act 2006* by making it a requirement for the courts to take account of the context where someone was acting in a socially beneficial way for the benefit of others.

He noted that there had been some criticism that the Bill would undermine the rights of employees but said that the Bill would not prevent anybody who had been injured from bringing a claim, or prevent the court finding an employer or any other defendant negligent, if the circumstances of the case warranted it.

Lord Lloyd of Berwick (Crossbencher) moved an amendment to oppose Second Reading on the basis that:

> (1) it is unnecessary and the subject matter is already covered by Section 1 of the Compensation Act 2006, and (2) the sole purpose of the Bill is not to make new law but to send out a powerful message or signal on behalf of the Government to the Courts, which is not a proper use of legislation.[19]

Lord Lloyd considered that the Bill was "unamendable":

> The Bill is so defective in all three operative clauses that the only feasible amendment is to take each of the three clauses in turn and remove it from the Bill, one by one.

Lord Beecham, Shadow Spokesperson for Justice, criticised the Bill as being "trivial" and called it "doubly otiose". However, he did not consider that it should attract such an amendment and said, if there was a division on it, he would advise Opposition Members to abstain.[20]

Other peers also said that they could not support the amendment. For example, Lord Pannick (Crossbencher) said that he shared much of Lord Lloyd of Berwick's analysis but would not vote against Second Reading:

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17 HC Deb 21 July 2014 c1212
18 HL Deb 4 November 2014 cc1545
19 HL Deb 4 November 2014 cc1548
20 HL Deb 4 November 2014 cc1554-5

> This is a Government Bill that has been through the House of Commons. Its contents are not objectionable; they are simply pointless. Such a Bill is not worthy of provoking a fundamental conflict between the two Houses of Parliament.[21]

Lord Lloyd of Berwick withdrew the amendment and the Bill was read for a second time.

3 Debate on the clauses of the Bill

This section of this paper deals with debates in both Houses on proposed amendments. Not all proposed amendments are considered; nor are attempts to extend the scope of the Bill.

3.1 Clause 1: When the Bill applies –Not amended

Public Bill Committee

In Public Bill Committee (PBC), Andy Slaughter moved Amendment 2 which would have added to **Clause 1** the following words:

> Nothing in this Act confers on any person immunity from civil liability, nor does it change the relevant standard of care in negligence or breach of statutory duty.

Andy Slaughter said that the courts already took into consideration the matters included in the Bill and asked the Minister to confirm the Government's intention behind the Bill and whether it was to change the substantive law.[22]

In response, Shailesh Vara said the Bill would send out a powerful signal to the public "that when they do the right thing, the courts will take that into account and they will not be penalised".[23] He stated that **Clauses 2 and 4** essentially reflected the current law but would "strengthen and emphasise it" while **Clause 3** would change the law.[24]

The Minister did not consider that that there was any risk of **Clause 1** being misinterpreted by the courts and said that Amendment 2 was unnecessary:

> Nothing in the Bill suggests that it gives immunity from civil liability. It also does not change the standard of care that is generally applicable. That is and remains what the ordinary and reasonable person should have done in the circumstances. The Bill simply requires the court to have regard to certain factors in deciding what steps should have been taken to meet that standard of care in a particular case. It does not tell the court what conclusions to draw or prevent a person from being found negligent if the facts of the case warrant it.[25]

Shailesh Vara drew a distinction between the provisions of the Bill and section 1 of the *Compensation Act 2006*:

> At the moment, the court may take into account certain factors, which means that it does not have to do that. We are seeking to direct that the courts must do that. That is pretty simple and straightforward, but it is important.[26]

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21 HL Deb 4 November 2014 cc1565
22 PBC Deb 9 September 2014 cc58-67
23 PBC Deb 9 September 2014 c64
24 PBC Deb 9 September 2014 c62
25 PBC Deb 9 September 2014 c63
26 PBC Deb 9 September 2014 c66

Andy Slaughter questioned what material difference this change from "may" to "must" would make. He pressed for a division on Amendment 2; the amendment was defeated by 9 votes to 5.

House of Commons Report

Andy Slaughter returned with the same amendment at Report stage, which Shailesh Vara again resisted using similar arguments as in PBC:

> Even if a defendant had been acting for the benefit of society, intervening in an emergency or acting responsibly during an activity when he injured somebody, he could still be found negligent or in breach of a statutory duty if the court considered that he did not meet the required standard of care. The Bill is not designed to encourage people to take unnecessary risks with people's safety, nor does it remove the court's ability to do justice in an individual case.[27]

The Minister re-iterated the effect the Bill might have in finely balanced cases:

> As I said in Committee, if in a finely balanced case the court considers the factors in the Bill and decides that this should tip the balance in favour of a defendant who had been acting for the benefit of society, demonstrating a generally responsible approach towards the safety of others during an activity or intervening to help someone in an emergency, we would welcome that outcome. It will be for the courts to decide how much weight to give these factors on a case-by-case basis, but we do not consider that there is any risk of the clause being misinterpreted by the courts as somehow granting individuals immunity from civil liability or changing the standard of care that is generally applicable.[28]

Andy Slaughter withdrew the amendment.

