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THE SUNDAY TIMES' THALIDOMIDE CASE

*E.S. Venkataramiah**

I Introduction

EVEN THOUGH it is all over, in the midst of the *Spycatcher*[1] controversy, it is worth revisiting the message of the *Thalidomide* discourse. Although the *Spycatcher* locates the so-called "menace" of the free press to national security, the issues before British courts are not all that different in terms of legal values and techniques than those involved in *Attorney-General* v. *Times Newspapers Ltd.*,[2] popularly known as the *Thalidomide* case. The facts of the case are as follows:

In 1958 Distillers Co. (Biochemicals) Ltd. (hereinafter referred to as Distillers) commenced the manufacture and sale in the United Kingdom of a sedative containing a drug of German origin called thalidomide. Available on prescription, this came to be used by many pregnant women. Soon it was discovered that many new-born babies suffered from serious deformities, owing to consumption of the drug by their mothers during pregnancy. When this was realised Distillers withdrew the drug from the market. But publicity of its adverse effects led to many claims for damages on behalf of the babies who had suffered. One such action, filed in 1962, was followed by about 70 more within the course of five or six years. The claimants were faced with two problems, *first*, a question of law which was not free from doubt, *viz.*, whether a person could sue for damage done to him before his birth, and *second*, the enormous cost involved in proving negligence on the part of Distillers in marketing the drug. They, however, joined together and, after negotiations with Distillers, settled their claims at 40 per cent each, assuming that the liability was established. Accordingly 65 cases were settled and Distillers paid about a million pounds in all as damages on the basis of trial of two cases.

But by 1969 there came to light about 400 more claims, not covered by the earlier settlement, which Distillers offered to settle by setting up a trust fund of over three million pounds, provided it was acceptable to all claimants. While the majority agreed, five dissented. An attempt was made to compel these dissenting ones to agree by having the official solicitor appointed to look after the interests of their children. But the Court of Appeal, in April

*Judge, Supreme Court of India, New Delhi.

1. For a discussion of the controversy, see, M.V. Desai, " 'Spycatcher' Case and after', *Hindustan Times* (8 June 1988, Delhi).

2. (1973) 3 All E.R. 54.

1972, reinstated these five parents.[3] In June 1972 Distillers made some new proposals but they were not accepted and ultimately it was found that 389 claims remained outstanding without any prospect of settlement.

II Times and Thalidomide

While the case was *sub judice*, a long and powerful article[4] in *The Sunday Times* raised the questions, *first*, as to whether those who put such drugs on the market ought to be absolutely liable for damages and, *second*, whether in such cases the currently accepted method of assessing damages was inadequate. It added:

> Thirdly, the thalidomide children shame Distillers.... It may be argued that Distillers have a duty to their shareholders and that having taken account of skilled legal advice, the terms are just. But the law is not always the same as justice. There are times when to insist on the letter of the law is as exposed to criticism as infringement of another's legal rights. The figure in the proposed settlement is to be £ 3.25m, spread over 10 years. This does not shine as a beacon against pre-tax profits last year of £ 64.8 million and company assets worth £ 421 million. Without in any way surrendering on negligence, Distillers could and should think again.[5]

The Attorney-General was unmoved by Distillers' request to take action against the editor of *The Sunday Times* for contempt of court. The editor intended to publish another article of a different character and send its material to the Attorney-General who took the view that he should intervene. Accordingly he moved the divisional court for an injunction restraining the editor from publishing the article. The court (Chief Justice Lord Widgery and Justices Melford, Stevenson and Erabin) granted an injunction[6] but the Court of Appeal (Lord Denning, M.R., and Lord Justices Phillimore and Scarman) allowed the appeal of the editor and discharged the injunction.[7] Lord Denning, M.R., explained the legal position thus:

> It is undoubted law that, when litigation is pending and actively in suit before the court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors, or the witnesses, or even by prejudicing mankind in general against a party to the cause....Even

3. *Re Taylor's Application*, (1972) 2 All E.R. 873.

4. "Our Thalidomide Children : A Cause for National Shame", *The Sunday Times* (24 September 1972, London).

5. Quoted in *supra* note 2 at 59.

6. *Attorney-General* v. *Times Newspapers Ltd.*, (1972) 3 All E.R. 1136.

7. *Attorney-General* v. *Times Newspapers Ltd.*, (1973) 1 All E.R. 815.

