THE PRESS, THE COURTS AND THE LAW

BY HIS EXCELLENCY SIR ZELMAN COWEN*

[*His Excellency Sir Zelman Cowen, Governor-General of Australia, delivered the twelfth Allen Hope Southey Memorial Lecture at the University of Melbourne on 12 October 1978. The lecture, which is here reproduced in full, deals with the legal and policy issues raised when the* Sunday Times *newspaper attempted to activate public opinion in relation to the defendants' conduct of settlement negotiations arising out of the* Thalidomide *litigation in the United Kingdom. The* Sunday Times *was restrained by injunction at the suit of the Attorney-General from publishing an article which,* inter alia, *reflected adversely on Distillers Ltd's action in placing the drug on the market in the first place, on the ground that the article constituted a contempt of court. Thereafter, the matter was taken to the European Commission of Human Rights, where it was held that the injunction breached the European Convention on Human Rights. The matter has now gone to the European Court of Human Rights. In the course of exploring the various aspects of the* Thalidomide *case, His Excellency outlines briefly the development of the common law of contempt with respect to media reporting of matters* sub judice, *together with parliamentary practice as to the discussion of such matters, and relates these to an examination of the conflicting claims to protection of freedom of the press and the right of parties not to have a trial of the issues prejudiced by adverse publicity.*]

I

Twenty years ago, in July 1958, the Vice-Chancellor of the University of Melbourne wrote to Mrs Southey accepting her offer to provide a prize in the Law School in memory of her husband Allen Southey, who had graduated as a Master of Laws in 1917. The Vice-Chancellor proposed that the Dean of the Faculty of Law, after consultation with members of the Faculty, should bring forward suggestions for the form of the prize. I was Dean at the time and later in that year I proposed to Mrs Southey that a Southey Lecture should be endowed, to be given annually or biennially. Mrs Southey agreed, and after appropriate University legislation was adopted, Sir Robert Menzies was invited to give the first Southey lecture. He had been a contemporary of Allen Southey, and his lecture 'The Challenge to Federalism' was delivered in 1960. It was a notable occasion, and it was preceded by a dinner which was attended by Mrs Southey and her son, Sir Robert Southey.

I remained in the Law School until the end of 1966, and in those years Southey Lectures were delivered by Willard Pedrick, then of Northwestern University, Sir Rupert Cross of Oxford, Sir Kenneth Bailey, who had had a long and distinguished career in the University of Melbourne Law School before he became Solicitor-General of the Commonwealth, and by Sir

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Hugh Wooding, Chief Justice of Trinidad and Tobago. In the years which followed, lectures were given by Sir George Paton, by David Daube and H.L.A. Hart of Oxford, by Lord Gardiner, Geoffrey Sawer and Aubrey Diamond. It is a distinguished list and I am honoured by the invitation to join it. I should tell you that when Sir George Paton gave the lecture in 1967, soon after I had left the School, he noted that I was not on the list of those who had given it. Drily and characteristically, my old teacher and friend observed that 'this must be one of the few lecture bills on which he has not figured. Time will no doubt remedy this'. His prediction is fulfilled, and I am pleased, because the Southey Lecture has an important place in the academic calendar of a University with which I have had a long, close and cherished association, and, more particularly, because in this case I was present at and was indeed part of the process of the creation.

May I also say that in the years during which I had responsibility for arrangements for the lecture I had happy correspondence with the late Mrs Southey on proposals for successive lectures, and she attended the lectures when it was possible for her to do so. I am pleased that her son, my friend Sir Robert Southey, is present tonight.

II

I have taken as my subject 'The Press, the Courts and the Law'. That is a very large subject matter and I have already explored some of the issues, so far as they bear on defamation, privacy, the protection of the fair trial and obscenity, in my Tagore Lectures in 1975 which were later published under the title of *Individual Liberty and the Law* (1977). On this occasion I propose to explore only one aspect of the matter, that which bears on the free press — fair trial issue, and in the particular context of the fascinating and difficult *Thalidomide* case.[1]

Twenty-one years ago, in October 1957, the drug thalidomide was placed on the West German market under the description Contergan by Chemie Grünenthal. In the United Kingdom it was manufactured and marketed as Distaval by Distillers (Biochemicals) Ltd, who also marketed it in Australia under that name. Other manufacturers and distributors sold it elsewhere; it appeared in Sweden as Neurosedyn, in Canada as Talimol and Kevadon, and an application (which fortunately was held up) was made to the Federal Drug Authority in the United States to market it as Kevadon. This account is not exhaustive; it was sold elsewhere in the world. In the advertising, including the advertising of Distaval, it was claimed to be perfectly safe and free of toxic effects. The thalidomide drugs were introduced as sedatives, with particular benefits to women suffering from pregnancy nausea.

[1] *Attorney-General v. Times Newspapers Ltd* [1973] Q.B. 710 (D.C.; C.A.); [1974] A.C. 273 (H.L. (E.)).

