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COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION
OF HUMAN RIGHTS

Application No. 6538/74

TIMES NEWSPAPERS LTD. and others

against

United Kingdom

Report of the Commission

(Adopted on 18 May 1977)

Strasbourg

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I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

2. The application was introduced on 19 January 1974 by Mr. Harold Evans, a United Kingdom citizen, born in 1928 and resident in London. He is the Editor of the Sunday Times, a weekly newspaper which is published and owned by Times Newspapers Ltd.

Mr. Evans brought the application

(1) on behalf of the publisher, Times Newspapers Ltd.;

(2) on behalf of The Sunday Times as a group of journalists, composed of Mr. Evans himself and MM. Bruce Page and Phillip Knightley as well as Ms. Elaine Potter;

(3) in his personal capacity and as editor of the Sunday Times.

3. All three applicants are represented by Mr. Antony Whitaker, Legal Manager of Times Newspapers Ltd.

The substance of the applicants' complaints

4. The applicants claim that an injunction to restrain them from publishing an article in the Sunday Times dealing with thalidomide children and the settlement of their compensation claims in the United Kingdom constitutes a breach of Art. 10 of the Convention. The injunction was issued by the Queen's Bench Division of the High Court of Justice on 17 November 1972 and was finally upheld by a decision of the House of Lords of 18 July 1973. It was based on the finding that the article constituted contempt of court in view of pending litigation between the thalidomide children's parents and the producer and distributor of the drug in the United Kingdom, Distillers Co. (Biochemicals) Ltd.

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The proceedings before the Commission

5. The present application was introduced on 19 January 1974 and registered in the name of the three applicants mentioned above on 26 February 1974.

6. On 28 May 1974 the Commission decided to give notice of the application to the United Kingdom Government and invited them to submit their written observations on admissibility. The Commission specified that these observations should in particular deal with the question which of the applicants, if any, should be regarded as the proper party in the proceedings before the Commission, having regard to the terms of Art. 25 of the Convention.

The respondent Government submitted their written observations on admissibility on 23 September 1974, and the applicants submitted observations in reply on 3 December 1974.

7. In a letter preceding the submission of their written observations on admissibility, the Government informed the Secretary of the Commission that they wished to make available to the Commission, as an annex to their observations, the draft article which had been the subject of the domestic proceedings.

The Government stated that it would make this draft article available to the Commission on certain conditions relating to its use in any decision or report of the Commission. The Commission subsequently decided on 8 October 1974 that, as a matter of principle, it could not accept any conditions regarding the use in its decisions or reports of documentary material submitted other than those relating to the confidentiality of any proceedings before it.

In view of the Commission's decision, the Government then made the draft article available to the Commission while expressing the hope that regard would be had to the desirability of restricting references to the details of the draft article in any decision or report of the Commission (letter of 11 November 1974).

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8. In their reply of 3 December 1974 to the written observations of the Government, the applicants drew the attention of the Commission to the report of a government-appointed committee charged with a comprehensive review of the law of contempt which was shortly to be published but not yet available at the date of their reply. They reserved the right to rely on the recommendations for the reform of the law of contempt made by that committee. The Report of the Committee on Contempt of Court (Cmnd. 5794, hereafter cited as the report of the Phillimore Committee) was submitted to the Commission by the applicants on 13 December 1974.

9. On 21 March 1975 the Commission decided to declare the application admissible in regard to all the applicants, provided that the respondent Government were prepared to waive the opportunity of making further submissions on admissibility at a hearing before the Commission. By letter of 3 April 1975 the Government informed the Commission that they did not insist on such a hearing and consequently the Commission's decision on admissibility became definitive.

10. By letter of 1 April 1975, the applicants were invited to submit their written observations on the merits of the case before 13 May 1975. On 26 April the applicants asked for an extension of this time limit until 13 June 1975. On 5 May the Acting President acceded to this request, and the observations dated 10 June 1975 were received on 13 June.

By letter of 16 June 1975 the respondent Government were invited to submit their written observations in reply before 31 July 1975. However, on 25 July 1975 the Government also asked for an extension until 4 September which was granted by the Acting President on 7 August 1975. The Government's observations were submitted on 2 September 1975.

11. The Commission then discussed the future procedure in the case on 6 and 10 October 1975. It decided to hold an oral hearing on the merits and fixed 11 December 1975 as the date for the hearing. The oral hearing on the merits took place on 11 and 12 December 1975.

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12. The applicants, of whom two (MM. P. Knightley and B. Page) were themselves present at the hearing, were represented by MM. Antony Whitaker, Legal Manager of Times Newspapers Ltd., Counsel, and James Evans, Secretary of the Thomson Organisation, Adviser.

The Government were represented at the hearing by MM. P.R.N. Fifoot, Barrister-at-Law, Legal Counsellor at the Foreign and Commonwealth Office, Agent, I.K. Mathers, Assistant Legal Adviser at the Foreign and Commonwealth Office, Assistant Agent, G. Slynn Q.C., N. Bratza, Barrister-at-Law, and R.N. Ricks of the Treasury Solicitor's Department.

The present Report

13. The present Report has been drawn up by the Commission in pursuance of Art. 31 of the Convention after deliberations and votes in plenary session, the following members being present:

MM. G. SPERDUTI, Acting President
J.E.S. FAWCETT
F. ERMACORA
L. KELLBERG
B. DAVER
K. MANGAN
J. CUSTERS
C.H.F. POLAK
J.A. FROWEIN
R.J. DUPUY
G. TENEKIDES
S. TRECHSEL
N. KLECKER

14. The Report was adopted by the Commission on 18 May 1977 and is now transmitted to the Committee of Ministers in accordance with para. (2) of Art. 31.

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15. A friendly settlement of the case has not been reached and the purpose of the present Report, as provided in Art. 31 (1) is accordingly,

(1) to establish the facts, and

(2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

16. A schedule setting out the history of the proceedings before the Commission, the Commissions's decision on admissibility, the Sunday Times draft article and other press comments on the thalidomide litigation as quoted in Mr. Evans' affidavit of 30 January 1973, as well as the headnotes of the relevant English court decisions are attached hereto as Annexes I-V. An account of the Commission's unsuccessful attempts to reach a friendly settlement has been produced as a separate document (Annex VI).

17. The full text of the pleadings of the parties together with further documents handed in as exhibits, are held in the archives of the Commission and are available to the Committee of Ministers, if required.

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II. ESTABLISHMENT OF THE FACTS

18. The facts of the case are generally not in dispute between the parties.

19. There are essentially four sets of facts which are at the basis of the application, namely

A. The proceedings brought by the victims of thalidomide against the producer of the drug in Britain, Distillers Co. (Biochemicals) Ltd.;

B. The Sunday Times' campaign in support of the thalidomide victims; and

C. The injunction restraining the publisher of the Sunday Times, Times Newspapers Ltd., from publishing certain matter in this connection.

D. Proposals for the reform of the law of contempt of court: The Phillimore Report.

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A. The proceedings brought by the victims of thalidomide against the producer of the drug in Britain, Distillers Co. (Biochemicals) Ltd. (hereinafter referred to as Distillers)

20. Thalidomide is a drug which was first developed in Germany. Between 1958 and 1961 it was manufactured and marketed in the United Kingdom by Distillers. The drugs were prescribed as sedatives for, among others, expectant mothers. In the year 1961 a number of mothers to whom the drugs had been administered gave birth to children suffering from severe physical deformities. In November 1961 Distillers withdrew all drugs containing thalidomide from the British market.

21. Following that withdrawal, claims were made against Distillers in respect of the malformed children on the basis that the cause of the deformities was the effect on the foetus of thalidomide taken by the mother during pregnancy.

The proceedings on the actions brought by the victims of thalidomide against Distillers were not only the subject of the relevant series of articles which the Sunday Times proposed to publish (see B. below), insofar as they were still pending they were also the reason why the British courts considered that the applicants would be in contempt of court if they proceeded to the above publication (see C. below).

It is therefore material to give first a short account of the development of those proceedings and, in particular, the state of procedure at the time when the injunction was issued.

22. A first group of actions was brought by the parents of 70 of the deformed children between 1962 and 1966. The parents issued writs against Distillers on behalf of the children and on their own behalf alleging, i.a., negligence in the production, manufacture and marketing of the drugs containing thalidomide. Distillers by their defences in each of the actions denied that they had been negligent and put in issue the legal basis of the claims.

23. The legal advisers of the parties entered into settlement negotiations which led to a settlement of 65 cases early in 1968. 62 of these cases concerned living malformed children and since these children were minors it was necessary that the settlements were approved in court. On 19 February 1968 a single judge gave his approval to terms of settlement on the basis that Distillers paid 40 per cent of the amount of

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damages to which each plaintiff would have been entitled if wholly successful in the proceedings. The parents, in turn withdrew their allegations of negligence.

The three remaining cases which were included in the 1968 settlement concerned children who had died and no court approval was therefore needed.

Five cases were not included in the 1968 settlement because the writs had not been issued within the statutary limitation period of three years.

24. In the 62 cases which had been settled on a 40 % basis the parties subsequently could not agree on the calculation of the damages.

Two representative cases were therefore brought before the court by agreement between the parties. On 30 July 1969 the same judge who had approved the 1968 settlement assessed the damages in these cases on the assumption of full liability on the part of Distillers (1).

Subsequently, damages in a further 56 and of the total of 62 cases were agreed and approved by the court.

One case was excluded, because it was agreed that the deformities had not been caused by thalodomide.

In one case, the child concerned died before the amount of damages could be approved by the court.

In the remaining two cases, the amount of damages was still being negotiated at the time of the House of Lords' decision.

25. Following the settlement of the first group of actions in 1968 and the statement made in court on behalf of Distillers on that occasion, further claims were made against Distillers by the parents and guardians of other deformed children.

As mentioned above, 5 actions remained pending after the 1968 settlement.

In 261 further cases leave to issue writs out of time was granted ex parte by the court on various dates pursuant to the Limitation Act 1963.

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(1) cf. S. v. Distillers Co. (Biochemicals) Ltd. (1970) 1 W.L.R. 114.

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Altogether 266 actions thus remained pending before the court.

In addition, 123 claims were advanced against Distillers without a writ being issued.

The total number of claims against Distillers thus was 389.

26. Negotiations ensued with a view to settle all these claims. In 1971 Distillers made a proposal to establish a charitable trust fund to be administered to the benefit of the deformed children, but subject to the condition that it was accepted by all the plaintiffs.

The parents of all but five of the children concerned were willing to accept the scheme and the terms of settlement, but five parents made it a point of principle that compensation should be by right and not as a charity with a means test.

This resulted in an application to the court by the majority parents with the object to remove these five parents from the office of next friend for their children, and to appoint instead the Official Solicitor as the legal representative of these children. The single judge granted the application by a decision of 22 March 1972, but on 12 April 1972 the Court of Appeal reversed the decision and reinstated each of the parents as next friend.(1)

27. After this date, the five parents remained unwilling to accept the proposed charitable trust, which accordingly could not be established.