House of Lords Committee

At House of Lords Committee stage, Lord Beecham moved an amendment to specify that the Act would not exempt an employer (and others) from vicarious liability for any act or omission referred to in **Clauses 1 to 4**. Lord Faulks said that he did not consider that the amendment was necessary: "vicarious liability is not intended to nor will be altered in any way by the provisions of the Bill".[29] Lord Beecham withdrew his amendment.

Lord Pannick tried to amend section 1 of the *Compensation Act 2006* to specify that the court "must" rather than "may" consider the matters specified in that section, saying that **Clauses 2 to 4** of the Bill could then be removed. He was concerned that, if the Bill was enacted in its current form, there would be two statutes addressing the same general issue in different language. Lord Faulks accepted the similarities between section 1 of the 2006 Act and **Clause 2** of the Bill, but pointed to the difference between the two provisions:

> Clause 2 of SARAH takes a different and firmer approach than the Compensation Act by requiring the courts to consider in every case whether a person was acting for the benefit of society or any of its members. It focuses more firmly on the actions of the defendant in a particular case than on the effect that a finding of negligence might have on others participating in similar activities. For these reasons we consider that Clause 2 of our Bill will provide greater reassurance than the 2006 Act has done to those in the voluntary sector and elsewhere who are still deterred from getting involved in socially

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27 HC Deb 20 October 2015 c684
28 HC Deb 20 October 2015 c686
29 HL Deb 18 November 2014 c385

> valuable activities by worries about liability. I do not suppose that they will have Halsbury's Laws of England to hand when making these difficult decisions, but their general approach will be affected by the climate and the context in which we live and the way the law reflects that.[30]

Lord Faulks was not convinced that amending the 2006 Act would have the same impact as the Bill, which, he said, had been "deliberately designed to be comprehensible to non-lawyers".[31]

Lord Pannick withdrew the amendment.

3.2 Clause 2: Social action – Not amended

Clause 2 states: "The court must have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members."

Public Bill Committee

Andy Slaughter challenged the wording that the court "must have regard to…", saying that "it is either discretionary or it is not".[32] He spoke to amendments which would have replaced the word "must" with the word "may" in **Clauses 2, 3 and 4**.

Shailesh Vara resisted the amendments and said that removing the requirement for the courts to consider the factors set out in the Bill "would dilute that message and simply serve to confuse the public about the Bill's intentions".[33] He reiterated that the Bill was designed to direct the court on what it ought to take into account, but that ultimately the court would draw its own conclusions, on the basis of the facts at issue.

Andy Slaughter withdrew the amendment but again questioned the basis of the Bill:

> Is the use of the word "must" actually about sending a message to volunteers? Is it about the issue of comfort again; is it about saying, "Don't worry. We will make sure that if you're in a situation in which you're likely to be sued for negligence arising out of your good will or the other cases that the Bill covers, a very strong message goes to the court"? I think that that is probably what the Government want to do, but it is a very inefficient way of doing it. One thing that all the witnesses agreed on was that not many people are going to sit down and read this Bill before they decide whether to volunteer. There are many other ways in which that can be dealt with. This is not a good way to legislate…[34]

Andy Slaughter also questioned what the last five words ("or any of its members") added to the meaning of the Clause, and moved an amendment which would have removed these words.

Shailesh Vara replied that the phrase "the benefit of society" would apply in a wide range of situations in which people were acting for the benefit of others and that "purely self-interested or self-centred actions" would not fall within the scope of **Clause 2.** He said that the words "or any of its members" were designed to ensure that the clause applied to acts of altruism

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30 HL Deb 18 November 2014 c390
31 HL Deb 18 November 2014 c390
32 PBC Deb 9 September 2014 c68
33 PBC Deb 9 September 2014 c69
34 *Ibid*

towards individuals, as well as more organised activities which might have benefit to society in a more general sense.[35]

Andy Slaughter withdrew the amendment.

House of Lords Committee

Lord Lloyd of Berwick opposed **Clause 2** standing part of the Bill, saying that it added nothing useful to what was already contained in Section 1 of the *Compensation Act 2006* and pre-existing common law.[36] He considered that the wording of the Clause would give rise to difficulties:

> I hope I have said enough to persuade the Committee that Clause 2 should find no place on our statute book. First, it serves no useful purpose. Secondly, the drafting is so defective that it will be greeted with "derision" by the courts—that is the word of Sir Edward Garnier, former Solicitor-General, from the Government's own Back Benches. Thirdly, it has been described—in evidence that was never challenged by the Government—as being likely to have "horrific" consequences. So the only remaining purpose for this Bill is to repeat a message sent out eight years ago by Section 1 of the Compensation Act which may or may not ever have been received. That, I submit, is a misuse of legislative process. If the Government wish to send out messages—as no doubt they do—they should use some other means.