Reports began to appear which questioned the safety of the drug. The first reports, as I understand it, related to cases of peripheral neuritis, indicating that the drug affected the human nervous system. Then in October 1960 cases of phocomelia, a rare disease manifested in gross malformation in infants, were reported in West Germany. A sudden increase in the number of cases of phocomelia was observed, and, late in 1961, Dr Lenz of Hamburg stated that he had tentatively traced these malformations to the taking of thalidomide by women at periods during early pregnancy. There was much concern in West Germany, and in November 1961 a German paper, *Welt am Sonntag*, revealed the catastrophe. Contergan and other thalidomide-associated drugs were withdrawn from sale in West Germany in that month.

In Australia Dr William McBride, working in Sydney, saw cases of phocomelia during 1961 and linked them to the administration of thalidomide in early pregnancy. His findings were reported in articles in the medical journals late in that year. Distillers withdrew its thalidomide drugs from the market late in 1961. As Lord Denning said in the Court of Appeal early in 1973, an overwhelming tragedy befell hundreds of families in the United Kingdom as a result of the taking of thalidomide. The editor of the *Sunday Times*, Mr Harold Evans, wrote in *The Thalidomide Children and The Law* (1973) that thalidomide was the greatest drug tragedy of our time, producing in the countries in which it was marketed thousands of cases of phocomelia. He said that it could be seen as a symbol of the havoc that a technically complex society could wreak upon its own members. It was fortunate that the application to the federal authority to market it in the United States was held up; a few cases were reported following trial runs administered by doctors, but had the drug been generally released in the United States the consequences would very likely have been tragic.

The first writs against Distillers alleging negligence were issued in 1962 on behalf of thalidomide-deformed children. There were very substantial difficulties in the way of the plaintiffs, going to the proof of negligence (which was denied by the defendants), and to the very existence of a cause of action on behalf of children who suffered the damage while still *in utero*. So far as I know, no civil action has been carried through to a conclusion in the courts anywhere in the world, though many have been settled and, as I understand, are still being settled. Criminal proceedings instituted in West Germany were discontinued after protracted hearings for want of the required proof. In 1967 Distillers made an offer of settlement on the footing of a determination of the basis of assessment of damages to be made by a judge. That judicial determination was made; it provided modest recompense, and 62 actions were compromised on the basis of lump sum settlements in 1968. Leave to issue further writs was granted in 266 further cases, but there was very little movement beyond

the earliest steps in the judicial process in any of these cases. Additional claims were notified by correspondence but not covered by the issue of a writ. It is clear from the glacially slow movement of the litigation process that what was really sought was an adequate settlement, and in 1971 negotiations were taking place on the basis of Distillers' proposal to set up a charitable trust of some $3.25 million for the children who had not been covered by the 1968 settlement. This proposal was made conditional upon the acceptance by all the parents, but some stood out. An unsuccessful court application was made to bring these cases within the ambit of the settlement negotiations.

It was at this stage that the *Sunday Times* resolved to take action. It published an article on 24 September 1972 which said strong things about a company of great resource and profitability which had, in its view, shown a gross lack of concern for the thalidomide victims. It was clearly designed to put strong moral pressure on Distillers to settle on much more substantial terms. Distillers complained of this article and said, in substance, that it constituted contempt of court in its impact upon the subsisting actions at law. The Attorney-General raised questions about this, and the *Sunday Times* sent a second article to the Attorney-General, advising him that it was proposed to publish it. While this article (which was made public years later) did not express direct views on the legal liabilities of Distillers, it clearly traversed issues which were material to the conduct of Distillers in the preparation of the drug, and the article contained a detailed analysis of some of the evidence likely to be given in the case together with a discussion of the issue of Distillers' standards of conduct in putting thalidomide on the market. The Attorney-General took proceedings to restrain publication of the article by injunction. The editor of the *Sunday Times*, by affidavit at the time and later and in other statements, made clear his purpose and the purpose of the paper. Ten years had elapsed since the last thalidomide victims were born, without an adequate offer of compensation. One of the *Sunday Times'* concerns was to arouse public opinion and thereby to bring pressure on Distillers to make a better offer. Moreover, over the period of ten years since the first writs were issued no investigation of the various issues surrounding the manufacture and marketing of the drug had been undertaken, and searching and critical investigation of these issues had been stifled by a legal process which had been stretched out at unacceptable length.

The main argument in the case was that publication constituted contempt of court, though Distillers raised other objections in law to the publication. The Divisional Court unanimously granted the injunction;[2] that decision was unanimously reversed by the Court of Appeal,[3] and that decision in

[2] [1973] Q.B. 710.
[3] *Ibid.*

turn was unanimously reversed by the House of Lords,[4] though within the House of Lords there was substantial disagreement over specific issues. In particular, the Divisional Court had held that the earlier published article of 24 September was a contempt of court in that it constituted an unlawful interference with the course of justice. Three of the five law lords in the House of Lords disagreed with the Divisional Court on this point.