Further negotiations took place on the basis of new proposals which Distillers made on 29 June 1972. The requirement that all parents had to agree was dropped, and substituted by the requirements of the consent of "a substantial majority" of the parents. It appears that by September 1972 a settlement had been worked out for the setting up of a £ 3.25 million trust. It was expected that the parties would seek court approval of the settlement in the court term starting on 2 October 1972 when the Sunday Times published, on 24 September 1972, a critical article about the legal basis of that settlement, headed "Our Thalodomide Children : A Cause for National Shame". The newspaper's simultaneous annunciation of further publications

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(1) In re Taylor's Application (1972) 2 Q.B. 369

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on the topic set in motion the developments which eventually led to the issue of the injunction with which the present application is concerned, on 17 November 1972.

28. The public criticism had the effect that the envisaged settlement did not proceed, and Distillers came forward with substantially increased proposals in December 1972 and January 1973 (the value of the proposed trust fund had been increased to £ 20 million instead of the original £ 3.25 million).

The negotiations on these new proposals were still taking place when the Sunday Times' case was heard in the Court of Appeal (decision of 18 February 1973) and a settlement had not yet been concluded by the time of the House of Lords' decision on 25 July 1973.

However, only five days after that decision, on 30 July 1973, a single judge of the Queen's Bench Division approved the terms of the thalidomide settlement in the great majority of cases.

29. The settlement (1) provided in each case for a payment on a similar basis as the 1968 settlement (i.e. 40 per cent of the value of the claim in turn for the withdrawal of the action). In addition, a charitable trust fund was set up the beneficiaries of which included all qualifying children including those who had settled in 1968.

It was stated in court that not all claimants had accepted the offer, and Distillers had agreed to settle with those who had, leaving the rest to take whatever course they might be advised to take.

It was also stated in court on behalf of Distillers that they had always denied and continued to deny that either they or any of the scientists and medical men who had advised them were in any way negligent. Since some few writs remained outstanding, the negligence issues remained sub judice.

30. There were still four outstanding actions at the time of the discharge of the injunction (23 June 1976).

In one of the extant actions the pleadings were closed, but nothing had been done since 1974. It had not been set down for trial.

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(1) cf the law report in The Times of 31 July 1973

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In two actions a statement of claim was delivered and nothing further done.

In another case only a writ had been issued.

31. The applicants have described the situation in one of these outstanding cases in somewhat more detail. This was the action of a family of Lancaster on behalf of their deformed child. The father of this child took the view that it would be morally wrong for him to accept what he regarded as a charity in agreeing to the terms of Distillers' settlement. Because of his personal circumstances he had lost the benefit of legal aid, but he still planned to continue legal action against Distillers if he possibly could. However, he wanted to await the outcome of the present proceedings before the Commission before deciding what course to adopt.

32. The Commission's attention has also been drawn to further litigation between Distillers and their insurers, which also involved the issue of Distillers' negligence in manufacturing and distributing thalidomide. Distillers claimed that the insuring underwriters were liable to pay the above settlement on four policies covering the period 1958 - 1962. The claim was challenged by the underwriters i.a. because Distillers allegedly had not carried out adequate tests and research on the drug.

The case had been set down for trial on 4 October 1976 but was settled shortly beforehand, on 24 September 1976. It was therefore still pending at the time when the Sunday Times injunction was discharged (23 June 1976).

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B. The Sunday Times' campaign in support of the thalidomide victims

33. The facts relating to children born between 1959 and 1962 and alleged to have been deformed as a result of their mothers having taken thalidomide as a tranquilliser or sleeping pill during pregnancy had been reported regularly in the Sunday Times since 1967.

In 1971/72 the paper decided to campaign for these children more directly and forcefully, in a series of investigative and leading articles, in view of the fact that by then over 300 claims for compensation were still outstanding.

The article of 24 September 1972

34. A long article headed "Our Thalidomide Children: A Cause for National Shame" appeared in the issue of 24 September 1972 of the Sunday Times along with an editorial under the title "Children on our Conscience". This article examined the settlement proposals which were then being considered, and described difficulties which the children's claims for compensation encountered in the English legal system. These included, in particular, the absence of a clear rule as to whether they were entitled in law to claim damages for injuries sustained before they were born, and the necessity for them to establish Distillers' negligence. The thalidomide children's chance of being successful in their lawsuits was therefore considered to be less than even when they concluded the 40 per cent deal in 1968. Further difficulties arose in the determination of the amount of damages "through a judicial refusal to take account of inflation, taxation and the actuarial technique of estimating life-span".

35. The Sunday Times which described the sums paid on the basis of the 1968 settlement as insufficient found it disturbing that in view of the sum offered (£ 3,25 million) the proposed new settlements which would

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rest on essentially the same legal basis would have to be on a general level much below that which had been fixed four years ago. The editorial also criticised the long delay needed to get any damage at all.

36. The newspaper on the one hand appealed to Distillers not to insist on the letter of the law and to make a more generous offer. On the other hand it called for major reforms of the legal system. It stated i.a. :

> "Our laws on personal injury and damages are notoriously ramshackle : almost certainly, they are going to be reformed. If, in the meantime, the most important of recent claims for personal injury should have been disposed of on an old and unfair basis, it would rank as one of the worst single failures of the English legal system."

The Sunday Times' draft article

37. A footnote to the above article announced that "in a future article the Sunday Times (would) trace how the tragedy occurred."

The proposed article was to be the object of the injunction with which the present case is concerned. Its text has been submitted by the respondend Government.

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38. The proposed article stated that investigations made by the Sunday Times suggested that the manner in which DCBL (Distillers) went about marketing thalidomide in Britain left a lot to be desired.

The main theses were that the British company

" - Relied heavily on the German tests and had not completed full trials of its own before marketing the drug.

- Failed to uncover in its research into medical and scientific literature the fact that a drug related to thalidomide could cause monster births.

- Before marketing the drug did no animal tests to determine the drug's effects on the foetus.

- Accelerated the marketing of the drug for commercial reasons. Were not deflected by a warning from one of its own staff that thalidomide was far more dangerous than had been supposed.

- Were not deflected by the discovery that thalidomide could damage the nervous system, in itself a hint that it might affect the foetus.

- Continued to advertise the drug as safe for pregnant women up to a month from when it was withdrawn." (1)

39. The draft article gave a detailed account of Distillers' activities and attitudes with regard to the drug thalidomide from the moment of buying the licence for the drug until its withdrawal from the market. It also covered the results of tests which had been carried out in Britain and elsewhere insofar as they were known, or could have been known to Distillers.

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(1) Cf. Annex III, at p.119

40. The conclusion drawn in the draft article was that

"the burden of making certain that thalidomide was safe fell squarely on DCBL. How did the company measure up to this heavy responsibility? It can be argued that:

1. DCBL should have found all the scientific literature about drugs related to thalidomide. It did not.

2. It should have read Thiersch's work on the effects on the nervous system of drugs related to thalidomide, have suspected the possible action on unborn babies and therefore have done tests on animals for teratogenic effect. It did not.

3. It should have done further tests when it discovered that the drug had anti-thyroid activity and unsuspected toxicity. It did not.

4. It should have had proof before advertising the drug as safe for pregnant women that this was in fact so. It did not." (1)

41. The proposed article also contained a summary of arguments in favour of Distillers' position as follows:

"For DCBL it could be argued that it sincerely believed that thalidomide was free from any toxicity at the time it was first put on the market in Britain; that peripheral neuritis did not emerge as a side effect until the drug had been on sale in Britain for two years; that testing for teratogenic effects was not general in 1958; that if tests had been done on the usual laboratory animals nothing would have shown because it is only in the New Zealand white rabbit that thalidomide produces the same effects as in human beings; being given to pregnant women no serious results followed (because thalidomide is dangerous only during the first 12 weeks of pregnancy)." (2).

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(1) Cf. Annex III, at p.139
(2) Cf. Annex III, at p.140

Other published material on the thalidomide tragedy and the public response in 1972/1973

42. Although the draft article announced on 24 September 1972 was not published because contempt of court proceedings were started the Sunday Times continued to focus on thalidomide children and the laws of compensation, and a number of articles were published in the issues of 1, 8, 15, 22 and 29 October 1972. These included, in particular, a paper by Professor Harry Street "Why we must Change the Laws of Compensation" in the issue of 1 October (1), and a series of case histories (2).

43. There was apparently immediately a considerable response from the public, press and television, and it appears that as a consequence of this, contempt of court proceedings were also considered in respect of a certain radio programme broadcast on 8 October, and in respect of the display of certain protest posters in London Underground stations (3). However, only the case against the Sunday Times was pursued.

44. A second wave of publications followed when the matter was debated in Parliament on 29 November 1972 on the initiative of Mr. Jack Ashley, M.P. Mr. Ashley in his introductory speech expressly referred to the Sunday Times' campaign and moved

> "That this House, disturbed about the plight of thalidomide children, calls upon Distillers (Biochemicals) Limited, in dealing with these cases, to face up to their moral responsibilities: and calls for immediate legislation to deal with the problems of such children, including the establishment of a trust fund to provide for the thalidomide children, for State as well as private responsibility for provision on an actuarial basis for proved cases, and all other related questions."

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(1) Reprinted in "The Thalidomide Children and the Law," p. 20.
(2) Ibid., pp. 24 ss.
(3) See the references to this in the Times law report on the first hearing of the Sunday Times case in the Divisional Court on 7 November 1972, reprinted in "The Thalidomide Children and the Law", at pp. 43 and 47.

After a long discussion it was resolved

"That this House, disturbed about the plight of thalidomide children, and the delay in reaching a settlement between Distillers (Biochemicals) Limited and most of the children and their families, recognises the initiatives taken by Her Majesty's Government to improve services for the handicapped and disabled; and welcomes the undertakings of Her Majesty's Government to investigate any case where the needs of a thalidomide child are thought not to be met by the services available, and to consider, as soon as the cases are no longer sub judice, whether a trust fund needs to be established for thalidomide children."

45. One of the press publications which followed the Parliamentary debate was a sequence of two articles in the Daily Mail of 8 and 9 December 1972 which purported to reveal "for the first time the whole, tragic story" of thalidomide. Particular reference has been made to these articles in the proceedings before the Commission, because they covered partly the same ground as the enjoined draft article of the Sunday Times, and described elements which might be considered as indicating a certain negligence on behalf of Distillers. Characteristic are the sub-headings of the second article which read as follows:

- The doctors who took the new wonder drug on trust.
- The tests that failed to reveal the consequences.
- The research entrusted to an overworked chemist.
- The warning signs that went unrecognised.

46. There was also a considerable number of press comments which quite openly denied the legal responsibility of Distillers. Some of these were quoted by Mr. Evans in the affidavit which was read at the appeal hearing of the Sunday Times case on 30 January 1973 (1).

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(1) Cf. Annex No. IV. at p. 141

The eventual publication of the Sunday Times' draft article

47. The Sunday Times' draft article which had been the object of the injunction of 17 November 1972 was not printed until after the discharge of the injunction on 23 June 1976. It was eventually published in the issue of the Sunday Times of 27 June 1976.

48. There were, however, a number of editiorial changes, additions and also ommissions in comparison with the original draft.

The latter were essentially due to the fact that a further injunction had been granted against the article on 31 July 1974. This injunction from which the applicants did not appeal forbade the disclosure of information received in confidence as part of the process of the discovery of documents by the plaintiffs in the thalidomide litigation. The Sunday Times draft article had partly been based on documents which had been obtained from a consultant advising the legal advisers of the thalidomide children's parents.

It has been clearly stated by the applicants in the present case that they do not complain of this additional injunction.