Lord Faulks defended the Clause, speaking of the context for legislating:

> Sending a message is not, of course, the primary purpose of legislation but, as I said at Second Reading, we legislate in a particular context. We do not live in a hermetically sealed Chamber where we do not take into account what people on the outside think and say. We should indeed not be out of step with those who drink at the Dog and Duck, who are aware of the possibility of a compensation culture. If the Bill chimes in common-sense terms with what ordinary people feel—that we have gone too far—then the Bill is providing a useful purpose.[37]

He suggested that it would be useful to put into statute the matters a judge should consider:

> It has been said, rightly, that judges would normally be expected to pay attention to the matters in Clause 2 in any event, but I suggest that it is sometimes useful for a judge, perhaps faced with a seriously injured claimant, to bear in mind a specific statutory provision when considering what is often an extremely hard task for a judge—to turn down a badly injured person—because the injury was sustained as a result of the act of someone acting for the benefit of society or any of its members. It should not change the law, but it is sometimes useful to put into statutory form what is often difficult to find in the morass of common-law decisions.[38]

House of Lords Report

At Report stage in the House of Lords, Lord Lloyd of Berwick moved an amendment to leave out **Clause 2,** stating that his main objection was that it served no useful purpose, and reiterating points made previously.[39]

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35 PBC Deb 9 September 2014 c72
36 HL Deb 18 November 2014 c396
37 HL Deb 18 November 2014 c407
38 HL Deb 18 November 2014 c407
39 HL Deb 15 December 2014 c13

There was some support for the amendment. For example. Lord Pannick considered that there were better ways of sending a message:

> Courts already have regard to whether the alleged negligence or breach of statutory duty occurred when the person was acting for the benefit of society or any of its members. I referred to the leading cases at Second Reading. The Minister has at no stage suggested that there are any cases in which courts have ignored such obviously relevant factors.
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> What then is the point of Clause 2? As the noble and learned Lord, Lord Lloyd, has already explained, the Lord Chancellor, Mr Grayling, has been very clear. He wants Parliament to send a message. But if the object of the legislation is to encourage people to volunteer and to encourage heroism without people being concerned about possible litigation—the objective referred to a few moments ago by the noble Lord, Lord Hodgson of Astley Abbotts—Mr Grayling should buy a half-page advertisement in the Sun or the Daily Mail or, if he wants to reach younger citizens, open a Facebook page or set up a Twitter account, and simply tell people the obvious truth, that the law is already on their side. That would be a much cheaper and more effective way in which to communicate a message than to take this sad Bill through all its stages in Parliament.
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> It is simply ridiculous for the Government to suggest that people who are currently inhibited from volunteering by a fear of litigation are somehow going to step forward when they hear—if they do—that we have approved Clause 2 of the Bill. Mr Grayling cannot seriously think that around the dinner table tonight, or in the Dog and Duck public house, or anywhere, people will say to themselves, "I see that Clause 2 has passed its latest stages in the House of Lords. I look forward to its speedy enactment next year because then I will be much more willing to volunteer and act like a hero, my concerns about litigation having been removed".[40]

However, although Lord Beecham said that he shared "entirely the noble and learned Lord's criticisms of the vacuous nature of the Bill", he said that he would abstain if there was a division on the amendment.[41] Lord Beecham set out the context for his stance:

> At Second Reading, I acknowledged that the House is properly cautious about declining to give a Second Reading to Bills emanating from the Commons, and there is a similar reluctance totally to destroy Bills in the way in which the amendments of the noble and learned Lord, Lord Lloyd, would achieve if passed, which would leave the Bill consisting of only its title. However, if we were to go so far on a Bill as feeble as this, it would actually strengthen the hand of the Lord Chancellor in relation to the vastly more important and damaging provisions of the Criminal Justice and Courts Bill, which we have sent back to the Commons with our amendments. I fear that he would not hesitate to cast this House as a recalcitrant and obstructive group, placing us alongside the left-wing pressure groups and campaigners which he conjured up as the phantom proponents of judicial review and opponents of his attempts to undermine it. It would, I suggest, make it more unlikely for the Lord Chancellor to exercise political responsibility in relation to the amendments on secure colleges and JR by accepting them, or, should he fail to do so, for MPs on the Government Benches to demonstrate political heroism in a just cause by voting for them.[42]

Lord Pannick questioned this approach:

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40 HL Deb 15 December 2014 c17
41 HL Deb 15 December 2014 cc22-3
42 HL Deb 15 December 2014 c22

> Is the noble Lord saying that the Opposition are not going to support the noble and learned Lord, Lord Berwick, because, although they think that Clause 2 is absolutely terrible, it is not the worst legislative proposal that Mr Grayling has brought forward in this Session?[43]

Lord Beecham reiterated his concerns:

> I merely say that on this Bill it is not worth the House taking a position that is a departure from its normal practice. I genuinely fear that the Lord Chancellor will use such a vote to muster support against the much more serious amendments that we have sent back for the Commons to consider. That will not help us in sticking to those amendments, should they come back to us. That is why I will not be in either Lobby this evening if the noble and learned Lord decides to test the opinion of the House.

Lord Lloyd also questioned the reason given for the Opposition not supporting the amendment:

> However, that still leaves the question of why on earth the Opposition are not supporting the amendment. After all, on the whole, it is the duty of the Opposition to oppose. If they found that they were against something—and I understood them to be against Clauses 2 and 4, just as they are against Clause 3—in the ordinary way they would oppose it.
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> However, I am wrong about that. The reason given for this seems to me to be entirely incomprehensible. The reason why the Opposition now do not want to oppose Clauses 2 and 4 is that if they did so while opposing Clause 3, that would then have some effect—which I really did not understand—on the attitude of the Lord Chancellor in relation to some other Bill; namely, the Criminal Justice and Courts Bill. That is a wholly irrational ground for an Opposition to act on. I would have thought it their duty, if they are against Clauses 2 and 4, to oppose them. They say, however, that, for reasons which I do not understand, they do not intend to take that view officially…[44]

Lord Faulks again defended **Clause 2** in similar terms as had been expressed on previous occasions.