The judgment of the Divisional Court granting the injunction was given on 17 November 1972. On 29 November 1972, before the appeal was heard in the Court of Appeal, Speaker Lloyd in the House of Commons allowed a full discussion of the issues to take place in the House, holding that it was not restrained by the *sub judice* rule. The report of the parliamentary debate was given wide publicity. Mr Robin Day, who was a member of the Phillimore Committee on Contempt of Court, which had been appointed in 1971 to consider the law on this subject and which delayed its report until it had had an opportunity to consider the decision of the House of Lords in the *Thalidomide* case, observed in a separate note in the report of the Committee that if the campaign against Distillers was a serious interference with the course of justice, the law of contempt was unable to prevent it. The matter had been discussed in parliament, it was debated in the press and on television, there were pressures by institutional shareholders for a better offer from Distillers and a threatened boycott of Distillers' products. 'Despite the suppression of the *Sunday Times* article', said Mr Day, 'the campaign of protest and pressure made a mockery of the law of contempt'.

While the contempt action was proceeding settlement negotiations were halted, but in 1973 Distillers made a new offer some seven times higher than its original offer six years earlier. Even as recently as this year further settlements with English thalidomide victims were reported in the press. The injunction was lifted, on the application of the Attorney-General, in 1976.

When the Phillimore Committee reported after the contempt proceedings had been concluded in the House of Lords it reviewed the case at length. In general it concluded that while

> the right to issue such publications must on occasion be overridden by the public interest in the administration of justice, we consider that the balance has moved too far against the freedom of the press.

The Committee was critical of the formulation and the application of the law of contempt by the House of Lords.

It might have been thought that the *Sunday Times* and its editor Mr Evans would have concluded that while they had lost the judicial battle over the right to publish the article which was the immediate object

[4] [1974] A.C. 273.

of the proceedings, they had in practical terms won the war by forcing Distillers to a very different and substantial settlement. They did not however see it this way. A book, *The Thalidomide Children and the Law* (1973), was published which included the texts of the judgments of the three English jurisdictions through which the *Thalidomide* litigation had passed, a reprint of editorial comment on the decision and an introduction by Mr Evans which was sharply critical of the decision. He said, in effect, that the courts had been afforded an opportunity for a classic debate on the limits and role of a free press and had been found wanting. Lord Devlin also wrote a comment on the decision in this book, and he expressed the view that the decision of the House of Lords had eased the law of contempt in favour of the press. Mr Evans renewed his criticisms of the decision in a Granada lecture in 1974 on 'The Half-free Press'. In January 1974 the *Sunday Times* took more dramatic action. In that month the Times Newspapers Ltd, the editor of the *Sunday Times*, Mr Evans, and a group of journalists from the *Sunday Times* made application to the European Commission of Human Rights, alleging that the injunction preventing publication in the *Sunday Times* of the article on the thalidomide children constituted a violation of provisions of the European Convention on Human Rights, to which the United Kingdom was a signatory, and specifically offended against clauses assuring freedom of expression and prohibiting discrimination.

In 1977 the European Commission of Human Rights, having heard argument, held by a majority of eight to five that the restriction imposed on the applicants' rights to freedom of expression was in breach of Article 10 of the Convention on Human Rights. The argument based on discrimination was dismissed. Under the procedures provided for in the Convention the case was referred by the European Commission of Human Rights to the European Court of Human Rights. Written submissions were made to the Court on behalf of the United Kingdom Government and by the *Sunday Times* and the individual parties, and oral argument was heard by the Court in April 1978. The judgment of the Court is awaited: the issue which is squarely before it is a very unusual and historic one. It is whether a decision of the highest court in the United Kingdom on a matter wholly of common law, and the first case in the law of contempt of court directly affecting the press ever to go to the House of Lords, is itself a denial of the freedom of expression assured by the European Convention. As one writer commenting on that Convention has put it:

> The European Court of Human Rights is the only truly functioning international judicial organ established by international agreement with the power to adjudicate violations of internationally agreed human rights.

This narrative has taken some time to relate, but it is a very unusual story, and the broad implications of the appeal to the supra-national Commission and Court are fascinating.

III

I propose now to consider more closely some of the developments in the law of contempt of court. More than two hundred years ago an English judge declared that nothing was more incumbent upon courts of justice than to preserve their proceedings from being misrepresented, nor was there anything of more pernicious consequence than to prejudice the minds of the public against persons in causes before the cause is heard. The law in this area has evolved since that time, and, particularly in modern times, it may not have been clarified by the categorization of the conduct as contempt of court. This point was made in the *Thalidomide* case where in the House of Lords Lord Cross said that the continued use of the contempt terminology in such cases was misleading in that it conveyed the impression that the concern was with a supposed affront to the dignity of the court, whereas the central issue was with the protection of the due and fair administration of justice. There have been other judicial statements to like effect. The Phillimore Committee agreed that the terminology was inaccurate and misleading, but because of long and ancient usage and for want of a suitable alternative it chose to use contempt as 'convenient shorthand' in dealing with this branch of the law.