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C. The injunction restraining Times Newspapers Ltd. from publishing certain matter in connection with the thalidomide litigation

Intervention by the Attorney-General

49. Following the publication of the Sunday Times article on compensation on 24 September 1972, Distillers made formal complaints to the Attorney-General claiming that the article constituted contempt of court in view of the litigation still outstanding. There followed an exchange of letters between the Solicitor-General (replacing the Attorney-General who was absent) on the one side and the editor of the Sunday Times, Mr. Harold Evans, on the other (1). In the course of this correspondence the editor submitted to the Solicitor-General the proposed article. On 29 September the Solicitor-General informed the editor that the case would be referred to the Attorney-General after the latter's return.

50. By a letter of 9 October 1972 the Solicitor-General informed the Legal Adviser to Times Newspapers Ltd., Mr. James Evans, that the Attorney-General had decided not to take any action over the matter already published. With regard to the draft article he asked whether it had been submitted to any of the parties to the litigation (or their advisers). As a consequence of this the draft article was sent to Distillers on 10 October 1972.

51. On 11 October 1972 the Sunday Times was informed by the Attorney-General's Office that representations had been made on behalf of Distillers and that the Attorney-General had decided to apply to the High Court for an injunction to restrain publication of this article. On 12 October the Attorney-General issued a writ against the Sunday Times.

The decision of the Divisional Court

52. The hearing before the High Court of Justice, Queens Bench Division, took place from 7 to 9 November 1972. On 17 November 1972 the Court decided that publication should not be allowed and that the injunction should be granted.

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(1) Cf. The Thalidomide Children and the Law, pp. 37-41.

53. The Divisional Court of 3 judges, presided over by Lord Widgery, found unanimously that the proposed article constituted contempt of court in that its avowed purpose was to persuade Distillers to pay more, or to settle for a higher figure than they would otherwise have been minded to settle for. The means by which this result was intended to be achieved was not by supplying the children's advisers with additional and valuable information, but by supplying that information to the public so that public opinion might be brought to bear on Distillers' attitude to this case. In a matter of "contempt of court" the court's concern was with ensuring that justice should be administered impartially in the court.

54. Unilateral comment prior to the conclusion of the court hearing might prevent the due and impartial administration of justice in three principal ways: (1) it might affect and prejudice the mind of the tribunal itself even where, as in civil cases nowadays, juries were employed less and less; (2) it might affect witnesses who were to be called, and (3) it might prejudice the free choice and conduct of a party himself, causing that party to abandon his claim or to settle his claim for a lower figure than he would otherwise have been prepared to accept.

55. As regards the argument that there were two competing public interests, namely the protection of the administration of justice on the one hand, and the right of the public to be informed on the other, the Divisional Court held that it was not for a court to balance such competing public interests which was an administrative rather than a judicial function. Furthermore, the issue in the present case was not whether the full story of thalidomide should be told or withheld for all times, but whether it should be told now rather than after the determination of the pending cases. There was no public interest in immediate disclosure which could possibly outweigh the public interest in preventing the application of pressure to the parties to pending litigation. The Court concluded that publication of the article complained of would create a serious risk of interference with Distillers' freedom of action in the litigation and it would therefore be a clear contempt.

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The decision of the Court of Appeal

56. Times Newspapers Ltd. appealed against the above judgment to the Court of Appeal which heard the case on 30 January and 1 and 2 February 1973. On 18 February 1973 the Court of Appeal composed of Lord Denning, Master of the Rolls, Lord Justice Phillimore and Lord Justice Scarman unanimously reversed the order of the Divisional Court for principally two reasons:

57. Firstly, the prohibition of unilateral comment applied only when litigation was pending and was actively in suit before the courts, and there had to appear to be a real and substantial danger of prejudice. However, in the present case, writs had been issued in 266 cases in 1968. In one case a statement of claim had been filed and a defence delivered in 1969, and in many cases, by agreement, no pleadings had been served. Nothing more had been done in these actions. The article which the Sunday Times proposed to publish drew attention to the moral responsibility of Distillers for all the 451 children, not merely the 266 who had issued writs. It did not prejudice pending litigation because that litigation was dormant and had been so for years. Although the article might have been intended to bring pressure to bear on Distillers to increase their offer, that pressure was legitimate in view of the fact that these claims ought to have been settled a long time ago and on generous terms.

58. Secondly, the House of Commons had debated the whole subject on 29 November 1972 and these debates had been published. There had been two articles in the Daily Mail which in effect reproduced the article prepared for the Sunday Times and banned by the order of the Divisional Court. Although it was a different matter for Parliament to discuss a subject than for newspapers, the subjudice rules applied in the Houses of Parliament and in the courts should be broadly in line. To attempt to maintain the injunction in the face of what had been said in Parliament would mean that the courts were seeking to impose a standard at variance with that imposed by Parliament. In the light of the newspaper comment which had followed the debate it would be unfair discrimination to prohibit the defendants by injunction from publishing the article.

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The decision of the House of Lords

59. It appears that, although the Court of Appeal had refused the Attorney-General leave to appeal against their judgment to the House of Lords, the Attorney-General appealed successfully against this refusal and the hearing of his main arguments before Lords Reid, Morris of Borth-y-Gest, Diplock, Simon of Glaisdale, and Cross of Chelsea began in May 1973. On 18 July 1973 the Law Lords issued their judgment unanimously allowing the Attorney-General's appeal from the appeal court ruling on the following grounds:

60. Generally, the law of contempt of court was founded entirely on public policy. It was not there to protect the private rights of parties to a litigation or prosecution. It was there to prevent interference with the administration of justice and should be limited to what was reasonably necessary for that purpose. Public policy generally required a balancing of interests which might conflict. Freedom of speech should not be limited to any greater extent than was necessary but it could not be allowed where there would be a real prejudice to the administration of justice. 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; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute had been submitted to a court of law, they 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.

61. On the other hand, the public interest in freedom of discussion stemmed from the requirement that members of a democratic society should be sufficiently informed that they might influence intelligently the decisions which might affect themselves. The public had a permanent interest in the general administration of justice and the general course of the law. But, as regards particular litigation, society, through its political and legal institutions, had established the relevant law as a continuing code, and had further established courts of law to make the relevant decisions on the basis of such law. The paramount interest pendente lite was that legal proceedings should progress without interference. Once the proceedings were concluded, the balance of public interest shifted. The paramount

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interest of the public then was that it should be fully apprised of what has happened and hear unhampered debate on whether the law, procedure and institutions which it had ordained had operated satisfactorily. There was one particular situation where the law might strike the balance between the competing interest either way but in fact struck it in favour of freedom of discussion. This was true where a matter was already under public debate when litigation supervened which the continuance of the debate might interfere with. However, this applied only where the discussion might, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens to be a litigant.

62. In the present case, the projected article was avowedly written with the purpose and object of arousing public sympathy with, and support for, the claims that were being made and in order to bring pressure upon Distillers to pay more. In the pending litigation one of the issues was whether Distillers had been negligent. The projected article had gone too far because, with much elaboration of facts and suggestions, while not asserting a settled conclusion, it, in effect, conveyed the message to all who would read the article that an examination of the issue as to negligence showed that there was a considerable case that could be presented against Distillers. It was not possible to say that there was no contempt of court because the litigation in which it was seeking to interfere was "dormant". Even though no procedural step in the actions was being currently taken, the parties were in negotiation towards a settlement; and interference with such negotiation, by holding one of the parties up to obloquy in order to cause him to abandon some position which the law vouchsafed him, would amount to interference with the due course of justice, since the due course of justice included negotiation towards a settlement on the basis of the ordained law. It would be setting a bad example to discourage the settlement of civil actions by suspending the right of the parties to any remedy for contempt of court, so long as negotiations for a settlement were pending. In these circumstances the Divisional Court had been right in granting the injunction and nothing that had happened since had altered that position. In particular, the discussions in Parliament had not done so as these concentrated almost entirely on the moral obligation of Distillers. There was therefore no need to consider whether, if members of Parliament had taken it on themselves to discuss the legal issues in the case, that fact ought to have affected the attitude of the Courts to similar discussion in the Press.

63. On 25 July 1973 the House of Lords made an order that the cause be remitted to the Divisional Court with a direction to grant an injunction in the following terms: "That the defendants, Times Newspapers Ltd. 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

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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) Ltd. in respect of the development, distribution or use of the drug 'thalidomide',with liberty to apply to that court."

The discharge of the injunction

64. On 23 June 1976 counsel on behalf of the Attorney-General applied to the Divisional Court of the Queen's Bench Division to discharge the injunction which was the subject of the applicants' petition to the Commission. The Divisional Court granted that application and discharged the injunction absolutely.

65. The reasons given by the Attorney-General were that the need for the injunction did no longer arise. The injunction had been made on the basis of public interest. The public interest which was sought to be protected related to the actions being brought in respect of injuries suffered as a result of taking the drug. Most of the actions had now been the subject matter of settlement proposals, and there were only four extant actions. In one of the extant actions the pleadings were closed, but nothing had occurred since 1974 so that a substantial period had elapsed. In two others a statement of claim was delivered and nothing further done. In another case a writ was issued. If those cases had been pursued diligently they could have by then been brought before the courts.

66. As there was a conflicting public interest in the Sunday Times being allowed to publish what it chose at the earliest possible date, the Attorney-General in his discretion now brought the matter before the court as one where the public interest no longer required the Sunday Times to be restrained (1).

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(1) See The Times' law report of 24 June 1976.

D. Proposals for the reform of the law of contempt of court: The Phillimore Report

67. While legal action was being undertaken against the Sunday Times for contempt of court a Government-appointed committee was just about to examine whether any changes were required in the law relating to contempt of court. The committee which had been appointed on 8 June 1971 was presided by Lord Justice Phillimore, who was also sitting as a judge in the hearing on the Sunday Times case in the Court of Appeal. In December 1974 the committee presented its Report to Parliament admitting that its work had been much delayed by the Sunday Times case which it described as "the first case in the law of contempt directly affecting the press ever to go to the House of Lords".

68. The Report covered, of course, the whole field of the law of contempt, but dealt also very extensively with the problems raised by the Sunday Times case. In this respect, it generally disapproved the House of Lord's decision and made recommendations the application of which would make a repetition of the Sunday Times case impossible.

69. The committee concluded that the law of contempt was required as a means of

(a) maintaining the rights of the citizen to a fair and unimpeded system of justice, and

(b) protecting the orderly administration of the law.

But the operation of the law of contempt should be confined to circumstances where the achievement of its objectives required the application of a swift and summary procedure. Existing uncertainties restricting reasonable freedom of speech should be clarified by statute so as to allow as much freedom of speech as was consistent with the achievement of the above-mentioned objectives. This concerned, in particular, uncertainties as to the period of operation of the law of contempt, especially in cases of imminent proceedings.

70. To these ends the committee recommended i.a. that a strict liability should be introduced for publications if they created, whether intentionally or not, a risk of serious prejudice to the administration of justice in a particular case. But a publication should give rise to strict liability in the law of contempt only if certain conditions, to be fixed by statute, were met. Proposed conditions were, i.a.,

- that the publication created a risk that the course of justice would be seriously impeded or prejudiced;

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- where the proceedings in question were civil and took place in England or Wales, that the case had been set down for trial;

- that it should be a defence to an allegation of contempt to show that a publication formed part of a legitimate discussion of matters of general public interest, and that it only incidentally and unintentionally created a risk of serious prejudice to particular proceedings;

- that bringing influence or pressure to bear upon a party to proceedings should not be held to be a contempt unless it amounted to intimidation or unlawful threats to his person, property or reputation.