When challenged by Lord Pannick to provide a precedent for legislating not to change the law but to provide reassurance, Lord Faulks replied:

> I am not sure that off the top of my head I can think of a particular legislative provision that provides reassurance, but part of the function of much legislation is to provide reassurance and protection to the vulnerable. There is nothing novel about producing a piece of legislation which, in a difficult area, provides some clarity and a modest degree of reassurance in an area of considerable uncertainty.[45]

The House divided and the amendment was defeated by 222 votes to 77.

3.3 Clause 3: Responsibility - Government amendment agreed

Clause 3 originally stated: "The Court must have regard to whether the person, in carrying out the activity in the course of which the negligence or breach of statutory duty occurred, demonstrated a generally responsible approach towards protecting the safety or other interests of others". Following considerable debate on the meaning, intent and drafting of the

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[43] HL Deb 15 December 2014 c23
[44] HL Deb 15 December 2014 c27
[45] HL Deb 15 December 2014 c26

Clause, a Government amendment was agreed at Third Reading stage in the House of Lords to replace the word "generally" with the word "predominantly" **[Amendment 1]**. A summary of the debate at various stages of the Bill's progress through both Houses, which resulted in this amendment, is set out below.

Public Bill Committee

Andy Slaughter referred to **Clause 3** as "perhaps the most troubling part of the Bill for us". He spoke to three amendments, one of which proposed leaving out the word "generally" because he did not think it added anything to a "responsible approach". He queried how the provision would actually work:

> Does it mean that an employer who generally has a good safety record, who puts the right notices up, who sends most of the staff on training, who subscribes to the right organisations and has most of the right safety gear on the premises, for example, is less liable if one member of staff does not get that training or does not get the safety gear, or is instructed to put themselves in a dangerous position? That seems grossly unfair.[46]

He said that the courts already looked at the behaviour of employees "and if they acted unreasonably they will not succeed".[47]

Andy Slaughter considered that the Clause could exonerate someone of wrongdoing based on matters that were not central to the facts under consideration. He argued that it would lead to more complex litigation:

> Without amendments about what circumstances and "other interests" are relevant, and without any consideration of whether it is the immediate lead-up to the accident and the most relevant facts that are to be taken into account, as opposed to the entire conduct of the parties over an indefinite period, the clause will add layers of complexity to the trial process. The Government have said that they want the exact opposite of that to happen.[48]

Shailesh Vara resisted the amendments, saying they were unnecessary:

> Employers may well have a good health and safety record over a number of years, but if on the day, during the activity in question, their actions are risky or careless and cause injury, there is nothing in clause 3 that says they cannot be found negligent.[49]

Andy Slaughter pressed the Minister to clarify his earlier assertion that **Clause 3**, unlike **Clauses 2 and 4**, would change the law. Shailesh Vara set out the Government's position:

> We consider that clause 3 represents a change in that it ensures that the court takes into account a defendant's general approach towards protecting the safety and interests of others when carrying out an activity. It is the general issue that is relevant there.
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> The clause states that if a person carries out an activity in a generally responsible way and, despite their best efforts, something goes wrong and somebody is injured, the court should take full account of the circumstances. That will help to deter people from

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46 PBC Deb 9 September 2014 c73
47 PBC Deb 9 September 2014 c74
48 PBC Deb 9 September 2014 c75
49 PBC Deb 9 September 2014 c75

> bringing speculative and opportunistic claims and will give confidence to responsible employers and others that if they resist such claims, the law will be on their side.[50]

The Minister resisted an attempt to limit the clause to people who have been taking a generally responsible approach towards the safety of employees or bystanders.

Andy Slaughter did not press any of the amendments, but spoke further in the clause stand part debate. He said that, rather than "being simply irrelevant or nugatory" the Bill might "do some damage":

> The problems with the clause go beyond simply whether it confuses or complicates the matter. There is a change in the law. I am not sure I have understood from the Minister … what the change in the law is in relation to the clause, but I think the intention is sufficiently clear. It is to dilute responsibility when an alleged tortfeasor—they may or may not be an employer—is liable to be held responsible. Not only a lot of time and a lot more money, which again means that the case will cost a lot more for the claimant, but lots of extraneous and often irrelevant information will be brought into the case. The consequence may be—although one hopes not because one trusts the good judgment and wisdom of the courts—that either the decision will go against a claimant who otherwise has a meritorious claim, or the claim will not be brought in the first place because the advice will be that they will have to look into it in a lot more detail than in a previous simple personal injury or employer's liability claim.[51]

Shailesh Vara reiterated that judges would still decide cases on the facts and said that he had full confidence in the interpretations made by the judiciary and that they would take into account the factors that "Members on both sides of the Committee want them to take into account". He outlined further the way in which **Clause 3** was intended to change the law:

> Clause 3 invites the court to consider placing weight on the defendant's general behaviour in relation to the activity in the course of which the negligence is alleged and to determine in that light whether they were in breach of the standard of care. There is a difference, because, while it is open to the courts to look at all the circumstances of a case in reaching a decision on liability, they are not currently obliged to consider whether a person took a generally responsible approach to safety during the activity in question. The language about acting in a generally responsible way does not feature in the case law.