In the English cases the law of contempt has been applied quite draconically in the context of criminal proceedings. A celebrated modern case was *R. v. Bolam*,[5] where a widely circulated English daily newspaper published statements referring to a man accused of murder and subsequently convicted. It was said that he was a 'human vampire', with supporting details, and that he had committed other murders, with the name of victims supplied. The Lord Chief Justice, Lord Goddard, who was a plain speaker, said that it was of the utmost importance that the court should vindicate the common principles of justice and in the public interest see that condign punishment was meted out to persons guilty of such conduct. The offending editor was sent to prison and the newspaper company was heavily fined. Mr Harold Evans in his Granada Lecture in 1974 had no quarrel with this particular application; nobody, he said, wants a 'vampire splash'. He was however in some doubt in relation to the criminal law as a whole. He pointed specifically to the Watergate case in the United States, arguing that in England once persons had been arrested the law of contempt would have restrained the investigation which proceeded in the United States. There the arrests revealed the tip of the iceberg, and the media investigations and reports which followed exposed the malefactions of many in all their amplitude. The law as it has evolved in the United States is very different from our own. It has evolved in modern times from a very broad reading of the Bill of Rights provisions in the United States Constitution, which assure freedom of expression and of the press. The

[5] (1949) 93 *Solicitor's Journal* 220 (D.C.).

cases, to this point, leave it unclear whether *any* constraint could be lawfully imposed on the media in dealing with subsisting criminal proceedings. Thus it was said in a modern American case:

> How best to protect accused persons from the prejudicial effect of newspaper publicity has been a matter of immense concern. In England such publicity is largely curbed by the free use of the power of the courts to punish for contempt. In this country [the United States] the course of treatment has been different. . . . More fundamentally it has been thought that this modern phenomenon of 'trial by newspaper' is protected to a considerable degree by the constitutional right of freedom of the press. . . . On this view there has been some fatalistic acceptance of 'trial by newspaper' however unfortunate 'as an unavoidable course of metropolitan living'.

From time to time the activities of the media in dealing with such matters have aroused public concern. So it was with the Lindbergh baby kidnapping case in the 1930s, and so it was with the activities of the media in the immediate aftermath of the assassination of President John Kennedy in 1963. At that time the American Bar Association and the Warren Commission on the Assassination of President Kennedy voiced their deep concern: they spoke of the need to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial. When these concerns are translated into questions touching the desirability of imposing restraints upon the media by law, there is strong, not to say vehement, opposition. The distinguished American newspaper publisher, Mrs Katharine Graham, in a Granada Lecture in England in 1974 said:

> I shudder at the notion that the American press should be restrained. That would not purify the American system of justice. On the contrary it would tend to allow that system to be far more arbitrary and capricious than it is now. The administration of justice in the United States may be less swift and sure, more overburdened, far more open to the influences of politics and prejudice. But the sure and safest way to promote due process and equal treatment under the laws is to report the ways the system does and doesn't work. Without the press injustices would multiply and reforms, I think, could not be won.

It is a very large statement and one not in line with our way of thinking, but quite uncompromising. I do not understand Mr Evans of the *Sunday Times* to take such an absolutist position. As I read what he says, I think he would say that both in criminal and civil proceedings the law should take quite openly into account the public interest. He has quoted with approval — as did Lord Reid in the House of Lords in the *Thalidomide* case — a statement by Sir Frederick Jordan, then Chief Justice of New South Wales, in a case some forty years old:

> It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a court of justice from having his case tried free from all matter of prejudice. But the administration of justice, important though it undoubtedly is, is not the only matter in which the public is vitally interested; and if in the course of the ventilation of a question of public concern matter is published which might prejudice a party in the conduct of a law suit, it does not follow that a contempt has been committed. The case may be one in which as between competing matters of public interest the possibility of prejudice to a litigant may be required to yield to other and superior considerations. The discussion of public affairs and the denunciation of public abuses, actual or supposed, cannot be required to be suspended merely because the discussion on the denunciation may,

> as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens at the time to be a litigant.[6]

That, as I understand the editor of the *Sunday Times*, should be applied to criminal as to civil proceedings. The words do not however perfectly fit the *Thalidomide* case, because there the 'discussion or denunciation', to use Sir Frederick Jordan's words, was plainly *intended* to achieve what the *Sunday Times* believed to be a just outcome to the claims of the thalidomide victims. It was certainly not an 'incidental but not intended by-product' of the publication.

IV

There are other problems associated with criminal proceedings and the law of contempt. These include problems associated with the reporting of preliminary proceedings in criminal matters and this has been a source of much controversy, but I do not propose to pursue that matter here. Overall, so far as the English and Australian law is concerned, there is general agreement that more comprehensive and stringent protection is appropriate to criminal than to civil proceedings, and this has the support of the Phillimore Committee.