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III. SUBMISSIONS OF THE PARTIES

A. The applicants' submissions

(1) General

71. The applicants originally complained that the decision of the House of Lords and the principles upon which it was founded amounted to a violation of the right to freedom of expression within the meaning of Art. 10 of the Convention.

72. They considered that in the years since the thalidomide tragedy occurred there had been no public discussion of its causes because of the pending litigation and that this prohibition would probably continue for several more years. This was a classic case where the English interpretation of the law of contempt - in contrast to that of a number of other countries - was contrary to the public interest and in breach of Art. 10 of the Convention.

73. The applicants asked the Commission to direct, or alternatively, to request the United Kingdom Government to introduce legislation overruling the decision of the House of Lords and bringing the law of contempt into line with the Convention.

74. The applicants maintained the above request even after the discharge of the injunction on 23 June 1976, arguing that this left the law unchanged and that it was the very principles of law that had been applied which in their view contravened the Convention (1).

75. At the oral hearing the applicants also raised a point under Art. 14 of the Convention alleging that the laws of contempt operated in a discriminatory way. In this respect they referred to other press publications of a similar nature which had not been banned (2).

They further raised a point under Art. 18 of the Convention alleging that in their case the principles of contempt of court, which should be limited to the maintenance of the independence and impartiality of the judiciary were in fact applied for the protection of a litigant.

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(1) Cf. the applicant's comments of 14 September 1976, para. 1.

(2) Cf. Verbatim Record, pp. 30, 35.

(2) As to Art. 10 of the Convention

76. The applicants have argued their case mainly on the basis of Art. 10 para. (2) of the Convention, since the Commission had stated in its decision on admissibility that there was no doubt that their freedom of expression had been restricted by the decision of the House of Lords, and that the only question before the Commission was therefore whether this restriction could be justified under Art. 10 (2) of the Convention.

77. The following summary of the applicants' argumentation on the merits also includes some arguments which were advanced at the admissibility stage of the procedure. In so far as these questions were examined in the Commission's decision on admissibility on a prima facie basis only they must again be set out in view of a final assessment by the Commission.

78. The applicants' arguments under Art. 10 (2) of the Convention have been grouped under the following principal headlines:

- duties and responsibilities connected with the exercise of the freedom of expression by a newspaper;

- the scope of the restriction imposed on the applicants;

- whether the restriction was prescribed by law;

- whether the restriction was necessary in a democratic society for one of the admitted purposes.

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(a) Duties and responsibilities connected with the exercise of the freedom of expression by a newspaper

79. The role of newspapers in society was discussed at some length at the oral hearing on the merits of this case.

80. The applicants' counsel in his pleadings referred to the Commission's Report in the Dutch Soldiers case (1) where reference had been made to the particular situation of the person exercising freedom of expression and the responsibilities which are incumbent on him by reason of this situation. The Commission had concluded that different standards might be applicable to different categories of persons such as civil servants, soldiers, policemen, journalists, politicians, etc., whose duties and responsibilities must be seen in relation to their function in society.

81. The principal, predominant function of newspapers and journals was to inform. But they were not only the sounding board of public opinion, they also had to find the truth on matters of public interest by whatever legitimate means was available to them. The truth did not exist in the abstract, it was only of value if it was known to men; therefore it had to be told.

82. Modern society needed free enquiry as well as free speech. It was not sufficient to trust that the truth would emerge if all discussion was submitted to the powerful test of the reason of rational man. If the House of Lords had essentially ruled that it was all right to utter opinion but not the evidence that one believed sustained that opinion, this meant that the press was only half-free.

83. In the applicants' opinion the law of libel, malicious falsehood and the criminal offence of attempting to pervert the course of justice put a rigorous discipline on the newspapers to stick to the truth.

84. With regard to the concrete case, the applicants would not admit that they had neglected their journalistic duties. They stressed that they were convinced that the contents of the draft article were true. They were prepared to prove its truth in the defence to a libel action. Moreover, the article contained "reasoned and temperate argument put together on the basis of detailed research" It also took account of the points that could be made in Distillers' favour which were summarized at the end of the article.

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(1) Report of 19 July 1974, para. 161

The Government itself had admitted that the draft article was couched in moderate language.

85. It was one of the purposes of a newspaper to investigate the shortcomings of a large and powerful drug company which it believed to have been "slapdash and slipshod" in distributing a potentially harmful drug to the public with tragic and disastrous results. This was even a responsibility to the society in which the paper circulated and to which it should accommodate. The material which discussed the evidence and the issues in the thalidomide case should in their view be made available to the world, and this at the moment when it was likely to be of the greatest topical interest to the onlookers and those taking part in the trial of what was involved. The injunction, however, had prevented them from performing their journalistic duty.

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(b) The scope of the restriction

86. The applicants claimed that all three of them were affected by the injunction, and were therefore victims, within the meaning of Art. 25(1) of the Convention, of a violation of Art. 10 of the Convention.

87. Although the injunction mentioned only "Times Newspapers Ltd. by themselves, their servants, agents or otherwise", it was not only the first applicant who was bound by it. Under the law of England (1) not only those expressly named by an injunction were under an obligation to comply with it, and were in contempt if they did not do so, but anyone who, knowing of its existence, did anything to frustrate it.

Referring to the publicity the injunction concerning the thalidomide article had received both in England and abroad they doubted that any newspaper, magazine or book publisher or any distributor of foreign publications in England was not as fully bound by the injunction as Times Newspapers Ltd. itself.

88. Moreover, the injunction was not confined to the draft article but covered any publication of the same kind, and not only in the Sunday Times or in the course of any particular individual's employment by Times Newspapers Ltd. There were plans for the publication of a book on thalidomide and those at the Sunday Times who were involved in the thalidomide investigation had a desire to continue their research, whether in public or private, and whether as professional journalists or as private individuals (2).

89. Any apparent absence of concrete proposals to publish should be treated by the Commission exclusively as evidence of a willingness on the part of the applicants to abide by the law for the time being, though they considered it as unsatisfactory and unacceptably restrictive. The same was true with regard to the refusal by the third applicant to make comments or give details which were forbidden by the injunction, although he had been invited to do so and had been heavily criticised for acquiescing in what the critics regarded as censorship. But an applicant could not be expected to show himself prepared to break the law in order to qualify to make an application to the Commission. It would be wholly against the spirit of the Convention to introduce such an element into its jurisprudence.

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(1) Acrow (Automation) Ltd. v. Rex Chainbelt (1971) 3 A.E.R. at p. 1180

(2) The applicants have mentioned in their comments of 14 September 1976 that the injunction prevented them from passing the results of their research to the Pearson Committee on Personal Injuries or to the Phillimore Committee on Contempt of Court

90. The applicants understood the essence of the House of Lords' decision to be the following: Holding a party to litigation up to obloquy to influence him to abandon a position vouchsafed by law, whether in litigation or in negotiations to dispose of it, amounted to objectionable interference with legal proceedings, and this notwithstanding that the actions might be "dormant" in that they were not actively pursued.

91. The applicants stated that they did not accept a distinction between the specific decisions of the House of Lords on the one hand and the principles upon which it was founded on the other hand, the latter's compatibility with the Convention allegedly being an abstract question falling outside the competence of the Commission.

But in the present case there was no application in abstracto to the Commission. The issue between the applicants and the United Kingdom concerned the compatibility with the Convention of those principles of the law of contempt which were involved in and necessary to the decision of the House of Lords.

The applicants submitted that the principles and their application were inseparable, the principles being incapable of formulation except in relation to the particular facts. In their opinion, the Commission should therefore give full consideration to all the principles discussed in the House of Lords and the lower Courts.

92. The above arguments came again into focus when the possibility of a removal of the applicants' immediate object of complaint by the discharge of the injunction was discussed at the oral hearing on the merits, and when the injunction was actually discharged in the summer of 1976.

The applicants stressed that it should not be taken as a point against them that they did not make an application to the Divisional Court for the discharge of the injunction. Such a measure would not meet the argument which they sought to advance, and could only be regarded as "an act of administrative generosity, leaving the rigour and intrinsic unfairness of the law itself untouched". It could only be a departure from principle. But the applicants challenged the very principle of the rule which had important implications beyond their own case. Moreover, the discharge of the injunction would not remove the operation of the restriction during the three years which had elapsed since it was granted.

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93. The applicants' lawyer therefore stated at the oral hearing: "We want a decision that the rule has operated unfairly over the period that we have been bound irrespective of any dispensation which we may or may not be given hereafter. Any decision from the Commission which endorsed or went the least distance towards accepting an act of political or administrative generosity as a sufficient substitute for a guarantee of a right covered by the Convention would in our submission strike at the very roots of the Commission's authority. It would amount to a total disregard of Article 1 of the Convention, which requires the High Contracting Parties to secure to everyone within their jurisdiction the rights and freedoms in this Convention."

94. The same arguments were repeated in the applicants' comments of 14 September 1976 following the discharge of the injunction on the application of the Attorney-General.

The applicants stated that the injunction had been in force from 17 November 1972 until 23 June 1976 and had circumscribed the applicants' freedom of expression through an application of the law of contempt which in their view contravened the Convention. The discharge of the injunction left the law unchanged and it could be made to operate in the same way at any time as a matter of administrative discretion on the initiative of the Attorney-General. The applicants therefore submitted again that the principles applied contravened the Convention.

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(c) Whether the restriction imposed was prescribed by law

95. The applicants did not dispute that the principles of the law of contempt as applied by the House of Lords were the law in England.

96. They did, however, draw the Commission's attention to certain elements which they considered to indicate an uncertainty of the law, or certain inconsistencies or illogicalities of the present state of law.

a) In this respect the applicants pointed to the fact that the House of Lords' decision was directly opposed to the unanimous decision of the Court of Appeal, but that the discharge of the injunction was eventually granted on similar grounds as those which had led the Court of Appeal to allow the applicants' original appeal against the injunction, namely dormancy of the litigation, an argument which had been expressly rejected by the House of Lords as an erroneous view of law.

b) Moreover, the situation which was relied upon as justifying the discharge of the injunction on 23 June 1976 had existed already since 30 July 1973, the date when the thalidomide settlement was accepted, that is only five days after the House of Lords' decision in which Lord Reid had held that it was sufficient that "the general lines of a settlement" had emerged.

c) Another illogicality of the law of contempt was that it was apparently only applicable in relation to the parents' litigation while it did not operate in relation to the insurance litigation although the latter had developed to a stage much beyond that which was ever reached by any of the parents' actions. However, no complaint of any sort had been voiced against the publication of the article on 27 June 1976, despite the fact that the issue of Distillers' negligence was also essential in the insurance litigation.

d) The uncertainty of the law of contempt had also been noted by the Phillimore Committee which had therefore found it necessary to make proposals for its clarification by statute.

