(Not So) At Home Abroad: Its Drawbacks for the Press

London

Harold Evans of the Sunday Times, London, is one of the most resourceful, determined and successful editors in Britain. He and his staff can make sense of the complicated and the hidden, the doings of a Bernie Cornfeld or the management of an election. The Sunday Times has rightly won just about all the journalism prizes going over here.

In 1972 Harry Evans decided to dig into what he considered a legal scandal: the delay of more than 10 years in providing some compensation for the families of Britain's thalidomide children. About 450 mothers who had taken the tranquilizer thalidomide gave birth in 1961 to children lacking legs or arms or having other horrifying deformities. A decade later 370 of the families were still trying to settle lawsuits against the company that made the drug, and had not collected a penny.

What happened to Harry Evans in his coverage of the thalidomide case should be noted by any American editor, reporter or citizen who takes freedom of the press lightly. He ran into the British legal doctrine of contempt of court.

In its best-known form, the contempt doctrine prohibits press comment on pending criminal cases. An editor whose paper printed a colorful piece about a murder suspect, describing his past record or alleged confession, would certainly pay a stiff fine for contempt and might well go to jail himself.

The theory behind that rigorous rule is that it will keep outside influences from prejudicing a jury and assure the defendant a fair trial. The theory does not always hold up; in at least one case recently a newspaper was fined for printing a rude description of a defendant before trial, but the defendant lost when he tried to have his trial delayed to let the prejudicial atmosphere disappear. In any event, the object of preventing prejudice to criminal defendants is one that Americans can easily understand.

What is more startling is what happened to the Sunday Times: the application of the contempt rule to a civil case tried by a judge alone. In other words, there was no criminal defendant whose fate was at risk, and there was no jury that might be improperly influenced, but still the English court banned a newspaper article related to a pending case.

The article that the Sunday Times proposed to print was a thorough investigation of the way thalidomide has been developed, tested and marketed in Britain a decade ago. It reached critical conclusions about the manufacturer, the Distillers Company, finding that it had not adequately tested the drug before selling it, nor noted danger signals from other countries quickly enough.

Distillers is one of Britain's largest companies, with sales of over $1 billion a year, mostly in the liquor business. Among other brands it makes Vat 69, Johnny Walker, Haig and Black & White Scotch, and Booth's and Gordon's Gin. It had offered to settle the lawsuits brought against it by the 370 thalidomide families, but only on condition that all 370 accept its terms. Some would not.

The Sunday Times showed its piece to Distillers before publication for comment. Distillers went right to the Attorney General, Sir Peter Rawlinson, and demanded that he move to stop publication—as a contempt. He did, and

a three-judge court agreed that it would be contempt. The court enjoined the paper from using the piece.

At its ripest, the contempt idea in British law used to condemn even criticism of judges' decisions after they were rendered. It is nice to muse on how many editors and politicians from the American South might have gone to jail under that doctrine, for what they wrote about Earl Warren.

Nowadays, English judges say they are self-confident enough to stand up to adverse comment on their judgments. As the Lord Chief Justice, Lord Widgery, said in the thalidomide case, a court's concern in contempt matters is "not with the preservation of the dignity of itself or its judges."

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But the doctrine is still extremely broad, by American notions. Lord Widgery defined three kinds of outside comment that would be contempt:

1. Comment on a pending case that might "affect and prejudice the mind of the tribunal," even if that is a judge without a jury. As an example he suggested any publication that would make a judge fear being "severely criticized" if he did not rule a particular way in a pending case.

2. Comment that could affect witnesses, as by persuading them even unwittingly to alter their recollection of events. That might well be any newspaper or television reconstruction of the facts involved in a pending lawsuit.

3. Comment that may "prejudice the free choice and conduct of a party" to a lawsuit.

It was this last kind of contempt that Lord Widgery and his judicial colleagues found in the thalidomide case. They assumed that the Sunday Times article was entirely accurate. But by showing that Distillers had been at fault in making and selling thalidomide, the judges said, the article sought improperly—contemptuously—"to enlist public opinion to exert pressure on Distillers and cause the company to make a more generous settlement."

Was that wrong? I mean wrong not in some abstract legal sense but in terms of the realities of this human problem.

On one side of the pending lawsuits was the Distillers Company, with assets so immense that it was effectively under no financial pressure. Its last reported annual profit was $90 million, compared with a recent increased settlement offer to the thalidomide families totaling $12 million. Nor was it under any pressure of time: like most big corporate defendants in damage suits its interest was served by delay.

On the other side were the 370 families, many of them poor and none with the resources to meet the medical and rehabilitation and special living needs of their children without help. The families were under appalling financial pressure, the worse as time passed and the children needed new care or devices to help them lead lives at home and in school as near normal as possible.

The only effective way to make the two sides less grossly unbalanced in their strength would be by exerting on Distillers the pressures of conscience and public opinion. That was part of what the Sunday Times sought to do. The other part was to suggest that, whatever Distillers did, there was a public responsibility toward these families.

Most editors, British or American, would regard those as legitimate press functions—indeed public obligations. The Americans, if they thought about it, ought to be grateful that their right to perform the role is protected by a written constitution and judges who expound what it means by "freedom of the press."

It is not only in the contempt area that Americans can look at British restraints on the press and value their own freedom the more. Another danger area is libel; a mistaken criticism, even a joke that does not come off, may cost a British paper thousands of pounds. There is nothing like the constitutional rule of The New York Times libel case, protecting criticism of public figures unless it is not only untrue but malicious.

Again there is the draconian protection given to "official secrets." Present law literally makes it a crime to publish information from government sources unless it is officially released, though this ridiculous statute is seldom invoked. A committee has proposed changes to limit the law's reach to information concerning defense, internal security, the currency and foreign relations, and information that might "impede" police work. By American standards the proposed reform would still leave the law shockingly—unconstitutionally—overbroad.

No wonder British editors often have a barrister at their elbow. Thinking about their difficulties may focus our minds on the value of what Justice Brennan of the American Supreme Court rightly called our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open."

—Anthony Lewis