I propose now to look at the *Thalidomide* case in more detail. I find it a great case in the issues it raises, though the course of the case through the hierarchy of the English courts raises some puzzling issues and problems. In starting, I am reminded of a reference by the distinguished American constitutional lawyer Paul Freund to a statement of Mr Justice Brandeis that sunlight is the most effective of disinfectants. Whether, says Professor Freund, that is or ever was scientifically accurate, it makes a valid point about disclosure. The question is necessarily one of limits and the balancing of competing interests: in this context I quote Mr Justice Holmes to the effect that my right to swing my arm ends at the point at which your nose begins. It is interesting to note that in the *Thalidomide* case in the Court of Appeal and in the House of Lords this was clearly seen and specifically stated. It is odd, in a sense, that while the point was unambiguously argued in the Divisional Court as well, the Lord Chief Justice, Lord Widgery, specifically rejected the proposition that any such balancing was appropriate to the judicial office. If what is meant is that in a contempt case there is *no* valid countervailing interest when a serious risk of interference with pending legal proceedings is demonstrated, that is understandable, even if disputable. Lord Widgery C.J. however appeared to say more generally that the balancing of competing interests is an administrative rather than a judicial function and that if left to the courts it would give rise to uncertainty and inconsistency in decision. That seems to me not to be so; I should have thought that it has been done,

[6] *Ex parte Bread Manufacturers Ltd* (1937) 37 S.R. (N.S.W.) 242, 249, *per* Jordan C.J.

actually if not expressly, many times within the processes of the common law.

In the *Thalidomide* case in the House of Lords Lord Simon of Glaisdale stated very clearly a first principle:

> The first public interest involved is that of freedom of discussion in a democratic society. People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument. This is the justification for investigative and campaign journalism.[7]

There were however clear limits. In the context of the issue before him in the case Lord Reid said:

> What I think is regarded as most objectionable is 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. . . . I do not think that the freedom of the press would suffer, and I think the law would be clearer and easier to apply in practice if it made a general rule that it is not permissible to prejudge issues in pending cases.[8]

All of the judges in all of the jurisdictions through which the *Thalidomide* case passed agreed that there must be some restraints on the freedom of the media in such cases; all agreed generally that 'trial by television or press' was unacceptable. The difficulty lay in reaching agreement on an acceptable formulation of limits. The Divisional Court took a straightforward view: that there was a contempt in a case where a newspaper deliberately sought to influence the settlement of pending proceedings by bringing pressure to bear on one party, and that on this basis there was a serious risk of interference with Distillers' freedom of action in the litigation. By this test the Court would have held that not only was there a contempt to be restrained in the publication of the second article, but also that a contempt had been committed by the publication of the first, September, article. The House of Lords, which restored the injunction granted by the Divisional Court and denied by the Court of Appeal, did not reach that conclusion on the same clear basis. They held unanimously that a contempt was threatened by the publication of the second article because that article traversed and prejudged issues which would be before the court: issues going to the quality and character of Distillers' conduct as negligence, and that was not permissible. Moreover, it is interesting to see why it was not permissible. It was not because the discussion and the conclusions of the newspaper article would have influenced or affected the court in its determination of these issues. As Lord Reid said, from the standpoint of Distillers the publication of the second article would not have added much to the pressures on the company; the damage was already done. The publication of the second article would be a contempt because it was a usurpation of the court's function, which was to try the case without a parallel trial of the issues by another, unauthorized, body,

[7] [1974] A.C. 273, 315.
[8] *Ibid.* 300.

in this case the newspaper. It is a proper office of the law of contempt to protect the role and authority of the courts against intrusion without necessary reference to the impact of that intrusion on the court in its disposition of the issue.

It is perhaps surprising that the House of Lords, having taken this point, was divided over the issue whether the first article constituted a contempt. That article argued strongly that Distillers had a moral obligation to settle on what it regarded as proper terms, but three out of five judges in the House of Lords said that the exercise of such public pressure on Distillers did not constitute a contempt. If the general principle is the protection of the authority of the court it is not easy to see how that authority is assured if a party is subjected to heavy pressure from outside. It may be thought that such pressure is calculated to have more influence on the outcome of the case, particularly through a settlement, than the canvassing of issues in the litigation which a civil court has the fortitude and self-control to ignore and which may not be the central issue in leading to a settlement.

There is another problem, which arises from the differing ways in which the Court of Appeal and House of Lords viewed the case. All three judges in the Court of Appeal held that the litigation was dormant; they said quite plainly that while the law of contempt applied to protect litigation which was pending and actively in suit it did not apply to litigation which was not being actively pursued. In the ***Thalidomide*** cases little movement had taken place in most suits beyond the issue of a writ; in no case was the litigation far advanced or anywhere near ready for trial. Furthermore, the House of Commons had actively debated the issues in the case before it came to the Court of Appeal, and, as Lord Denning M.R. put it:

> if we in this court apply rules as to *sub judice* which are on the same lines as Parliament we shall not go far wrong.