> if the person making the comment honestly believes it to be true, still it is a contempt of court if he prejudges the truth before it is ascertained in the proceedings.... To that rule about a fair trial, there is this further rule about bringing pressure to bear on a party, none shall, by misrepresentation or otherwise, bring unfair pressure to bear on one of the parties to a cause so as to force him to drop his complaint, or to give up his defence, or to come to a settlement on terms which he would not otherwise have been prepared to entertain.... We must not allow trial by newspaper or 'trial by television' or trial by any medium other than the courts of law.[8]

Lord Denning emphasised that the principle enunciated by him "applies only when litigation is pending and is actively in suit before the court". Only when "there must appear to be, 'a real and substantial danger of prejudice' to the trial of the case or to the settlement of it", the principle should be advocated. The court should not be oblivious of the interest of the public "in matters of national concern and the freedom of the Press to make fair comment on such matters", even where the subject matter is such that the public interest counter-balances the private interest of the parties. He added :

> Our law of contempt does not prevent comment before the litigation is started, nor after it has ended. Nor does it prevent it.... when the litigation is dormant and is not being actively pursued. If the pending action is one which, as a matter of public interest, ought to have been brought to trial long ago, or ought to have been settled long ago, the newspapers can fairly comment on the failure to bring it to trial or to reach a settlement. No person can stop comment by serving a writ and letting it lie idle; nor can he stop it by entering an appearance and doing nothing more. It is active litigation which is protected by the law of contempt, not the absence of it.[9]

Since Parliament had allowed the matter to be discussed, there was no possible reason for the court to refuse public discussion through the free press. He further said:

> Whatever comments are made in Parliament, they can be repeated in the newspapers without any fear of an action for libel or proceedings for contempt of court. If it is no contempt for a newspaper to publish the comments made in Parliament, it should be no contempt to publish the self-same comments made outside Parliament.[10]

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8. *Id.* at 821-22.
9. *Id.* at 822.
10. *Id.* at 823.

The Court of Appeal refused leave to the Attorney-General to appeal to the House of Lords. However, on leave being granted by the appeal committee, the appeal was heard by the House of Lords which, by its unanimous judgment allowed it, reversed the decision of the Court of Appeal and remitted the matter to the divisional court with a direction to grant an injunction in the following terms:

> That, by consent, the Defendants, Times Newspapers Limited, by themselves, their servants, agents or otherwise, be restrained from publishing, or causing or authorising or procuring to be published or printed, any article or matter which prejudges the issues of negligence, breach of contract or breach of duty, or deals with the evidence relating to any of the said issues arising in any actions pending or imminent against Distillers Company (Biochemicals) Limited in respect of the development, distribution or use of the drug "Thalidomide", with liberty to apply to that court.[11]

The appeal before the House of Lords was heard by five Law Lords—Reid, Morris, Diplock, Simon and Cross and each one of them recorded a separate opinion. Four main questions arose for consideration before the House of Lords, *viz.* :

(*i*) Whether, in the facts and circumstances of the case, the article gave rise to a real risk that the fair trial of the action would be prejudiced?

(*ii*) Whether the article would have amounted to exerting pressure on a litigant compelling him to settle a dispute on terms to which he did not wish to agree.

(*iii*) What effect would the article have on other potential sectors?

(*iv*) Whether the Attorney-General was right in moving the court for an injunction?

Lord Reid, who wrote the leading judgment, stressed that the existing law of contempt suffered from uncertainty, as it was founded entirely on public policy, which required a balancing of conflicting interests. The law was not there to protect the private rights of parties to a litigation or prosecution. Even though freedom of speech should not be limited to any greater extent than was necessary it could not be allowed if real prejudice to the administration of justice existed.[12]

He endorsed Chief Justice Jorden's observations in *Re Truth and Sportsman Ltd., ex-parte Bread Manufactures Ltd.*,[13] and said that it was of extreme public interest that no conduct should be permitted which was likely

11· *Supra* note 2 at 87.

12. *Id.* at 60.