The Minister again confirmed that the courts would be required to take certain matters into account, but their discretion as to how to decide an individual case, based on the facts at issue, would not be fettered. The Bill, he said, would not prevent a finding of negligence or breach of statutory duty in relevant circumstances.

Andy Slaughter pressed for a division on the question of whether the clause should stand part of the Bill; the question was agreed by 9 votes to 5.

House of Commons Report

Andy Slaughter returned with similar amendments on Report, saying that he hoped that the Minister would at least agree that the drafting of the clause could be improved, but adding: "Having said that, I do not think its drafting could be improved; it simply needs to go".[52]

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50 PBC Deb 9 September 2014 cc75-6
51 PBC Deb 9 September 2014 cc77-8
52 HC Deb 20 October 2015 c688

In reply, Shailesh Vara repeated points he had made in PBC. He said that the need for **Clause 3**, which would provide reassurance, had been illustrated by evidence to the PBC:

> The damaging effects of the fear of litigation on people's willingness to volunteer, and the propensity of some involved in accidents to bring opportunistic and spurious claims, were emphasised.[53]

The House divided on an amendment to remove **Clause 3**. The amendment was defeated by 260 votes to 145.

House of Lords Committee

At Committee stage in the House of Lords, Lord Beecham also moved an amendment to leave out the word "generally".[54] Again, the Government resisted this amendment, in a similar way as in the Commons. However, Lord Faulks acknowledged that the use of the word "generally" was unusual in statutory terms and said that he would consider the matter further.[55] Lord Beecham withdrew the amendment.

House of Lords Report

At Report stage in the House of Lords, Lord Hodgson of Astley Abbotts (Conservative) moved an amendment (on behalf of Lord Hunt of Wirral) to replace the word "generally" with "predominantly".[56] He spoke of the difference this would make:

> I suspect that what your Lordships' House will wish the courts to consider, if this Bill passes into law, is whether the defendant will first claim that he was demonstrating an approach which on that occasion was in the main responsible in protecting the safety of others as opposed to the approach which usually, but not necessarily on that occasion, was responsible. Replacing "generally" with "predominantly"—we return to the Collins English Dictionary definition, which is,
>
> "for the most part mostly and mainly"—
>
> should provide the courts with the power to examine the approach of the defendant at the material time and avoid them having to consider the approach demonstrated at other times or taking the matter even wider, enabling them to take into account the approach followed other than that at the material time.
>
> This Bill has an important role to play in reassuring potential volunteers, but equally it should not encourage behaviour which is thoughtless or irresponsible and thus puts others at risk. This change of word may better balance the two aspects...[57]

Lord Beecham thought that "neither term is satisfactory in terms of either definition, which is entirely lacking, or effect":

> Why should someone suffering damage through an act of negligence or breach of statutory duty be denied compensation on the grounds that the act or omission was in effect a first offence, or at any rate a rare offence? What, for that matter, constitutes a "responsible" approach? How does the Minister define those terms? Moreover, and crucially, the clause is not limited to social action, responsibility or heroism, terms which are in themselves undefined and undefinable, or to personal injury cases. We

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53 HC Deb 20 October 2015 c691
54 HL Deb 18 November 2014 c410
55 HL Deb 18 November 2014 c414
56 HL Deb 15 December 2014 c26
57 HL Deb 15 December 2014 c31

> are dealing not just with safety but, in terms of the clause, with other interests. As I reported in Committee, the Minister in the House of Commons, Mr Vara, affirmed that the clause,
>
> "could in principle be applicable in relation to other instances of negligence such as damage to property or economic loss where issues of safety may not necessarily be relevant".—[Official Report, Commons, 20/10/14; col. 693.][58]

Other peers also expressed concerns about how the clause would operate. For example, Lord Pannick asked why the generally responsible approach of the defendant in other respects was of any relevance, and did not consider that Lord Hodgson's amendment would cure the defect in the Clause. He was also concerned that **Clause 3** was not confined to social action and heroism. Lord Goldsmith (Labour) said that, as a practising lawyer, "the idea of having to bring this into effect and applying it in the context of an actual case fills me with horror". Lord Woolf (Crossbencher) asked how the Clause would apply if there were two defendants, one of whom had shown a generally responsible approach towards protecting the safety or other interests of others and the other who had not exercised that approach. Lord Hope of Craighead (Crossbencher) queried how it would apply when contributory negligence was an issue.