I have said that after the Divisional Court had granted the injunction and before the matter was heard on appeal by the Court of Appeal there had been a discussion of the issue in the House of Commons. Speaker Lloyd, who allowed the discussion to proceed, wrote in his book *Mr Speaker, Sir* (1976) that:

> the [*Thalidomide*] cases had not been set down for trial or otherwise brought before the court. I had no hesitation in allowing debate.

He contrasted this case with the case of the Crossman Diaries,[9] where he refused to allow questions because the case had, on the same day as the matter was raised in parliament, been set down for hearing in four weeks time. Lord Selwyn-Lloyd, writing in 1976, quoted with approval what Lord Denning M.R. had said in the Court of Appeal in the *Thalidomide* case about the desirability of accord between the courts and the parliament

[9] *Attorney-General v. Jonathan Cape Ltd* [1976] Q.B. 752.

on matters *sub judice*. If there is not accord there can be difficulties, since the courts cannot exercise control over what is discussed in parliament and over what is reported in consequence. The House of Commons has considered this problem in recent years; in 1963 it was resolved that reference should not be made to matters awaiting or under adjudication in a civil court from the time that the case has been set down for trial or otherwise brought before the court (as for example by notice of motion for an injunction) and that such matters may be referred to before that date unless it appears to the Chair that there was a real and substantial danger of prejudice to the trial of the case. A further Commons resolution of 1972 emphasized the discretion of the Speaker to judge of the propriety of debate or discussion in the national interest. The matter of parliamentary discussion of such matter has also been discussed in the Australian context and has arisen both in the context of the Senate and the House of Representatives. While there is no formal rule, the general consensus is that the presumption should be in favour of discussion rather than against it, and that unless there are strong and overriding reasons parliament should not be restrained from discussing matters of national importance. Speaker Snedden, in a recent extra-parliamentary discussion of the *sub judice* doctrine, has expressed the view, which accords with that of Speaker Lloyd, that the *sub judice* doctrine should not apply in a civil action merely because a writ had been issued and had not been followed up by substantial action to bring the matter to trial.

The House of Lords dealt quite peremptorily with these arguments in reversing the decision of the Court of Appeal and restoring the injunction. As Lord Reid put it:

> It was said that the actions had been dormant or asleep for several years. Nothing appears to have been done in court, but active negotiations for a settlement were going on all the time. No one denies that it would be contempt of court to use improper pressure to induce a litigant to settle a case on terms to which he did not wish to agree. So if there is no undue procrastination in the negotiations for a settlement I do not see how in this context an action can be said to be dormant.[10]

Lord Diplock, starting with the proposition that it was one of the elements in the due administration of justice that once a dispute has been submitted to a court of law the parties should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law, categorized it as 'wholly unrealistic' to describe the proceedings as dormant pending the outcome of complicated negotiations for a settlement. 'It would', he said,

> be *pessimi exempli* to discourage the settlement of court actions by suspending the right of the parties to any remedy for contempt of court so long as negotiations for a settlement were pending.

The Lords seemingly thought little of the fact that discussion had been allowed and had taken place in the House of Commons and of the view

[10] [1974] A.C. 273, 301.

of the three judges in the Court of Appeal that there should desirably be a concurrence between the court and parliamentary practice in such matters; that, as Lord Justice Scarman put it, if there were a substantial gap between the two practices 'a serious and perhaps dangerous situation would arise'.

There can be little doubt that the plaintiffs in the *Thalidomide* actions wanted a satisfactory settlement and not protracted and uncertain litigation. In terms of progress to a disposition by a court of the substance of the matter virtually nothing had happened in most of the actions beyond the service of writs. It is interesting to note that the House of Lords, in sharp disagreement with the Court of Appeal, saw the protection of the law of contempt as covering negotiations between the parties as well as actual proceedings within the court. In this connection I repeat what I have already said: it is understandable that the canvassing of the issue of negligence on the part of Distillers was integral to the resolution of the matter by the court; it is not really so easy to see why it had such relevance to the settlement negotiations, which, in part anyway, recognized the great difficulties in the court action. Indeed, it is easier to see why the first article, with all its moral pressures on Distillers, might have affected the balance of the settlement negotiations. Notwithstanding this, three members of the House of Lords were of opinion that the first article did not constitute a contempt.