13. (1937) 37 S.R.N.S.W. 242.

to prevent a litigant in a court of justice from having his case tried free from all matter of prejudice. But since the administration of justice is not the only matter in which the public was vitally interested, and if in the course of the ventilation of a question of public concern matter was published which might prejudice a party in the conduct of a law suit, it did not amount to contempt of court. He stated that it was well setted that a person could not be prevented by process of contempt from continuing to discuss publicly a matter which might fairly be regarded as one of public interest, by reason merely of the fact that the matter in question had become the subject of litigation, or that the person whose conduct was being publicly criticised had become a party to litigation either as plaintiff or as defendant, and whether in relation to the matter which was under discussion or with respect to some other matter.[14]

In the opinion of Lord Reid what was regarded as most objectionable was "that a newspaper or television programme should seek to persuade the public, by discussing the issues and evidence in a case before the court, whether civil or criminal, that one side is right and the other wrong."[15] Moreover, he said:

> [T]rial by newspaper is intrinsically objectionable. That may be because if one can find more limited and familiar grounds adequate for the decision of a case it is rash to venture on uncharted seas.[16]

He opined that anything in the nature of prejudgment of a case or of specific issues in it, was objectionable not only because of its possible effect on that particular case but also because of its side effects which might be far reaching.

Lord Reid, of course, agreed that responsible 'mass media' would do their best to be fair, but there might also be ill-informed, slapdash or prejudiced attempts to influence the public. If people were led to think that it was easy to find the truth, disrespect for the processes of the law could follow, and, if mass media were allowed to judge, unpopular people and unpopular causes would fare very badly. The freedom of the press would not suffer if it was made a general rule that it was not permissible to prejudge issues in pending cases.[17]

Lord Morris felt that in the general interests of the community it was imperative that the authority of the courts should not be imperilled and that recourse to them should not be subjected to unjustifiable interference. When such interference was suppressed not because those charged with the responsibilities of administering justice were concerned for their own dignity but because the very structure of ordered life was at risk if the recognised

14. *Id.* at 249, quoted in *supra* note 2 at 61-62.
15. *Supra* note 2 at 64.
16. *Id.* at 65.
17. *Ibid.*

courts of the land were so flouted that their authority wanes and was supplanted. He stated that as the purpose and existence of the courts of law, however, was to preserve freedom within the law for all well disposed members of the community, it is manifest that the courts must never impose any limitations on free speech or free discussion or free criticism beyond those which were absolutely necessary.[18]

Lord Diplock opined that the due administration of justice required, *first*, that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities. *Second*, they should be able to rely on obtaining in the courts the arbitrament of a tribunal which was free from bias against any party and whose decision would be based on those facts only that have been proved in evidence and adduced before it in accordance with the procedure adopted in courts of law, and *third*, that once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which was calculated to prejudice any of these three requirements or to undermine the public confidence that these requirements would be observed, amounted to contempt of court.[19] Applying these three criteria, he held that "trial by newspaper" violated them all.

Lord Simon also approached the matter in terms of two conflicting public interests which are liable to conflict in particular situations, *viz.*, in freedom of discussion, and unimpeded settlement of disputes according to law.[20] He placed the whole matter at par with similar conflicts of interest involved in determination of obscenity and "crown privilege."[21] To avoid judicial arbitrariness, inductable on a case to case approach, he favoured the enunciation of a "general principle of law." And he located this in the restriction of freedom of the press in *pendente lite* situations.

Lord Cross pointed out that if uninhibited discussion of pending judicial matters were allowed in the press "gradually the public would become habituated to, look forward to, and resent the absence of, preliminary discussions in the 'media' of any case which aroused widespread interest."[22] He was apprehensive that, unless checked, such discussion would encourage a "gradual slide towards trial by newspaper or television."

On the facts, all the Law Lords were of the view that an injunction ought to issue and accordingly made an order as stated above.[23]

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18. *Id.* at 66.
19. *Id.* at 72.
20. *Id.* at 81.
21. *Ibid.*
22. *Id.* at 84.
23. *Supra* note 2.

III European Court of Human Rights

But the matter did not end with the issue of the injunction by the House of Lords in 1973. *The Sunday Times* appealed to the European Court of Human Rights in 1974 impugning the House of Lords decision as violative of article 10[24] of the European Convention on Human Rights 1950. Later it was also contended, *inter alia*, that it was also violative of article 14[25] of the convention by reason of the fact that similar press publications had not been restrained and difference between the rules applied in Parliament in relation to comment on pending litigation and the rules of contempt of court applied to the press.