Lord Faulks again defended **Clause 3** and set out the Government's position:

> As I explained earlier, the approach that we have taken does not rewrite the law in detail, but it represents a change to the law in that it does not currently oblige a court to consider whether a person took a generally responsible approach to safety during the activity in question. We wish to ensure that the courts take a slightly broader view of the defendants' conduct in these circumstances, by looking at whether his approach to safety, taking into account all that he did or did not do, was generally a responsible one. I suggest that that would very much tally with what a number of members of the public might think was fair. If a defendant was really predominantly doing all that he or she could reasonably be expected to do to look after the safety of an individual, why should there not be some reflection of that fact in the determination of liability? Why should it be ignored altogether? The court would be obliged to weigh it in the balance—that is all—when considering the ultimate question of whether the defendant met the required standard of care.[59]

Lord Faulks said that the court would consider the activity in question:

> It will not therefore enable a body with a slipshod approach to safety to escape liability by pointing to its health and safety record over a longer period of time. If its actions during the course of the activity in question were so risky or careless as to be negligent, it can still be found liable.[60]

Lord Faulks emphasised that **Clause 3** would not prevent a finding of negligence or breach of statutory duty where this was justified and said that he was confident that the courts would "continue to take a common-sense approach to these cases and … exercise the flexibility which this clause gives them to reach a just decision in all the circumstances of each individual case". He said that this also answered the points on contributory negligence and two defendants.[61]

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58 HL Deb 15 December 2014 c31
59 HL Deb 15 December 2014 c36
60 HL Deb 15 December 2014 c34
61 HL Deb 15 December 2014 c35

Lord Faulks agreed that "predominantly" was a better word than "generally": "It is more focused and conveys with a little more clarity for the purposes of the judge what we intend by that expression". He said that, if the Clause survived, he would bring back an amendment at Third Reading "which, if not using the precise wording in the order that is proposed, would include the adverb 'predominantly' as opposed to 'generally'".[62]

Lord Hodgson of Astley Abbotts withdrew the amendment.

Lord Beecham then moved an amendment to remove **Clause 3** from the Bill entirely. On division, the amendment was defeated by 238 votes to 190.

House of Lords Third Reading

At Third Reading, Lord Pannick moved an amendment which attempted to leave out the word "activity" and insert "act or omission", calling it a significant drafting point.[63] Other peers supported the amendment. For example, Baroness Butler-Sloss (Crossbencher) spoke as a judge of many years' experience and said: "the phrase 'act or omission' is extremely well known in the law and is one which judges…understand perfectly well. The word 'activity' is ambiguous".

Lord Faulks resisted Lord Pannick's amendment saying that judges would have no difficulty in interpreting the term "carrying out the activity". Lord Pannick withdrew the amendment.

Lord Faulks moved an amendment to replace the word "generally" with the word "predominantly":

> I indicated on Report that we were attracted to the suggestion made by my noble friends of replacing "generally" with "predominantly", and, following further consideration, we have concluded that this is the best approach to give greater clarity to the aim of the clause. This amendment makes clear that a body or individual who takes a slapdash approach to safety on a particular occasion cannot escape liability merely by pointing to a previously unblemished health and safety record. Instead, it means that the court must focus on whether the defendant has taken a predominantly responsible approach to safety in carrying out the activity in the course of which the alleged negligence or breach of statutory duty occurred. As I have previously explained, we believe that this is an important factor that merits the court's attention.[64]

The amendment was agreed without division.

3.4 Clause 4: Heroism – Government amendment agreed

Clause 4 originally stated: "The court must have regard to whether the alleged negligence or breach of statutory duty occurred when the defendant was acting heroically by intervening in an emergency to assist an individual in danger and without regard to the person's own safety or other interests". At Report stage in the House of Lords, a Government amendment was agreed to leave out the words from "danger" to the end of the clause **[Amendment 2]**. A summary of the debate at various stages of the Bill's progress through both Houses, which resulted in this amendment, is set out below.

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62 HL Deb 15 December 2014 c39
63 HL Deb 6 January 2015 c252
64 HL Deb 6 January 2015 c259

Public Bill Committee

Andy Slaughter spoke to three proposed amendments. One amendment was intended to address concerns raised at Second Reading and in the following written evidence from St John Ambulance:

> "Clause 4 of the SARAH Bill refers to individuals acting 'without regard to the person's own safety or other interests'. This is contrary to first aid practice—for example, the First Aid Manual states: 'Protect yourself and any casualties from danger—never put yourself at risk'..." [65]

Another amendment proposed leaving out the words "or other interests" from the end of the Clause. A further probing amendment was designed to ascertain whether the Government drew any distinction between "professional and amateur heroes".[66]

The probing amendment also proposed definitions of words used in the Clause – "acting heroically" and "emergency".

Shailesh Vara resisted the amendments, saying that they were not appropriate. He set out further information about why the words "or other interests" had been included:

> There are a wide range of circumstances in which a person may be faced with a decision on whether to intervene in an emergency to assist someone who is in danger. In some cases intervening may put their own safety at risk, but that will not always be the case. A person might be faced, for example, by other considerations, such as the possibility of failing to catch a train or missing an important appointment for a job interview. The wording we have used is simply intended to cover all the circumstances that might arise, and to make it clear that a person acts heroically by intervening to assist someone in danger regardless of the fact that doing so might risk his or her own safety or might otherwise not be in his or her own interests.[67]

He said that the Government wanted the Clause to apply in as wide a range of circumstances as possible, "so that all those who intervene in emergencies have the reassurance that the courts will have regard to the context of their actions in the event of their being sued".[68]

Andy Slaughter withdrew the amendment moved and did not move the other two.

