

FREEDOM OF EXPRESSION—EUROPEAN COMMISSION OF HUMAN RIGHTS FINDS THAT INJUNCTION AGAINST NEWSPAPER ARTICLE ON CASE DURING OUT-OF-COURT NEGOTIATIONS, UPHELD BY THE HOUSE OF LORDS, VIOLATES ARTICLE 10 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Between 1958 and 1961 a certain drug was manufactured and marketed in the United Kingdom by Distillers Co. (Biochemicals) Ltd. This relatively new drug, called thalidomide, was advertised and promoted as an effective sedative. The manufacturer removed the drug from the British market in November, 1961, after a number of women who had taken the drug during pregnancy gave birth to physically deformed children.¹ As a result of these births a number of parents brought legal actions against the manufacturer on behalf of their children. In these suits the parents sought to prove negligence, but an out-of-court settlement was negotiated before the cases went to trial.²

However, a second and much larger group of actions was brought against Distillers Co. (Biochemicals) Ltd. in 1968.³ For the next three years the parties to these actions attempted to reach a settlement similar to that agreed upon in the first series of cases. During this period the news media regularly reported the proceedings, but were careful not to interfere with the disposition of the pending cases.⁴ The *Sunday Times* had reported on the facts of the tragedy since 1967 and no complaints had been lodged.⁵ In 1972, however, the *Sunday Times* decided to initiate a more forceful and purposeful approach in its reporting of these cases.⁶

In September and October of 1972, the *Sunday Times* published a series of articles criticizing both the delay in reaching a settlement in the thalidomide cases and the proposed amount of the set-

¹ Attorney-General v. Times Newspapers Ltd., [1972] 3 All E.R. 1138 (Q.B.); Report of the European Commission of Human Rights, application no. 6538/74 (May 18, 1977) at 7.

² Distillers Co. (Biochemicals) Ltd. agreed to settle for 40% of the total damages which were determined in two representative actions. See *S. v. Distillers Co. (Biochemicals) Ltd.*, [1969] 3 All E.R. 1412.

³ A total of 266 additional writs were granted. Attorney-General v. Times Newspapers Ltd., [1972] 3 All E.R. 1139 (Q.B.).

⁴ *Id.* See also Report of the European Commission of Human Rights, application no. 6538/74 (May 18, 1977) at 12.

⁵ Attorney-General v. Times Newspapers Ltd., [1972] 3 All E.R. 1139 (Q.B.).

⁶ The avowed purpose of this new manner of reporting on the thalidomide cases was to arouse public opinion so that Distillers Co. (Biochemicals) Ltd. would be pressured into increasing its settlement offer. *Id.* at 1141.

tlement.⁷ These articles also argued for reforms in the system of compensation for personal injury.⁸ The paper announced its intention of publishing a future article which would deal with all aspects of the thalidomide cases.⁹ Distillers Co. (Biochemicals) Ltd. complained to the Attorney-General, claiming that publication of the proposed article would constitute contempt of court since litigation was still pending regarding the manufacturer's liability. The Attorney-General issued a writ to enjoin publication of the article on October 12, 1972.¹⁰

On November 17, 1972, the High Court unanimously ordered the injunction, stating that any attempt by the newspaper to influence the settlement negotiations by bringing pressure on a party would clearly constitute contempt of court.¹¹ But the Court of Appeal unanimously reversed the High Court. The decision of the Court of Appeal was based on the fact that the litigation was dormant. The court also balanced the parties' right to a fair trial with the newspaper's right to freedom of expression.¹² An appeal was taken to the House of Lords, which unanimously reversed the Court of Appeal and reinstated the injunction on July 18, 1973.¹³

On January 19, 1974, Mr. Harold Evans, editor of the *Sunday Times*, along with the publisher, Times Newspapers Ltd., and a group of journalists of the *Sunday Times* (hereinafter referred to as Applicants), applied to the European Commission of Human Rights for a hearing of the case.¹⁴ The Applicants alleged that the

⁷ Articles on the plight of the children and the attempts at settlement were published in the *Sunday Times* on September 24 and on the 1st, 8th, 15th, 22nd, and 29th of October, 1972.

⁸ Report of the European Commission of Human Rights, application no. 6538/74 (May 18, 1977) at 12.

⁹ See footnote to *The Sunday Times* of September 24, 1972.

¹⁰ *Attorney-General v. Times Newspapers Ltd.*, [1972] 3 All E.R. 1136 at 1138 (Q.B.).

¹¹ *Id.* at 1146.

¹² *Attorney-General v. Times Newspapers Ltd.*, [1973] 1 All E.R. 815 (C.A.).

¹³ *Attorney-General v. Times Newspapers Ltd.*, [1973] 3 All E.R. 54 (H.L.).