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(d) The necessity of the restriction in a democratic society

The standard of "necessity" envisaged in Art. 10 (2)

97. The applicants argued that the question whether a restriction of the freedom of expression was necessary in a democratic society for one of the purposes mentioned in Art. 10 (2) of the Convention could not be left to the Government's discretion alone although they accepted that a certain margin of appreciation existed in that a Government was entitled to exercise some degree of discretion in deciding what laws are best suited to the society over which it ruled. However, something like the Crown privilege did not exist in this area, and the Commission was perfectly competent to check whether the measure adopted by the Government was necessary for one of the above-mentioned purposes. In this respect the applicants referred to the Commission's decision as to the admissibility of application No. 753/60 ("Austrian Army Case") where it had been stated that the Commission was fully competent, and indeed had the duty, to appreciate whether the interference by the public authority with the right to freedom of expression fulfilled the conditions defined in para. (2).

98. The applicants submitted further that the test of necessity to be applied by the Commission was a strict one. In the way Art. 10 was drafted paragraph (2) had to be construed in such a way as to give maximum scope for the freedom defined under paragraph (1). Any restrictions of the freedom of expression could only be tolerated in a democratic society if they were indispensable for the purposes referred to, and if such results could not be achieved without them. This had been said by the English courts themselves, and Lord Morris had stated in the House of Lords even with regard to the present case that courts must never impose any limitations upon free speech or free discussion or free criticism beyond those which are absolutely necessary. This standard must be adhered to a fortiori when considering whether any margin of appreciation was appropriate. The term "necessary" must not be allowed to be diluted to mean only "convenient, desirable, helpful, advantageous, advisable or expedient".

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99. The applicants stated that the only ground of justification relied upon by the Government was the necessity to maintain the authority and impartiality of the judiciary which in the Government's view also seemed to include a certain protection of litigants. The applicants submitted, however, that the maintenance of the authority and impartiality of the judiciary was a wholly separate issue from the protection of litigants.

The applicants' submissions why they consider that the restriction on their freedom of expression was not necessary will therefore be set out separately in relation to each of the two aspects.

Necessity for the maintenance of the authority and impartiality of the judiciary

100. The applicants submitted that the law of contempt of court as applied in their case was not really necessary in a democratic society for maintaining the authority and impartiality of the judiciary, because the law in other democratic countries such as France, the Federal Republic of Germany, Switzerland and the United States did not know anything approaching the restriction imposed on them.

With regard to Art. 60 of the Convention which the Government had cited the applicants submitted that it could not be the meaning of this provision to set the standard of freedom at the lowest common denominator existing between member States. The trend ought to be in the opposite direction, the freedom rather than the restriction ought to predominate. The applicants therefore pleaded in favour of a progressive interpretation of Art. 10.

In this respect they stressed that Art. 10 itself in its paragraph (1) defined freedom of expression in such a way as to include the freedom to hold opinions and to receive and impart information and ideas "... regardless of frontiers". They submitted that it was therefore relevant whether the material in question was publishable in other member States. In their opinion the law of England stood in sharp contrast to the rest of the Convention countries in still having this unnecessary restriction.

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101. The applicants further contended that the law of contempt was not necessary as such for maintaining the authority and impartiality of the judiciary because it was duplicated by other remedies of the English law to protect the courts, in particular the criminal offence of perverting or obstructing the course of public justice. The Phillimore Committee had also expressed the opinion that the usual means to protect the courts should be criminal prosecution, while contempt of court should be reserved for cases where a swift and summary procedure was needed. The criminal procedure also avoided a number of difficulties which arose in the application of the law of contempt, in particular by restricting the offence to intentional behaviour.

102. The applicants submitted that it was not a usurpation of a judicial function for a newspaper to express its own views as to what conclusion a judge might reach in a civil case. The judge alone had the final power to make the decision, and therefore the right of access to unbiased civil tribunals which had been stressed by the House of Lords was not likely to be hindered even if newspapers reviewed evidence of the facts in issue or arguments based upon them.

The idea that a newspaper could "usurp" the function of the courts was a misconception which stemmed from the false assumption that there were matters which fell within the "exclusive province of the courts". The "exclusivity" of the judicial function would have the consequence that in the present case the courts should have had a monopoly of debate for a continuous period of thirteen years since the first writs were issued in respect of facts which took place as long as twenty years ago. The applicants submitted that that was a "deep and fundamental misconception" which could not be considered as necessary.

If a newspaper published something to do with a case before a judge the latter was as much at liberty to accept it as to reject it, and this acceptance or rejection was as likely to make a litigant feel more confident that he was getting a fair deal from the court as it was not.

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103. In England civil litigation was normally dealt with by professional judges who were by their training accustomed and able to hear and determine cases on the basis of evidence adduced in court, and nothing else. The authority and impartiality of a judge depended upon the man rather than his office, and in this respect the applicants regarded it as unacceptable to suggest that judges in England were open to wrongful persuasion and that their authority and impartiality would be undermined unless they were shielded from it. On the contrary, in view of frequent criticism directed against judges for their outmoded attitudes or opinions it might become rather than spoil the image of judges if they remained conversant with, rather than isolated from the issues of the day when they affected the matters with which they had to deal.

A professional judge therefore did not really need the law of contempt to protect him from prejudicial matter (1).

104. The applicants also submitted that the prejudgment criterion as applied by the House of Lords was not necessary.

In this respect they pointed to the exception allowed by the House of Lords for matter already under public debate, which they considered as illogical if prejudice was really the essential criterion of the law of contempt because it led to the existence of a kind of "permissible contempt".

The Phillimore Committee had also doubted the wisdom of applying the "prejudgment" criterion as the test of contempt of court. It had proposed a new test "whether the publication complained of creates a risk that the course of justice will be seriously impeded or prejudiced".

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(1) The applicants referred to the similar opinion expressed in the Phillimore Report and in the decision In re Clemens and the Republic of Costa Rica v. Erlanger (1877) 46 L.J.Ch. 375, at p. 383.

105. The applicants furthermore denied that the article in question prejudged the thalidomide litigation, either by the presently applied criteria or by those proposed by the Phillimore Committee. They denied that anything short of putting oneself wholly in the place of the judge was prejudgment.

They admitted, however, that the article in question was in a different category from the Sunday Times' earlier publications in that, in addition to presenting information which strengthened the moral argument for a fairer settlement, it included evidence which related to the issue of liability in the thalidomide proceedings. They nevertheless considered its restriction to be unnecessary, because in their view it was not prejudicial to discuss in a balanced, unslanted way the issues involved and evidence relating to the case.

106. Temperate and balanced press comment must not necessarily have greater impact on those concerned than e.g. the advice of a friend. Although a friend's opinion might be much more effective in reshaping a witness's recollection, and more dangerous for justice in that such an influence was much more difficult to spot, it was only prohibited if its intention was to pervert the course of justice.

107. The applicants further pointed to certain undesirable side-effects of the injunction which certainly could not be considered as necessary. Thus the law of contempt led to the prohibition of the publication of matter which neither party wished to adduce as evidence. In the applicants' view it also had the effect of according precedence to one type of litigation over another, because it prevented the applicants from defending themselves against a libel action which Distillers' would otherwise probably have brought against them.

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108. One of the main arguments of the applicants why they considered the restriction of their article to be unnecessary for the maintenance of the authority and impartiality of the judiciary was the state of proceedings in the thalidomide litigation.

In this respect they referred to the Phillimore Report which had proposed that the operation of the law of contempt in civil cases should only start from the date of setting down for trial. They accepted this as a reasonable standard (although they later uttered some misgivings in respect of the long period ahead that the trial of the insurance litigation was fixed), and submitted that it was beyond any reasonable margin of appreciation to apply the law of contempt at a much earlier stage of the procedure.

109. The applicants also relied on the interpretation adopted by the Court of Appeal according to which the law of contempt should not be applied in relation to dormant litigation.

110. With regard to the concrete case the applicants submitted that the House of Lords had failed to take into account several factors in the thalidomide litigation which they considered to be relevant. These were, apart from the fact that the parties were engaged in settlement negotiations and did not then actively pursue the actions, that more than ten years had already passed since the first writs were issued, and almost twenty years since the material events took place; further, that there had been a partial settlement in 1968 on the basis of the payment of a percentage of the sum which would have been adjudicated if the plaintiffs had been wholly successful with their actions based on negligence. It was also contended to be relevant that it was foreseeable at the time of the decision that the litigation would continue for a considerable time. Lord Reid had himself stated in his judgment in the House of Lords that it could not be allowed that things dragged on indefinitely, and that the injunction meant only a postponement and not a prohibition of publication.

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111. In this respect the applicants also submitted that it was not necessary that the injunction should remain in force when most of the children's actions were settled shortly after the House of Lords' decision. When it was eventually discharged in the summer of 1976 the situation of the remaining actions was still unchanged, i.e. they continued not to be actively pursued. On the other hand the insurance litigation was apparently not taken into account although it had then been set for trial.

The applications submitted that the discharge of the injunction in these circumstances tended to confirm their opinion that the restriction had not been necessary from the outset.

112. The applicants finally submitted that the injunction was not necessary for the maintenance of the authority and impartiality of the judiciary because the publication in question concerned a matter of the greatest public interest.

113. The House of Lords had only allowed an exception for matter already under public debate, but this exception was illogical, led to unfair results and raised difficult questions with regard to the question of intent. It was difficult to determine whether a public debate or the litigation had started first, and it was illogical and unfair that there should be different rules according to whether one or the other had started first. The beginning of litigation would normally be the event which opened the door to the exercise of the right to fair comment within the limits of the law of libel, and therefore it was particularly unfair that it should at the same time operate as the barrier to further discussion under the law of

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contempt if there had been no prior comment. It was also unfair that an ongoing public debate should be forced to remain in the abstract although to be meaningful it would need concrete examples to hinge upon. Moreover, if prejudice was alleged to be of the essence of the law of contempt it was illogical to allow the possibility of any prejudice, whether deliberate or not.

114. With regard to the concrete case the applicants stressed the absence of any public discussion of the causes of the thalidomide tragedy, and the lack of an official inquiry into the matter despite the time that had elapsed. In their comments of 14 September 1976 they drew the Commission's attention to the fact that it had been definitely decided not to make an official investigation. They submitted that these were factors which ought to have been taken into account. They further submitted that it was unacceptable that private litigants should be able for their own purposes by continuing litigation to exclude from public discussion for an indefinite period matters which should be in the public domain.

Necessity for the protection of the rights of others

115. The applicants submitted that the maintenance of the authority and impartiality of the judiciary was a wholly separate issue from the protection of litigants from exposure to criticism and comment in relation to the remedies which they seek to pursue at law. The applicants considered it to be perfectly legitimate to criticise, from a moral point of view, the behaviour of somebody who takes advantage of legal remedies at his disposal, or of a certain procedural situation favourable to him if this led to a bad social effect. In their view this had nothing to do with contempt of court.

116. In this respect they referred to the Phillimore Report which also proposed to exclude from the law of contempt criticism of a litigant, whether public or private, unless it amounted to intimidation or unlawful threats to his person, property or reputation.

117. They submitted that the law of contempt could not properly be brought within the category of the "protection of the rights of others" under Art. 10 (2) of the Convention unless it was conceded that each and every right accorded by a national law was, solely by virtue of its existence, entitled to protection.

118. In their view the law of libel and malicious falsehood and the law of defamation accorded sufficient protection to a litigant. These laws put pressure on newspapers to make sure that they could prove the truth of what they wrote, and that it was fair and accurate comment. In the applicants' submission it was not necessary to protect the interests of litigants beyond this point by the law of contempt.