Ultimately the House of Lords sustained the injunction on the footing that the article in issue prejudged the issues, whether of fact or law, in pending proceedings, and pending proceedings were defined to include action directed towards settlement of the matter by the parties, even though virtually no steps had been taken by the parties to bring the matter to trial in court. I have already said that the Phillimore Committee, which had been reviewing the law of contempt, held up its report until it had an opportunity to consider the decision of the House of Lords in the *Thalidomide* case. It was critical of the decision of the House of Lords; it considered that the balance had moved too far against the freedom of the press. It made the point that the case was an unfortunate one because of the profoundly tragic implications and because of the difficulties which were seen to stand in the way of the litigation. While it accepted the validity of the objection to trial by the media, which especially in jury trials could substantially impair confidence in the impartial administration of justice, it did not agree that the Lords' test of 'prejudgment' struck the appropriate balance. Lord Reid had pointed to the fact that in all the circumstances of the case the publication of the article was unlikely to have any significant effect on the outcome of the case or on the parties even though it dealt with and prejudged issues in the case. The Phillimore Committee accordingly concluded that the 'simple test' of prejudgment was unsatisfactory. The only satisfactory test was one which had direct

reference to the mischief which the law of contempt was designed to suppress: that mischief was the risk of prejudice to the due administration of justice. Accordingly the Committee proposed as a test: whether the publications complained of created a risk that the course of justice would be seriously 'impeded or prejudiced'. Even then there should be a discretion which might be exercised in a particular situation to allow publication or comment.

What is also significant is that the Phillimore Committee directed its attention to the point of time at which the law of contempt should operate. It noted what had been said in the Court of Appeal and the House of Lords on this matter and it was unanimous in the view that to apply the strict rules of contempt in civil cases from the issue of the writ or summons would unreasonably stifle freedom of speech and comment because it was not necessary for the proper protection of the parties and the due administration of justice. The Committee accordingly recommended that the law of contempt in civil cases should apply from setting down for trial and not from an earlier time, and one member would have fixed a significantly shorter time.

It is a complex and a difficult story with many strands. The matter is one generally acknowledged to raise major questions of principle and the *Thalidomide* case exposed sharp differences between the judges as it made its way through the English judicial system. The matter is further complicated by the evolution of parliamentary doctrine on the *sub judice* rule, which, as I read it, tends to favour wider parliamentary discussion. It is, I think, significant that the Phillimore Committee saw the decision of the House of Lords in the *Thalidomide* case as too restrictive, as moving too far against the freedom of the press.

V

The report of the Phillimore Committee has been followed in the United Kingdom by a command paper which reviews the law and the report and invites discussion of the issues. That report notes that the issues are now complicated by the reference of the issues in the *Thalidomide* case to the European Commission of Human Rights and to the European Court of Human Rights. The central issue was whether the decision of the House of Lords in granting the injunction is a violation of Article 10 of the European Convention on Human Rights. That declares that everyone has the right to freedom of expression, which includes the right

> to receive and impart information and ideas without interference by public authority and regardless of frontiers.

This is qualified in the Article in these terms:

> 10(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.

It is a far cry from the absolutist simplicity of the American First Amendment providing that Congress shall pass no law abridging the freedom of speech or of the press. Modern conventions are drafted with more particularity and perhaps less confidence, and with a closer eye to the complexity of the problems which arise in the sensible interpretation of a bill of rights. In the case of this Article of the European Convention one commentator, noting the qualification 'for maintaining the authority and impartiality of the judiciary', observed that it clearly warrants the strict regime which prevails primarily in England with regard to the handling of cases pending before the courts leading to sentences for contempt of court. It may be that he spoke too soon, because the European Commission of Human Rights by a majority decision of eight to five has concluded that the decision of the House of Lords was a contravention of the freedom of expression assured by the Convention. The Commission had before it not only the decision of the House of Lords but also the critical Phillimore report, as well as submissions by the parties.

The majority opinion in the European Commission of Human Rights concluded that the *Sunday Times* article was not likely to influence the judges when the action came on for trial, that a trial was not in sight, and that it was an 'improbable eventuality'. There was a public interest here which transcended the interests of the parties to the litigation and justified publication as an expression of the right assured by the Convention. No official investigation of the thalidomide disaster had taken place, and if the public interest to clarify matters of great importance could not be satisfied by any kind of official investigation it must in a democratic society at least be allowed to find its expression in another way. Only the most pressing grounds, it was said, would be sufficient to justify the authorities in stopping information on matters the clarification of which would seem to be in the public interest, and this on the application of the persons concerned and for the reason that its publication would seriously disturb civil litigation in which those persons were engaged. On that test, the majority in the Commission held that it was a denial of the freedom assured by the Convention to prevent publication of the *Sunday Times* article. The dissenting members of the Commission held that the exemptions and restrictions spelled out in the Article were clearly meant to cover institutions peculiar to the Anglo-Saxon legal tradition. There was no uniform European conception of morals and likewise no European conception which would show what kind of protection the functioning of the judiciary requires. On this footing it was said that what the House of Lords had said and done was reasonably justified and should be held to fall within the terms of the exception.

The majority view in the Commission accorded closely with the statement of reasons in the judgment of the Court of Appeal, which the House of Lords treated with scant regard.

It was on the basis of general principle stated by the dissenters in the Commission that the United Kingdom Government made its submission to the European Court of Human Rights. Its memorial to that Court argued that in judging of permissible limits to freedom of expression provided for in Article 10(2) of the Convention it must be recognized that social, moral and legal considerations prevailing within different societies inevitably vary and that national judges are generally in a better position to give an opinion in the context of national needs. In judging whether the decision of the House was sustainable as a justifiable limitation on freedom of expression it was appropriate to give national courts and national laws a 'margin of appreciation'. By reference to such a test the House of Lords had acted reasonably and proportionately. That was the central argument of the submission, which also traversed the opinion of the Commission in some detail.