House of Commons Report

At Report stage, Andy Slaughter again asked the Minister whether he would consider withdrawing the final words from **Clause 4**: "without regard to the person's own safety or other interests."[69]

Shailesh Vara replied that, after giving the matter further thought, the Government did not agree the amendment:

> We do not consider that the clause will be misinterpreted by the courts or the public as somehow excluding people who did in fact have regard to their own safety or other interests, perhaps in the split second before they dived in, but decided to intervene anyway. Nor do we think that it would interpreted as sending a signal that members of

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65 PBC Deb 9 September 2014 c82
66 PBC Deb 9 September 2014 c83
67 PBC Deb 9 September 2014 c84
68 PBC Deb 9 September 2014 c85
69 HC Deb 20 October 2015 c689

> the public should recklessly expose themselves to danger. We think that the wording and intention of the clauses are clear, and, on balance, we do not think that the amendment is necessary.[70]

House of Lords Committee

Earl Attlee (Conservative) moved an amendment (and spoke to two others) to change the wording of **Clause 4**. He considered that the Clause, as drafted, would provide greater protection to "an imprudent person" than to "a person who has taken steps to avoid unnecessary risks".[71]

Lord Pannick spoke to an amendment intended to remove the final words of **Clause 4**: "and without regard to the person's own safety or other interests". He argued that the words could create an unjustified distinction:

> Those final words suggest that if I am thinking of acting heroically by jumping in the lake to save the drowning victim, Clause 4 will not protect me if I have regard to my own safety or other interests, perhaps by taking off my valuable watch before I jump in or, if we are to follow the Government's reasoning as regards Clause 4, by consulting my solicitor. Surely the hero deserves protection whether he or she jumps in "without regard to" their own safety or with regard to their own safety. What matters is that they jump in to save the victim. Clause 4, as drafted, protects the instinctive hero but not the thoughtful hero, and that distinction is entirely unjustified.[72]

Lord Pannick also objected to **Clause 4** standing part of the Bill for similar reasons to those advanced in relation to **Clause 2**, and also because he considered that **Clause 4** added nothing to **Clause 2.**

Lord Aberdare (Crossbencher) considered that Clause 4 would not give the reassurance intended by the Government.

Lord Faulks referred to the concerns raised by St John Ambulance, and, while not agreeing that the courts might misinterpret the provision, he said that he would consider the wording of the Clause and the omission of the final words before Report stage. He accepted that there would be instances covered by both **Clause 2** and **Clause 4** but said that "the scenario that the clause evokes in most people's imagination is sufficiently clear for it to be worth a clause on its own".[73]

Earl Attlee withdrew his amendment.

House of Lords Report

At Report stage, Lord Faulks said that he had noted the concerns raised at earlier stages and by outside organisations, and moved an amendment to leave out the words from "danger" to the end of **Clause 4**:

> This will put beyond doubt that the clause applies to anybody who intervenes in an emergency to help somebody in danger, regardless of whether they acted entirely spontaneously or weighed up the risks before intervening. What is more, St John Ambulance and the British Red Cross, as leading first aid organisations reaching hundreds of thousands of people a year, have said that if the amendment is agreed

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70 HC Deb 20 October 2015 c695
71 HL Deb 18 November 2014 c415
72 HL Deb 18 November 2014 c415-6
73 HL Deb 18 November 2014 c421

> they will use the opportunity to encourage more people to come forward to act in emergencies. I am very grateful to them for their offer of assistance, which will help to reassure many new first aid volunteers that they can intervene in emergencies secure in the knowledge that the law will be on their side.[74]

Lord Lloyd of Berwick (with some support) considered that **Clause 4** should be entirely omitted on the basis that it did not add anything not already covered by section 1 of the *Compensation Act 2006.* Lord Pannick agreed and said again that it added nothing to **Clause 2.**

Lord Walker of Gestingthorpe (Crossbencher) strongly criticised the standard of draftsmanship in the Bill.

Lord Faulks's amendment was agreed without division.

4 Scrutiny by the Joint Committee on Human Rights

The Bill was scrutinised by the Joint Committee on Human Rights (JCHR). The Parliament website includes links to correspondence and memoranda received by the JCHR in relation to the Bill.[75] The JCHR report on the Bill was published on 3 November 2014.[76]

The Committee noted from the Government's response to questions it had asked that different parts of the Bill had different purposes and that the Government intended that only clause 3 would change the law:

> Clauses 2 and 4 are intended to send a signal designed to counter a public perception about the current law, while clause 3 is intended to change the substantive law.

The JCHR queried this basis of legislating:

> As we have previously commented in legislative scrutiny Reports, we doubt whether merely sending a signal, rather than changing the substantive law, is an appropriate reason for legislating, unless there is clear evidence that the law is being misinterpreted and therefore misapplied in a way which undermines the purpose of the law in question.[77]

The Committee did not consider that the evidence relied on by the Government was a sound basis for legislation:

> 2.26 We have considered carefully the strength of the evidence base showing that the specific risk of legal liability, as opposed to risk generally, is a reason why people do not volunteer, and we have found it weak. The evidence relied on by the Government as demonstrating a public perception that volunteering carried too great a risk of legal liability is almost entirely anecdotal, and we do not consider such evidence to be a sound basis for legislating.