The European Court of Human Rights delivered its judgment on 26 April 1979 upholding the contention of *The Sunday Times*.[25a]

On the question whether the injunction was "necessary" within the meaning of the convention, the court, following its case law, affirmed that article 10(2) leaves to the contracting states, who have the initial responsibility for securing the convention rights and freedoms, a "margin of appreciation" and that when confronted with decisions of national courts, the court does not take the place of those courts but rather reviews the conformity of those decisions with article 10. The court also pointed out that its supervision is not limited to ascertaining whether a state has acted reasonably, carefully and in good faith; further, that since it had to assess the injunction's "necessity" in terms of the convention, the standards of English law could not serve as its criterion.

On the facts of the case, in the light of these principles, the court was of the opinion that publication of the proposed article would probably not

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24. Article 10 reads :

"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.

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 interest of national security, territorial integrity or public safety, for the protection of health or morals, for the prevention of disorder or crime, 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."

25. Article 14 states :

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

25*a*. "The Sunday Times Case", *Year Book of the European Convention on Human Rights* 402 (1979).

have added much to the pressure already on Distillers to settle the actions of parents on better terms and that, even to the extent that some readers might have formed an opinion as to the alleged negligence of Distillers, this would not in the circumstances have had adverse consequences for the "authority of the judiciary". Whilst publication might have provoked replies, the court could not decide whether this reason for the injunction was sufficient under article 10(2) without considering all the surrounding circumstances. It noted, in this connection, that a question as to initial necessity of the injunction was prompted by the fact that, when it was discharged in 1976, some actions involving the issue of negligence were still outstanding.

The court emphasised the importance, in a democratic society of the principle of freedom of expression, which is applicable in the field of the administration of justice just as in other fields. Not only do the mass media have the task of imparting information and ideas concerning matters that come before the courts, the public also has a right to receive them. The thalidomide tragedy and the question of where responsibility for it actually lay were matters of undisputed public interest, yet the case had been outstanding for several years; it was far from certain that the actions of parents would have come on for trial and there had been no public inquiry. Even though *The Sunday Times* was not prohibited from discussing wider issues, such as various general principles of English law, it was, in the court's view, rather artificial to attempt to divide those issues from that of the alleged negligence of Distillers. Besides, facts did not cease to be a matter of public interest merely because they formed the background to pending litigation.

The court (11 : 9) concluded that, in all the circumstances, the injunction did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression; it, therefore, did not have reasons that were sufficient under article 10(2); it was not proportionate to the legitimate aim pursued and, hence, not necessary in a democratic society for maintaining the authority of the judiciary; accordingly, there had been a violation of article 10.[26]

The response of Harold Evans, the then editor of *The Sunday Times* deserves to be given in full :

> It was the first time the European Court had reviewed a decision of the House of Lords. The narrow victory was the finding that their ban on *The Sunday Times* was disproportionate. "The Attorney-General moved the knight and left the queen exposed, 'said

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26. The court concluded unanimously :

"There had been no discrimination in violation of Article 14 taken together with Article 10 : failure to take steps against other newspapers was not sufficient evidence of discrimination against The Sunday Times and the respective duties and responsibilities of the press and parliamentarians, were essentially different." (*Id.* at 408)

> Whitaker pointing to the Court's comment on Widgery's 1976 discharge of the injunction:' Discharge in these circumstances prompts the question whether the injunction was necessary in the first place." But the European Court ruling went beyond Thalidomide and beyond even a repudiation of our archaic law of contempt. It put its judgment in a way which appealed to me, not so much on the right of the press to publish as the right of an individual to information which may affect his life, liberty and happiness. That is a powerful weapon against many of the censorships that have grown up in my generation in Britain. The same robust attitude on individual rights could affect many areas where bureaucratic, corporate or trade union power or common-law judgments have in Britain eaten into our liberties, in each case without reference to a written Bill of Rights of the kind which protects the American citizen. Many of our freedoms in Britain depend on judge-made common law. Sometimes, with a Denning, they are stoutly defended, sometimes they are repudiated, frequently they are frayed and always they are subject to legislative interference. The case for incorporating the European Convention into our own law was unanswerable, said Lord Scarman after our victory. It was a milestone in English law.[27]

In 1982, the British Parliament redefined the law by passing an Act. Among other reforms, it changed the standing point of *sub judice* so that it did not start from the issue of a writ but from the much later time when a case is set down for trial. Had this been the law earlier, the *Thalidomide* scandal could not for so long have remained secret.

27. See, Harold Evans, *Good Times Bad Times* 78 (1983).