VI

The opinion of the European Court of Human Rights is awaited with much interest. If it finds against the United Kingdom Government it will raise some very interesting problems. The specific question, as the United Kingdom Government pointed out, was whether the injunction restored by the House of Lords was consistent with the terms of Article 10 of the Convention. That injunction ceased to operate long before the European Court was seized of the matter, but the proceedings thus far before the Commission have not suggested that the case is moot for that reason. The House of Lords upheld the injunction on the basis of common law. It would appear that it is for the European Court itself to declare principles of law for the United Kingdom which in this area are consistent with the Convention Article. If the Court finds against the United Kingdom, it is difficult to see how there can be compliance without legislation of the United Kingdom Parliament.

I bring this to an end with three brief notes. First, it is very interesting to see a bill of rights introduced supra-nationally with application to a national political system with unlimited parliamentary competence. That is the British situation; it differs from the American constitutional system in which Congressional legislative competence is limited not only by a federal distribution of powers but also by an overriding Bill of Rights. The application of such Bill of Rights provisions falls to the courts, and more particularly to the Supreme Court of the United States. The task is a truly formidable one: the court is called upon to take decisions on matters with a very large reach into social policy. It is a puzzling and difficult question, in the broad, to decide whether a role so large should in a democratic

society be undertaken by courts. The *Thalidomide* case now poses that problem for such a country as the United Kingdom. An international tribunal without deep roots in a particular national system of government or law is called upon to take decisions on matters of national law. In some cases it may not be so difficult; in such a case as this, as both the dissenters in the European Commission and the United Kingdom Government in its submission to the European Court of Human Rights point out, there are very difficult questions of appreciation and evaluation of a historic national system.

Then again there is the great problem posed by the production and marketing of such drugs as thalidomide. It was the great drug tragedy of our time; as Harold Evans of the *Sunday Times* said, it could be seen as the symbol of the havoc that a technically complex society can wreak upon its members. It poses the complicated and difficult problem of society's capacity to protect itself adequately against such an outcome; on the other hand, there is the problem of assuring that society can have the benefits of a drug technology — to take the specific cases of medical drugs — which will contribute significantly and substantially to health. These, of course, are problems of technological development which go far beyond the particular area of pharmacological products.

Finally, let me bring the story up to date. On 31 July 1978 the *Sunday Times* published a 'shortened version of the original draft article' which gave rise to the proceedings, and in a note to it said that this was 'the first time that real light can be shed on the origins of the worst drug tragedy of our times'. There were in fact *two* injunctions. One has been central to this story, and it was lifted on the application of the Attorney-General in June 1976. Then the *Sunday Times* published an article entitled 'Thalidomide: The Story They Suppressed', but it was not the full text or the whole story as told in the original draft article.

Large numbers of Distillers' documents relating to thalidomide had come into the hands of the *Sunday Times* and had been used in the preparation of the article. In November 1972 Distillers issued a writ to recover them, arguing that their use would constitute a breach of confidence and of copyright. Because of undertakings given by the *Sunday Times* no action was taken on this matter until 1974, when Distillers applied for and was granted an injunction on grounds of breach of confidence and copyright. When the contempt injunction was lifted the *Sunday Times* asked Distillers to release them from the second injunction, but this request was refused.

I shall not trouble you with an account of the law of breach of confidence, which has been around for a long time and has been the subject of discussion and review in recent years, or of the law of copyright.

When the European Commission of Human Rights gave its opinion on the *Thalidomide* issue, it annexed to its report the full text of the original

Sunday Times article. The United Kingdom Government unsuccessfully objected to this on the ground that the Commission's dealing with the case had not covered the issues of breach of confidence and copyright. I do not have the full text of what was argued and of what transpired, but the *Sunday Times* reported that the European Court ordered publication of the Commission's full report. Without more, it is not easy to offer a confident judgment, but on its face this is surprising. The issue, to which the article is central, still awaits decision in the European Court. Further, there was a subsisting English injunction which restrained publication on other grounds.

At this point the *Sunday Times* made an application to an English court for an order lifting the second injunction, and this was granted by Mr Justice O'Connor, who, as the *Sunday Times* noted, became the twenty-sixth jurist (counting English judges and European Commissioners) to pronounce on the article.

I am sorry to have taken so long to tell this story, and I detain you only to say once again that I am very pleased to have been invited to deliver the Southey Lecture.

[Editors' Note: On 26 April 1979 the European Court of Human Rights decided by a majority of eleven to nine that the suppression of the *Sunday Times* article discussed in the text was in breach of the European Convention on Human Rights: *The Age* (Melbourne) 27 April 1979, 7.]