Furthermore, the JCHR did not consider that the Government had demonstrated by evidence that courts sometimes pay insufficient regard to the matters set out in clauses 2 to 4 of the Bill which made it necessary "to take the unusual step of introducing legislation directing

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74 HL Deb 15 December 2014 cc43-4

75 Joint Committee on Human Rights, *Social Action, Responsibility and Heroism Bill* [accessed 28 January 2015]

76 Joint Committee on Human Rights, *Legislative Scrutiny: (1) Modern Slavery Bill and (2) Social Action, Responsibility and Heroism Bill*, 13 November 2014, HL Paper 62 HC 779

77 *Ibid* paragraph 2.21

them to have regard to those matters when carrying out their judicial function of adjudicating in individual cases".[78]

The Committee thought that the Government had not demonstrated the need for the law to be changed in accordance with Clause 3:

> Although the Government says in response to our questions about this clause that it is to "provide reassurance to responsible employers" and not to reduce standards of health and safety in the workplace, elsewhere in the Government's response, as we point out above, it is clear that the Government does consider that this clause introduces a substantive change in the law and will therefore make a difference to the outcome of cases. To the extent that clause 3 of the Bill will lead to some health and safety cases against employers being decided differently, we do not consider that the Government has demonstrated the need to change the law to restrict employees' right of access to court for personal injury claims in the workplace.[79]

The Committee did not share the Government's view that the Bill would not apply to actions for breach of the duty to act compatibly with Convention rights under s. 6(1) of the *Human Rights Act 1998*, where the claim was for a breach of a public authority's positive obligation to take steps to protect Convention rights. The Committee considered that the breadth of the wording of the Bill gives rise to "unnecessary uncertainty about the effect of the Bill on the liability of public authorities for failure to take steps to protect Convention rights".[80]

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78 *Ibid* paragraph 2.32
79 *Ibid* paragraph 2.39
80 *Ibid* paragraph 2.45

Appendix

Members of the Public Bill Committee

Chairs: Mr Joe Benton, Mr Adrian Sanders

Members:
Mr Jeremy Browne (Taunton Deane) (LD)
Neil Carmichael (Stroud) (Con)
Nick de Bois (Enfield North) (Con)
Chris Evans (Islwyn) (Lab/Co-op)
Pat Glass (North West Durham) (Lab)
Simon Hart (Carmarthen West and South Pembrokeshire) (Con)
Dan Jarvis (Barnsley Central) (Lab)
Robert Jenrick (Newark) (Con)
Stephen Metcalfe (South Basildon and East Thurrock) (Con)
Grahame M. Morris (Easington) (Lab)
Ian Paisley (North Antrim) (DUP)
David Rutley (Macclesfield) (Con)
Mr Andy Slaughter (Hammersmith) (Lab)
John Stevenson (Carlisle) (Con)
Ian Swales (Redcar) (LD)
Karl Turner (Kingston upon Hull East) (Lab)
Mr Shailesh Vara (Parliamentary Under-Secretary of State for Justice)
Mr Ben Wallace (Wyre and Preston North) (Con)
Chris Williamson (Derby North) (Lab)

Committee Clerk: Matthew Hamlyn

Evidence to the Public Bill Committee

Written evidence
The Public Bill Committee received written evidence from:

- Campaign for Adventure;
- Law Reform Committee, City of Westminster and Holborn Law Society;
- Greater Manchester Fire and Rescue Service;
- Cheshire Fire and Rescue Service;
- Association of Personal Injury Lawyers; and
- St Johns Ambulance.

The written evidence is available on the Bill page of the Parliament website.[81]

Oral evidence
At its first sitting, on 4 September 2014, the Public Bill Committee examined the following witnesses:

- Fraser Whitehead, representing the Law Society of England and Wales;[82] and

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81 House of Commons Public Bill Committee on the Social Action, Responsibility and Heroism Bill 2014-15 [accessed 28 January 2015]

- Dr Justin Davis Smith CBE, Executive Director for Volunteering at the National Council for Voluntary Organisations.[83]

At its second sitting, also on 4 September 2014, the Public Bill Committee examined the following witnesses:

- Kevin Myers, acting chief executive at the Health and Safety Executive, and Matt Wrack, general secretary of the Fire Brigades Union;[84]

- John Spencer, president of the Association of Personal Injury Lawyers, David Johnson, president of the Forum of Insurance Lawyers, Simon Dewsbury, solicitor at Thompsons Solicitors, and Stuart Henderson, managing partner of personal injury, Irwin Mitchell;[85] and

- Amanda Brown, the assistant general secretary for advice, policy and campaigns at the National Union of Teachers, and Tracey Harding, head of health and safety at Unison.[86]

82 PBC Deb 4 September 2014 cc4-10
83 PBC Deb 4 September 2014 cc10-16
84 PBC Deb 4 September 2014 cc19-24
85 PBC Deb 4 September 2014 cc25-45
86 PBC Deb 4 September 2014 cc46-52