¹⁴ The Council of Europe was formed in May, 1949, and at the present time has twenty members. One of the earliest projects of the Council was the European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force Sept. 3, 1953, 213 U.N.T.S. 221. This Convention is binding on eighteen of the Council of Europe's member states (Austria, Belgium, Cyprus, Denmark, France, Iceland, Ireland, Italy, Luxembourg, Malta, the Netherlands, Norway, Sweden, Switzerland, Turkey, United Kingdom, West Germany; Greece resigned in 1969, but ratified the Convention again on November 28, 1974). COUNCIL OF EUROPE, WHAT IS THE COUNCIL OF EUROPE DOING TO PROTECT HUMAN RIGHTS? (1977).

Article 19 of the Convention sets up two bodies whose function is to attempt to enforce the provisions of the Convention: The European Commission of Human Rights and the

injunction upheld by the House of Lords constituted a violation of Article 10 of the European Convention on Human Rights and Fundamental Freedoms.¹⁵ The Commission declared the application admissible on March 21, 1975, and adopted its report on the case on May 18, 1977. The Commission found the injunction upheld by the House of Lords to be a breach of Article 10 of the European Convention on Human Rights and Fundamental Freedoms.¹⁶

The right to a fair trial on the merits is essential to any system of justice. It is well established that a person should refrain from publishing comments which might prejudice a party to an action.¹⁷ Published comments might have the effect of influencing the judge or jury,¹⁸ influencing a witness or the evidence,¹⁹ or deterring the parties from commencing or continuing their suit.²⁰ In order to protect the individual's right to a fair trial, the English

European Court of Human Rights. The High Contracting Parties to the Convention may apply to have a dispute resolved by these two entities. However, Article 25 of the Convention also gives an individual the right to appeal to one of these bodies. This provision was accepted by the United Kingdom in 1966. See generally A.H. ROBERTSON, HUMAN RIGHTS IN EUROPE (2nd revised ed. 1977); A.H. ROBERTSON, EUROPEAN INSTITUTIONS (3rd ed. 1973); J.E.S. FAWCETT, THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1969).

¹⁵ Article 10 states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

213 U.N.T.S. at 230.

¹⁶ Report of the European Commission of Human Rights, application no. 6538/74 (May 18, 1977) at 84; *The Times* (London), July 30, 1977, at 1, col. 3; Council of Europe Press Communiqué C(77), 29.7.1977, at 2.

On July 15, 1977, the case was referred to the European Court of Human Rights for a final determination. As this issue goes to press the *Times* case is still pending and no definite date has been set for the rendering of the judgment.

¹⁷ See generally BORRIE & LOWE, THE LAW OF CONTEMPT (1973); Borrie, *Report on Contempt*, (1975) CRIM. L. REV. 129.

¹⁸ *Russell v. Russell*, 11 T.L.R. 38 (1894).

¹⁹ *Vine Products v. Green*, [1966] Ch. 484.

²⁰ *Id.*; *Re The Williams Thomas Shipping Co., Ltd.*, [1930] 2 Ch. 368.

courts have held publication of comments which have any of these effects to be contempt of court.

The law of contempt of court is a creature of the common law.²¹ The main purpose behind this offense is to prevent any obstruction or abuse of the judicial process.²² Over the years three different activities have been recognized as interfering with the administration of justice. First, there is contempt in the face of the court, such as in-court demonstrations or other outbursts. Second, there is a type of contempt which occurs outside the courtroom, such as obstructing officers of the court or making improper criticism of the judges. Finally, there is contempt which occurs outside the court when comments are published which deal with a pending action and its issues.²³ This last type of contempt, although concerned with the right to a fair trial, has come into conflict on certain occasions with another basic right, that of freedom of expression.²⁴

Freedom of expression is a right also recognized as basic to any legal system in a democratic society. The growth of the media in modern times has increasingly caused friction between the individual's interest in a fair trial and the public's interest in the free discussion of events which affect society as a whole.²⁵ In England this conflict has been complicated by the uncertainty of the law of contempt. Confusion has been most apparent in regard to media comments which threaten to influence the outcome of an action pending before a court.²⁶

²¹ Report of the Committee on Contempt of Court, Cmnd. 5794, para. 1. There have been, however, a number of modern statutory measures which have modified the law of contempt, usually in regards to procedure.

²² Report of the Committee on Contempt of Court, Cmnd. 5794, para. 1. See generally BORRIE & LOWE, *THE LAW OF CONTEMPT* 1 (1973); WALKER, *THE ENGLISH LEGAL SYSTEM* (4th ed. 1976).