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(3) As to Article 14 of the Convention

119. The applicants submitted that it was open to them to raise an issue under Art. 14 of the Convention although it had not been expressly included at the admissibility stage. According to the Commission's case law which had been confirmed by the Court in the National Union of Belgian Police case, Art. 14 had no independent existence. It must therefore be admitted to rely on it as part of the alleged breach of Art. 10 of the Convention.

120. The applicants' main argument under Art. 14 was that the injunction granted against them was discriminatory because the Sunday Times was the only newspaper which had been stopped, while other newspapers such as the Daily Mail were allowed to publish criticism of Distillers on much the same line as that contained in the draft article. Lord Denning had also stated in the Court of Appeal that this would be "discrimination of the worst kind". An argument that the Sunday Times was a better, more powerful, more persuasive newspaper than the Daily Mail was not admissible, because it would mean that there was one law for the big and another for the small, and that was also discrimination.

Moreover, it was not open to the Government to argue that what happened to the Daily Mail was failure of enforcement rather than a defect in the law. Rights could only be enjoyed if their existence was plainly recognised and steps are taken to see that in practice people did enjoy equal treatment before the law.

121. The applicants submitted further that there was discrimination on the ground of status vis-à-vis the Members of Parliament in so far as the latter were entitled to speak and deal with issues of negligence arising in civil proceedings before the case had been set down for trial, and even later if the issues were of national importance. This distinction was not justified for various reasons. First, the privilege of an M.P. to say what he liked took place in an arena which was known to attract most publicity, and the debate in the House of Commons in the present case had indeed been freely and widely publicised at the time. Second, it was unjustified because a newspaper had the means of getting at the truth at its disposal, in terms of time, money and manpower, which M.P.s usually did not have. It was true that in the Dutch Soldiers case the Commission had applied a different standard to different categories of persons, but the applicants submitted that newspapers as well as politicians had a public task, and a journalist's freedom ought therefore to be assimilated to the privilege of the politician.

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(4) As to Article 18 of the Convention

122. The applicants submitted that it was open to them to raise an issue under Art. 18 of the Convention although it had not been mentioned at the admissibility stage. Art. 18 as Art. 14 had no independent existence, and it must therefore be admitted to rely on it as part of the alleged breach of Art. 10.

123. The Government had argued in their written pleadings that it was one of the admissible tests whether the margin of appreciation had been respected to examine whether a restriction had not been applied otherwise than for the purposes prescribed. It was accepted that the Government did not intend to apply the law of contempt for any purpose other than the relevant categories under Art. 10 (2), but if in fact the result and purpose, whatever the intent, of the restriction was to prevent important facts being told after twenty or more years after the events, i.e. to prevent a journalist from exercising his very duties and responsibilities, this allegedly amounted to a breach of Art. 18 of the Convention. In this respect it was not sufficient that one of the purposes of the law of contempt was a permitted purpose, i.e. to uphold the authority and impartiality of the judicial machinery and to preserve confidence in it, if this purpose was unlikely to be frustrated notwithstanding the exercise by the journalist of his function and duty.

B. The respondent Government's submissions

(1) General

124. The respondent Government originally asked the Commission to declare the application inadmissible as incompatible with the Convention in so far as it had been brought on behalf of the second and third applicants and in so far as it raised, in the Government's opinion, abstract questions. The Government asked the Commission to declare the remainder of the application to be manifestly ill-founded.

125. After the Commission's decision on admissibility the Government continued to argue that the scope of the injunction was more limited than the applicants wanted to make it appear. In their opinion the Commission could not examine the compatability with the Convention of the law of contempt of court as such, but only that of the principles which the majority of the House of Lords had applied in the concrete case. In this respect the Commission could not, however, assume the functions of a court of appeal.

126. The Government further submitted that Art. 10 of the Convention, if read as a whole and in the context of other relevant provisions of the Convention, in particular Art. 6 and Art. 60, accorded the High Contracting Parties a margin of appreciation which covered the injunction against The Sunday Times. The Commission's examination should be limited to certain tests whether the authorities had remained within the margin of appreciation accorded to them.

127. The Government further denied the admissibility of the applicants' introducing any arguments under Arts. 14 and 18 of the Convention.

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(2) As to Article 10 of the Convention

128. The Government, as the applicants, argued their case mainly under Art. 10 of the Convention.

However, the Government's views as to the interpretation and application of this Article were essentially different from those of the applicants. They have nevertheless been grouped in a similar way as the applicants' arguments, in order to facilitate the tracing of related questions.

129. The principal headlines are as follows (as regards the presentation of the applicants' arguments cf. para. 78 above):

- the structure of Article 10;
- duties and responsibilities connected with the exercise of the freedom of expression by a newspaper;
- the scope of the restriction imposed on the applicants;
- whether the restriction was prescribed by law;
- whether the restriction was necessary in a democratic society for one of the purposes envisaged in Art. 10 (2).

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(a) The structure of Article 10 of the Convention

130. The Government submitted that Art. 10 of the Convention must not be seen in an isolated way, but ought to be read in its context and against other provisions of the Convention. There was frequent interaction between the various rights guaranteed by the Convention, and in the case of Art. 10 regard must be had to those other rights and freedoms which might be affected by an unrestrained exercise of the right of free speech.

Art. 8 was cited as one example, but particular emphasis was laid in the context of the present case on the rights laid down in Art. 6. The exercise of the right to a fair trial and of the right to freedom of expression might conflict, and the Convention then required the balancing of the two rights.

131. In the Government's submission there was inevitably built into the freedom of expression an inherent limitation imposed by Art. 6 which required a fair trial and a fair administration of justice. This solution imposed itself because Art. 6 had not built into it express qualifications or reservations in the same way as had Art. 10. It was therefore only logical that in the case of a conflict between Art. 6 and Art. 10 the latter had to give way.

132. The Government opposed the applicants' approach, in interpreting Art. 10, namely to start from a statement that there was a restriction of the freedom of expression as defined in para. (1) of the Article, and then to examine, by applying strict criteria, whether it was necessary for one of the purposes of para. (2). The Government submitted that such an approach was not in line with the essential unity of Art. 10.

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133. In the Government's view provisions such as Art. 10 sought to achieve a balance by the interaction of paras. (1) and (2). The right to freedom of expression under Art. 10 was not an absolutely general right which must remain unrestricted save in certain limited circumstances which had to be strictly established. The restrictions in para. (2) of Art. 10 were in no sense to be regarded as exceptional restrictions which may only be resorted to in exceptional circumstances, nor was there a presumption that any restriction was inconsistent with the Convention and must therefore be justified on a strict and narrow basis.

134. The proper approach was to look at the Article as a whole and to accept that the freedom of expression guaranteed therein was a right to be qualified by the domestic laws of the member States in the manner and to the extent specified in para. (2) of Art. 10.

The Government claimed that their views in this respect were supported by the Commission's opinion in the De Becker case (Publ. Court, Ser. B, pp. 125 - 126).

135. The Government further submitted that the exception clause contained in para. (2) of Art. 10 was different in structure from the corresponding exception clauses in para. (2) of Arts. 8, 9 and 11. Art. 10 para. (2) made the exercise of the right defined in Art. 10 (1) conditional by subjecting it to "such formalities, conditions, restrictions or penalties as are prescribed by law". Thus Art. 10 gave the member States a wider area of discretion than the other Articles referred to which expressly underlined the exclusiveness of the restrictions.

136. In the Government's submission there was discretion for the State as to the method by which it imposed any limitations, in the same way as the Court had held in the case of the Belgian Police Union that Art. 11 left each State a free choice of the means to be used to the end of securing trade union rights.

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(b) Duties and responsibilities connected with the exercise of the freedom of expression by a newspaper

137. The Government emphasised that the applicants had not in fact violated their journalistic duties and responsibilities because they had submitted the draft article to the Attorney-General and agreed to the matter being referred to the court. They had also complied with the injunction.

138. The Government submitted, however, that it would have constituted a violation of journalistic duties and responsibilities if they had published material which violated the need to maintain the authority and impartiality of the judiciary, and for the protection of the rights of others. It was relevant in this context that the Sunday Times was a large national newspaper with very extensive circulation. The likeliness of a very adverse and wide-ranging effect of their publication by prejudging the issues upon the public imposed a greater duty to exercise restraint and show responsibility upon them than e.g. on a private individual who wrote a letter to his mother which, technically, would also constitute contempt of court, but the effect of which would be trivial.

139. The duty and responsibility included both the question whether there should be any publication at all, and the manner in which the publication was carried out.

In this respect, the Government submitted that it was not relevant whether the draft article contained true facts. Whether they were true or not could not be decided until those facts had been proved by evidence before a court, and the danger of a publication of this kind was exactly that it set out as established fact material which the court had not yet had an opportunity to test in cross-examination. Whether true or not, the only thing which mattered was that the draft article piled up the alleged facts on one side only.

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(c) The scope of the restriction imposed on the applicants

140. The Government submitted that there had been an extensive public and private debate on a number of questions in connection with the thalidomide tragedy which showed that a very considerable area remained for comment on pending legal proceedings. The discussion covered such questions as the problems of the treatment and rehabilitation of the victims and the contribution which society as a whole ought to make; the adequacy of the controls on the manufacture, supply and administration of drugs; and in particular the question whether the liability of drug companies should be in law strict liability, or whether it should continue to depend on the proof of negligence. The issue of writs by the parents thus did in no way bring to a halt the ongoing public discussion, as there was no such thing as a "gagging writ" by which a litigant could stop all comment on matters relevant to his action being published.

141. The particular situation created by the writs was, however, that negligence in the production, manufacture and marketing of thalidomide was alleged by the parents while the Distillers company completely denied that it had been in law negligent and that there was any legal duty owed to the parents or children in respect of the administration of the drug. This was the central question remitted to the courts for decision which was still one hundred per cent alive at the time of the Attorney-General's application. The House of Lords' decision was exclusively concerned with the publication of matter prejudging the determination of that very issue.

142. The Sunday Times' draft article was of a very special character, and this had been admitted by the third applicant himself. It differed from the Parliamentary debate, from other publications and the Sunday Times' own earlier articles, including the article of 24 September 1972, in that it dealt with, and was intended to deal with, the issue of Distillers' negligence, i.e. the very issue raised by the proceedings. In the Government's opinion the draft article was deliberately designed to affect the courts and the result of the proceedings by inducing Distillers to make a bigger offer. It

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did not, however, increase the evidence or arguments at the disposal of the plaintiffs, since it was in essence based on material received by their consultant Dr Phillips, as had been shown in the proceedings which led to the injunction of 31 July 1974. The Government admitted that the draft article was couched in moderate terms, but they stated that this in itself was not enough. What counted was that it gave a "highly selective account" of the evidence in the case in order to support the proposition that Distillers were negligent, and that it had the object to invite the public to reach certain conclusions with regard to Distillers' negligence.

143. The area of restriction imposed by the House of Lords' injunction was much more limited than the applicants wanted to make it appear. The Government referred to the head note in the report on the House of Lords' decision which they considered as an accurate summary. The head note said it was held:

> "that it was contempt of court to publish material which prejudged the issue of pending litigation or was likely to cause public prejudgment of that issue, and accordingly the publication of this article which in effect charged the company with negligence, would constitute a contempt, since negligence was one of the issues in the litigation."