²³ See *The St. James Evening Post Case*, 2 Atk. 469 (1742) (per Lord Hardwicke). The language of Lord Hardwicke is perhaps the most often quoted summary of the different types of contempt of court. See also JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* at 407-408 (1977), for a general discussion of the various types of contempt.

²⁴ Report of the Committee on Contempt of Court, Cmnd. 5794, para. 81; Bloom, *The Sunday Times Case*, 123 NEW L. J. 799 (1973).

²⁵ See generally Bloom, *The Sunday Times Case*, 123 NEW L. J. 799 (1973); Miller, *Contempt of Court: The Sunday Times Case*, (1975) CRIM. L. REV. 142.

²⁶ On June 8, 1971, a committee was appointed to reconsider the law of contempt of court in England and to recommend changes. The Report of the Committee on Contempt of Court, Cmnd. 5794 (popularly known as the Phillimore Report), was presented to Parliament in December 1974. In paragraph 5 of this report the Committee notes: "Our review of the law of contempt made it clear to us that in some important areas it falls short of the cer-

The general rule is that contempt of court will be found if one publishes comments which carry a substantial risk of influencing the outcome of a pending legal action.²⁷ This rule includes not only efforts to influence a judge or jury, but also attempts to persuade individuals to accept a compromise or settlement which they might not have agreed upon otherwise.²⁸ The two main problems in applying this rule are the determination of when a risk is "substantial" and the definition of a "pending case."

The risk of prejudice in any particular case is dependent upon the facts and circumstances.²⁹ One factor which might increase this risk is the prejudgment of an issue by the media. However, although this prejudgment might influence the judge or the jury, it should not affect the actions of a party to any great degree. Indeed, prejudgment has usually been thought to create a risk only in criminal matters, since most civil matters are tried by a professional judge who is thought less likely to be influenced by media reports.³⁰ The House of Lord's ruling in the *Times* case, though, appears to hold that the prejudgment of an issue in a civil matter can create a risk of influencing the parties themselves, and thus interfere with their right to a fair trial.³¹

In addition to holding that there was a substantial risk of prejudice in the *Times* case, the House of Lords also held that the thalidomide actions were still "pending" before the courts.³² The Lords based this finding on the fact that settlement negotiations were still being actively conducted.³³ Conversely, the Court of Appeal had found that out-of-court negotiations did not constitute active litigation.³⁴

tainty it ought to have. This is especially true of those parts of the law which affect the press."

²⁷ Re The William Thomas Shipping Co. Ltd., [1930] 2 Ch. 368; Borrie, *Report On Contempt*, (1975) CRIM. L. REV. 129.

²⁸ Vine Products v. Green, [1966] Ch. 484.

²⁹ Carl Zeis Stifting v. Rayner and Keeler, [1960] 3 All E.R. 289.

³⁰ Vine Products v. Green, [1966] Ch. 484; see also Miller, *Contempt of Court: The Sunday Times Case*, (1975) CRIM. L. REV. 134, where it is alleged that: "In recent years it has been assumed that a simple prejudging of the issues in pending civil proceedings would be unlikely to be treated as a contempt unless there was a likelihood of a jury trial".

³¹ [1973] 3 All E.R. at 55 (H.L.).

³² *Id.*

³³ *Id.* at 65.

³⁴ [1973] 1 All E.R. 815 (C.A.). See also Miller, *Contempt of Court: The Sunday Times Case*, (1975) CRIM. L. REV. 132, in which the author contends that the Court of Appeal is the first English court to require that a case be actively pursued in order for contempt to be available to discourage public comment on the case.

The method of determining what constitutes a substantial risk of prejudice and the definition of a pending action were the two points of disagreement in the English courts. The European Commission of Human Rights reached its findings on this case by interpreting "substantial risk" and "pending action" in light of Article 10 of the European Convention.

The Commission began by finding that the injunction constituted a restriction of the applicants' right "to impart information" and their right "to impart ideas" under paragraph (1) of Article 10 of the Convention.³⁵ However, paragraph (2) of the same article lists a number of circumstances which might justify such a restriction. Therefore, the Commission proceeded to consider whether the purpose supporting the injunction was among those set forth in paragraph (2), and if so, whether an injunction was an appropriate means to fulfill this purpose.³⁶ In order to justify the injunction under paragraph (2), it had to be "prescribed by law" and necessary for maintaining "the authority and impartiality of the judiciary."³⁷

A restriction is "prescribed by law" when one can predict or foresee the restriction after a study of prior court decisions on the subject.³⁸ The Commission noted that the law of contempt as applied to the press was uncertain in England as a result of differing interpretations of prior case law.³⁹ However, the function of the Commission is to apply the Convention, not to act as an English court interpreting English law. Therefore, while noting the confusion in the English courts, the Commission assumed that the injunction was capable of being foreseen, and thus was "prescribed by law."⁴⁰

The purpose of the English law of contempt is to promote the

³⁵ Report of the European Commission of Human Rights, application no. 6538/74 (May 18, 1977), para. 177, 185.