144. The Government argued, first, that it was not the law of contempt as such which was at issue in the present case. The Commission's examination must be limited to those principles of the law of contempt which were actually applied by the House of Lords. The applicants' arguments which were directed to more general questions of the law of contempt which had not been in issue in the domestic proceedings were inadmissible. These arguments included, in particular, those dealing with the exception allowed by the House of Lords for matter already under public debate.

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145. The Government further submitted that only the majority opinion in the House of Lords was at issue, and this majority opinion was that the draft article in question must be restricted because it "prejudged", made up its mind about, issues in pending litigation.

It was a misconception if the applicants also argued, to a wide extent, against opinions which had remained in the minority in the House of Lords. This applied, in particular, to the applicants' opinion that their article was restrained because it "held up one of the parties to obloguy for his attitude". The majority of the House of Lords had rejected this opinion which had been at the basis of the Divisional Court's original decision.

146. The Government also opposed the applicants' opinion according to which the injunction was tantamount to an act of Parliament in that it bound everybody. It only bound the persons to whom it was addressed, namely "the defendants who must not by themselves, their agents or otherwise publish the offending material". The Government admitted that the terms of the injunction were not expressly limited to the particular draft article but they explained that it was the usual practice to order in an injunction that similar or analogous conduct as the one complained of should also be restrained. This was perfectly reasonable because otherwise the defendant could avoid the effect of the injunction by only slightly changing what he planned to do.

147. The Government finally stressed that the restriction was limited in duration. The injunction ordered a postponement of publication, it was a temporary, not a perpetual ban. The House of Lords had given the applicants liberty to apply to the Divisional Court to discharge the injunction on the ground that the ground for its continued application had ceased to exist and this was possible even before the litigation had been fully terminated.

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(d) Whether the restriction was prescribed by law

148. The Government submitted that the principles of the law of contempt applied by the House of Lords were "prescribed by law" within the meaning of Art. 10 (2) of the Convention.

149. The domestic law applicable in the present case was not statute or other legislation, but common law. However, no distinction should be drawn between statutes or legislation on the one hand and the common law on the other. Both were normative and both were to be distinguished from the application of the law in particular instances. The principle that an abstract question relating to the compatibility of the domestic law with the provisions of the Convention could not be decided by the Commission also applied to the common law.

150. As regards the principles of contempt of court as applied by the House of Lords in the present case they were not plucked out of the air, but were defined on the basis of long existing authority. The principles applied thus were inherent in previous cases, and although there had admittedly been some uncertainty as to the extent to which articles of this kind could be published, the House of Lords had succeeded in removing that uncertainty. As a result of the House of Lords' decision the law was now clear. But that did not mean that there was not clearly a contempt of court already at the time of the initial injunction. Only the precise basis upon which the injunction should be granted was in issue.

151. The Government also emphasised that the application of the law of contempt was entirely founded on public policy. Private litigants could themselves make an application to the court to apply the law of contempt, but the ordinary way was through the Attorney General.

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The Attorney-General had a discretion to refer a publication to the court, and this he did not do as a member of the Government, but in his capacity of guardian of the public interest in order to assist the administration of justice. He was under an obligation to consider any publication referred to him, but he had discretion as to whether he considered its being laid before the court to be necessary. He did not himself pass a judgment on the matter, but if he was of the opinion that the publication fell within the existing rules of contempt it would be the ordinary way for him to refer the matter to the court. This was his constitutional right if not his legal duty. There was no question of "official lenience and political generosity" in this area, both as regards the fact that the Attorney-General did not refer other publications to the court (thus he had refrained from referring the Sunday Times' article of 24 September 1972 although the original representations by Distillers were made against this article) and as regards the Attorney-General's eventual application for the discharge of the injunction.

152. The Government finally argued that the present case only concerned the actual state of the law of contempt, so that the amendments proposed by the Phillimore Committee should not be taken into account in its examination. The fact that that there were proposals to change the law did not prove that the law was previously wrong in principle, or in breach of the Convention in that restrictions provided by it were not necessary.

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e) The necessity of the restriction in a democratic society

The standard of "necessity" envisaged in Art. 10 (2) and the Government's "margin of appreciation"

153. The Government did not accept the applicants' arguments in favour of s strict interpretation of the term "necessity". Instead they urged the Commission to recognise the "margin of appreciation" which in their view Art. 10 (2) of the Convention left to the High Contracting Parties.

154. The Government were aware that the Commission had refrained from using the term "margin of appreciation" in its recent decisions, but they still maintained that the concept of a "discretion within the limits of reasonableness and good faith which is to be allowed to the authorities in a democracy" was implicit in the Convention, and more particularly in Art. 10. The Government tried to demonstrate on the basis of the Commission's own earlier case-law (1) that the Commission itself had recognised this concept and that in cases concerned with Articles such as Art. 10 the function of the Commission was restricted to satisfying itself, first, that the provision or act of which complaint was made was capable of falling within one of the exceptions specified in the relevant para. (2) and, secondly, that it also fell within the margin of appreciation conferred on the authorities within a democracy and was not being used for a purpose other than that for which any relevant restriction was prescribed.

155. The Government accepted that in the ultimate resort it was for the Commission to decide whether there had been a breach of the Convention, thus the margin of appreciation could not mean that the Commission had no jurisdiction to review what a State did. However, the Convention only laid down certain bounds outside which the State must not step, and left it to the State to regulate the exercise of the individual's rights within these bounds; in particular, it was left to the State to decide the means by which the objects of the Convention were achieved.

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(1) Applications Nos. 753/60, Yearbook 3, p. 310; 1068/61, Yearbook 5, p. 278; 1284/69, Collection of Decisions 37, p. 74; 5109/71, Collection of Decisions 42, p. 82.

156. The necessity of the measures adopted by a State was not to be determined under an absolute rule, it had to be determined in accordance with the social and legal conditions in the particular State concerned. It was therefore relevant that the practice in question had been applied over a long period, and that a democratically elected parliament had not seen fit to interfere with its development.

157. The fact that a similar practice did not exist in any of the other Contracting States to the Convention was in itself not sufficient to show a breach of the Convention. In this respect the Government referred to Art. 60 of the Convention, and to the fact that Art. 10 (2) itself mentions democracy. In their submission this implied that the Convention did not seek to achieve uniformity. Sufficient room must also be allowed for the democratic process.

158. The Government moreover doubted that the difference of the English law of contempt from the corresponding regulations of other States was in fact as big as the applicants wanted to make it appear - and in this respect they quoted in particular Articles 226 and 227 of the French Penal Code, Article 353 d of the new German Criminal Code, Article 8 of the Austrian Criminal Law Amendment Act of 1963, Sections 116 a and 117 (2) of the Danish Administration of Justice Act which in their submission were provisions of continental legal systems which were analogous to the English law of contempt. They further referred to the law of Cyprus, Ireland and Malta which had similar rules as the English law. Finally, they also referred to the law of the United States which in their submission was not very different from English law, but only put the emphasis differently.

159. According to the respondent Government the test of necessity should be whether a State acting reasonably could consider the particular method of controlling the exericse of a right guaranteed by the Convention as necessary. This did not mean replacing "necessity" by "reasonableness"; the test still remained one of necessity. But the Commission could only intervene if it was satisfied that no reasonable State could adopt or apply the system of rules which a particular State has done, if it considered the rules adopted as utterly unreasonable and utterly outside the margin of appreciation.

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Necessity of the restriction for the maintenance of the authority and impartiality of the judiciary, and for the protection of the rights of others

160. The Government submitted that it was the purpose of the law of contempt in general, and of the principles applied by the House of Lords in the present case in particular, to maintain and preserve "the fair administration of justice". The foundation of a fair and proper judicial system was the existence of courts which were strong and capable of administering the law fairly and impartially. This was also the concept embodied in Art. 6 of the Convention, and in the qualifications of Art. 10 (2).

161. It was the primary purpose of the law of contempt to uphold the authority and impartiality of the judicial machinery and to preserve confidence in it. Very closely related to this was the further purpose to protect the right of an individual litigant to have the matter in dispute determined by the courts free from interference by third parties and in the confidence that there would be no usurpation of the court's function by any other person.

Both aspects of the law of contempt had been reflected in the House of Lords' decision, and were also recognised in the Phillimore Report.

In the Government's opinion it was thus manifest that the purposes of the law of contempt as such, namely to maintain the authority of the courts, and to protect the rights of litigants, were covered by Art. 10 (2).

162. In the concrete case it was clear from the speeches in the House of Lords that the court had the above purposes of the law of contempt in mind when making its decision. The margin of appreciation had been respected because the House of Lords had fully considered the relative claims of freedom of speech and due administration of justice. Its discussion ranged widely over the role of the courts in society, the danger of prejudicing the public against parties to litigation and "trials by newspaper", the extent to which it was legitimate to persuade, or to bring pressure upon parties to legal proceedings, whether in the course of the proceedings or in negotiations for a settlement, and the question of prejudgment of matters in issue in pending litigation. Eventually the House of Lords restricted the article on a closely defined basis, namely prejudgment, and not because it would have brought improper or unfair pressure to bear on parties to pending litigation.

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The Government referred to the Commission's earlier case-law (1) according to which it was sufficient proof of the necessity of a restriction that the competent courts considered the relevant circumstances of a case.

163. The particular reason why the restriction of the draft article had been considered as necessary was in the Government's opinion the fact that it dealt with questions which in the English legal system were exclusively reserved for the courts, namely the issues in pending litigation which had to be decided by the courts. Prejudging these issues, i.e. making up one's mind about these issues and publishing material which must lead the public to form an opinion on the decision to be taken, meant usurping the functions of the court.

164. Unrestricted comment on these issues before they were decided by the competent court created a risk of influencing or affecting the court, the witnesses or the parties in the case. It was disputed whether it was possible to influence the mind of an English judge by the publication of material out of the courtroom, but it could at least be doubted that the judge would remain wholly unaffected by such a publication. In this respect, the Government underlined that the applicants themselves had stated that they wanted to publish the material at a time when it was likely to have an effect on the outcome of the proceedings.

165. It was, however, not so much the threat to the impartiality of the judiciary which the House of Lords had in mind, as the attack on the court's authority caused by a prejudicial publication. Taking over the task of deciding the issues which are referred to and reserved for the courts must necessarily have the effect of undermining the public confidence in the courts' proper and constitutional functioning as the arbiter in criminal and civil proceedings. It was therefore necessary for the "authority of the judiciary" to stop publications which interfered with the exercise of its constitutional role.

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(1) Decisions on Applications Nos. 2648/65, Collection of Decisions 26, p. 31 and 1167/61, Yearbook 6, p. 204.

166. The restriction of such publications was at the same time necessary for the protection of the "rights of others", because a litigant, whether plaintiff or defendant, was entitled to have his case decided by the court alone and to be protected against a public judging of his case by someone outside the court system.

167. In particular, it was entirely for the parties to decide what evidence they should put before the court. The parties to civil litigation not infrequently excluded certain matters from the hearing, and the judge's task was to decide the case only upon the evidence before him. It was an intolerable and unjustifiable interference if a third party came before the judge and sought to bring to his attention behind the back of the parties certain information in order to influence his mind and judgment. The applicants' "apparent assertion of a right to interfere in civil litigation between two private litigants by putting before the court matters which neither party is disposed to adduce" was not recognised by the Convention, and could not form a valid basis for asserting a right to freedom of expression. Moreover, it was inadmissible to make the present application the vehicle for a general debate on the merits or demerits of the adversary system of litigation.