In paragraph 187, the Commission also found that the length of time the injunction was in force (three and one-half years) was sufficient to constitute a restriction under Article 10, para. 1.

³⁶ *Id.* at para. 207.

³⁷ *Id.* at para. 192.

³⁸ *Id.* at para. 203, "In the Commission's opinion it means 'predetermined by substantive law'."

³⁹ *Id.* at para. 202-204.

⁴⁰ *Id.* at para. 202-205. In paragraph 202, the Commission notes that the reasons put forth in the High Court, the Court of Appeal, and the House of Lords were completely different, and that "the Lords were themselves divided as to the reasons to be adopted. . . ."

fair administration of justice.⁴¹ The Commission found that this purpose was included in the meaning of the phrase, "maintaining the authority and impartiality of the judiciary," in paragraph (2) of Article 10.⁴² Since there was no claim that the proposed newspaper article affected the impartiality of the judiciary, the Commission only considered whether the injunction was necessary to maintain the authority of the judiciary.⁴³ It is on this point that the Commission's findings differed with the opinion of the House of Lords.

The House of Lords decided that prejudgment of specific issues by the media was improper when the case was pending. A case was apparently viewed as pending from the moment a writ is first issued until either a verdict is reached or the case is dismissed.⁴⁴ The Commission, however, concluded that since the negotiations were being held out of court, the probability of the matter actually going to trial was minimal. Thus, "the authority of the judiciary was not directly put in question by the publication of the draft article at that time."⁴⁵

The Commission's findings can be viewed as a victory for freedom of expression.⁴⁶ Furthermore, this victory was not achieved at the expense of judicial authority. The Commission indicated that there was no such threat in a case which had been stalled in the negotiation phase for several years. Thus, it did not consider whether the proposed article would be a threat if the case was ac-

⁴¹ The decision of the House of Lords clearly rests on the belief that one of the proper functions of contempt of court is the prevention of any "interference with the administration of justice." [1973] 3 All E.R. at 60 (H.L.).

⁴² Report of the European Commission of Human Rights, application no. 6538/74 (May 18, 1977), para. 214.

⁴³ *Id.* at para. 215. The House of Lords also recognized that there was no threat to the impartiality of the judiciary since in a case such as this a professional judge would not be affected. [1973] 3 All E.R. at 63 (H.L.).

⁴⁴ [1973] 3 All E.R. at 55 (H.L.).

⁴⁵ Report of the European Commission of Human Rights, application no. 6538/74 (May 18, 1977), para. 242.

While it was true that the settlement had to be approved by the Court, the Commission noted that this was required in this case only because the victims of the drug were minors. The judge would not be called upon to decide the issue of negligence. *Id.* at para. 239.

Both parties had already agreed to use the 1968 settlement as a model. *Id.* at para. 237.

⁴⁶ The Commission observed that it is "a legitimate function of the press in a democratic society" to deal with matters concerning the cause of a public disaster. The Commission also noted that there were no criminal proceedings brought by the Crown, nor were there any public investigations into the matter. It was left to the press to inform the public of the facts relating to the cause of the thalidomide tragedy. Report of the European Commission of Human Rights, application no. 6538/74 (May 18, 1977), para. 244-247.

tually before the court for a determination of negligence. The Commission merely found that an injunction was not "necessary" at that time to protect the authority of the judiciary.

The confusion regarding the law of contempt of court as applied to the press was recognized by the English government, as well as by the Commission. The Crown set up the Phillimore Committee to study this uncertainty.⁴⁷ The Committee recommended that Parliament make certain statutory clarifications of the law of contempt. One significant proposal was that the media not be enjoined from reporting on cases until after the date of setting-down for trial.⁴⁸ If adopted, this rule would insure that a holding such as that of the House of Lords in the *Sunday Times* case would not be repeated.

There is both external and internal pressure, then, for changes in the law of contempt of court in the United Kingdom. The case has been referred to the European Court on Human Rights for a final determination, and is still pending to date.⁴⁹ The United Kingdom has accepted the jurisdiction of the court, and has agreed to abide by the decision.⁵⁰ Hopefully, the Court of Human Rights will follow the findings of the Commission, bringing about a much needed clarification of the law of contempt and illustrating the effectiveness of the European Convention on Human Rights in upholding the international rights of individuals, even in the individual's native country.

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⁴⁷ See note 26 *supra*, at 9.

⁴⁸ Cmnd. 5794, paras. 126, 216(11).

⁴⁹ See note 16 *supra*, at 6.

⁵⁰ See note 14 *supra*, at 5.