168. As to the relationship of the law of contempt and the law of libel the Government submitted that the latter had a very different purpose, namely to protect the "reputation of others" within the meaning of Art. 10 (2). Although both the law of contempt and the law of libel could operate to inhibit the same publication, this was not so in the case before the Commission and it was irrelevant to the question of necessity whether the same material could be restricted under another legal head. If both forms of restriction were, as such, compatible with the Convention, there was no right under the Convention to be restrained by one rather than the other.

169. As regards the state of proceedings in the thalidomide litigation, the Government submitted that it could not be used as a valid argument against the necessity to restrict the draft article. The applicants' argument that the House of Lords had failed to take due account of the length of time since the thalidomide tragedy occurred was not admissible,

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because it was not the Commission's task to review the House of Lords' decision like a court of appeal, and to reopen arguments which had already been dealt with in the domestic proceedings. Moreover, the time factor had been fully canvassed in the domestic proceedings. The impression which the applicants wanted to create that the domestic proceedings had taken an unreasonably long time had no basis in the facts. In reality the actions which were at the basis of the injunction all dated from 1968 and later. They were not dormant because settlement negotiations were still in progress. Very often an action was at the most active when a settlement was being talked about. Although nothing was happening in the courthouse, it could not be denied that the actions were in a very important stage. And at the time there was no certainty that the actions might not finish up before the courts, because five parents had objected to the previous settlement proposal and were decided to fight the case in court if no satisfactory settlement was brought about. It was true that the majority of parents were anxious to avoid a trial and get a quick settlement. However, in any case, the court was required to approve the terms of settlement in view of the fact that the thalidomide children were minors.

170. The Government submitted, finally, that the restriction of the applicants' freedom of expression was not unnecessarily long. The House of Lords decision had envisaged only a temporary ban, and provided for the discharge of the injunction even at a date when the litigation had not been fully disposed of. This showed that the House of Lords' decision was based on good reasons of public policy, setting out to impose the minimum restraint on freedom of speech which the House thought was necessary to safeguard the fundamental rights and the fair administration of justice.

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(3) As to Articles 14 and 18 of the Convention

171. The Government replied only summarily to the applicants' arguments that the restriction had been applied in a discriminatory way against them (Art. 14), and that it achieved yet another purpose than the one intended by the authorities (Art. 18). With regard to both arguments, the Government stated that they were not part of the application as admitted by the Commission.

172. As regards Art. 14, the Government further stated that they considered the applicants' argument as unfounded. The other publications to which the applicants had referred were not in the same category. The Daily Mail article, in particular, had a wholly different character from the Sunday Times draft article in that it was not drafted as a case against Distillers and focused on positive efforts in other countries to avoid the tragedy. Another difference between the draft article and other publications was that the latter had not been referred to the Attorney-General before publication. Finally, as regards the Parliamentary debate, it did not go into the legal issues of negligence but concerned principally the moral issues involved. The debate, which was subject to rules and the guidance of the Speeker, could not validly be compared with a one-sided article.

173. As regards the substance of the applicants' argument under Art. 18, the Government equally submitted that it was unfounded. There was no possible justification for suggesting that the decision of the House of Lords was arrived at for any ulterior purpose than the fair administration of justice. Moreover, the applicants had themselves admitted in their Memorial that the House of Lords granted the injunction "on the basis of what they saw as a real prejudice to the administration of justice". It was impossible to bring this sentence in line with any allegations under Art. 18.

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IV. OPINION OF THE COMMISSION

A. Points at issue

174. The main issues in the present application arise under Art. 10 of the Convention, and in particular under paragraph (2) of this Article.

175. The applicants have in addition raised some questions under Arts. 14 and 18 in connection with Art. 10 of the Convention. In view of the Government's objection to the raising of these issues the Commission will have to examine the admissibility of the submission of these arguments at the merits stage of the proceedings. Should it find them admissible, it will also go into the substance of these arguments.

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B. As to the alleged violation of Art. 10 of the Convention

176. Art. 10 of the Convention reads as follows:

> "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.
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> 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."

177. The Commission has already stated in its decision on admissibility of 21 March 1975 that "there is no doubt that the applicants' freedom of expression has been restricted by the decision of the House of Lords ... The only question before the Commission is whether in the circumstances of the present case this restriction of the freedom of expression can be justified under Art. 10 paragraph (2) of the Convention ..."and, in particular,"whether the rules of contempt of court as applied in the decision of the House of Lords granting the injunction are a ground justifying the restriction under Art. 10 paragraph (2) ..."

178. In dealing with the issues in this case the Commission has first considered the nature and scope of the restriction imposed and has then examined the question whether the restriction imposed on the applicants' freedom of expression was justified under Art. 10 (2) of the Convention as having been prescribed by law and necessary for maintaining the authority and impartiality of the judiciary. In this latter context it has also taken into account the need of protecting the rights of others, namely the rights of the litigants in the thalidomide proceedings.

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(1) The nature and scope of the restriction imposed

179. The Commission considers that it must take the text of the House of Lords' decision itself as its point of departure. The House of Lords directed the Divisional Court to grant an injunction in the following terms:

> "That the defendants, Times Newspapers Ltd 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) Ltd in respect of the development, distribution or use of the drug 'thalidomide', with liberty to apply to that court."

180. It is only this text which circumscribed, with immediate binding effect for the applicants, the area of activity forbidden to them. The grounds relied upon by the Law Lords when making their decision thus found their concrete application in the present case in the terms of the above injunction. The reasoning in the House of Lords' decision does not create any additional obligation for the applicants.

181. The Commission notes that the wording of the injunction granted by the House of Lords covered generally any publication, and certain preparatory acts for publishing or printing, of matter related to the thalidomide proceedings. This obligation did not go as far as to prevent them from seeking further information on the development and distribution of thalidomide, for instance for the preparation of a future publication. Certain allegations made by the applicants that they were restrained from continuing their investigation have not been substantiated, and the Commission therefore takes it for granted that the injunction was solely directed at the restriction of "publication" for the time being.

182. It is true that the injunction was formulated in general terms, and therefore could have effects beyond the restriction of the Sunday Times' draft article on the development of thalidomide. In this respect the Commission refers to its decision on admissibility in which it accepted the applicants' prima facie claims to be victims of restrictions also in respect of the preparation of a book on thalidomide, and possibly certain lectures by the third applicant. However, these arguments have not been developed any further in the applicants' submissions on the merits, and the Commission

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does not therefore consider it necessary to examine this question in more detail. It is clear that the principal object of the injunction was the Sunday Times' draft article which was deemed to fulfil the criteria laid down in the injunction. The draft article provides the only accurate basis on which the Commission can examine whether the restriction of the applicants' freedom of expression can be justified in the existing circumstances, having regard to the provisions of Art. 10 paragraph 2 of the Convention.

183. The Commission will therefore limit its examination to the draft article.

The draft article was restricted because it was considered that it "prejudged" and "dealt with evidence" related to certain issues in the thalidomide litigation.

The Commission notes in this respect that the House of Lords itself, the Phillimore Report and the Government do not appear to distinguish the two heads of restriction as separate criteria but rather tend to treat "prejudgment" and "dealing with evidence" as two aspects of a single prejudgment criterion the test of which was laid down in the House of Lords' decision and later criticised by the Phillimore Committee. In the terms of Art. 10 paragraph (1) of the Convention the two elements indicated above seem to correspond to the broad division between "ideas" or "opinion" on the one hand, and "information" on the other hand. The applicants have occasionally drawn similar distinctions, e.g. when they submitted that the House of Lords' decision meant "that it was alright to utter opinion, but not the evidence that one believed sustained that opinion".

184. However, the Commission generally observes that both parties seem to be in agreement that the draft article in question was restricted not only because it contained information (i.e. the publication of certain evidence), but also because at the same time it tended to convey opinion, namely the idea that Distillers had a moral, if not legal, responsibility vis-a-vis the victims of thalidomide.

185. The Commission therefore finds that the injunction restricted both the applicants' right "to impart information" and their right "to impart ideas" within the meaning of Art. 10 paragraph (1) of the Convention.

186. There is finally the time element and it has been stressed by the Government that the restriction of the applicants' freedom of expression in the present case meant only the postponement of publication, and in no way the complete ban. That this was also the view of the authorities imposing the restriction is clear from the speeches in the House of Lords, and the opinion expressed by Lord Reid in particular. It is therefore of some importance to determine the actual period of postponement.

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187. The applicants' freedom of expression was formally restrained from the date of the Divisional Court's decision (17 November 1972) until the discharge of the injunction on the application of the Attorney-General (23 June 1976). It thus lasted more than three and a half years. But this period is not necessarily identical with the duration of the material restriction of the applicants' freedom which would seem to be the more relevant factor under the Convention.

188. As regards the beginning of the period, there can be no doubt that the Commission must also take into account the procedural stages preceding the issue of the first injunction, at least from the date of the writ (12 October 1972). This is also the date to which the parties have referred in their submissions.

189. As far as the end of the period is concerned, the Commission is confronted with the more difficult question whether the applicants failed to apply to the Divisional Court at an earlier date than the Attorney-General did, and thereby unnecessarily prolonged the effect of the restriction by a behaviour for which they are themselves responsible. However, the Commission notes that the Attorney-General himself referred to the necessity to allow publication "at the earliest possible date" when applying for the discharge of the injunction. It must therefore be assumed that the authorities considered the restriction as necessary until the date of the Attorney-General's application.

190. It follows that the material restriction of the applicants' freedom of expression must be calculated from the issue of the writ until the date of the formal discharge of the injunction.

(2) Was the restriction imposed justified in the light of the provisions of Art. 10 paragraph 2 of the Convention ?

191. The Commission would first observe that the justification of the restriction on the applicants' freedom of expression cannot be implied by the interpretation of other provisions of the Convention independently of Art.10. The Commission remarked already in its report on the De Becker case that it would run counter to the whole plan and method of the Convention to seek the justification of a restriction of the freedom of expression in other Articles of the Convention than the one especially designed to regulate the freedom in question. Art. 6 of the Convention which has been invoked by the Government can therefore only provide arguments for the interpretation of Art. 10 paragraph (2), but not substitute the criteria laid down in this provision. (1).

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(1) Cf. De Becker v. Belgium, Report of 8 January 1960, para. 263.

192. Art. 10 paragraph (2) of the Convention obliges the High Contracting Parties to limit any interference by the authorities with the exercise of the freedom of expression to measures which can be characterised as "formalities, conditions, restrictions or penalties" which are "prescribed by law" and "necessary in a democratic society" for certain enumerated purposes having regard to the "duties and responsibilities" which the exercise of the freedom of expression carries with it in such a society.

193. The Commission cannot accept the suggestion that the provisions of Art. 10 form an "essential unity" in the sense that the right to freedom of expression exists only to the extent circumscribed by the qualifications in paragraph (2) of the Article. This concept would have the necessary implication that the right in question is being conferred by the State to which this provision leaves a certain discretion in determining the limits of the exercise of this right. Such a consequence, however, would be in clear contradiction with the very idea of a "freedom", that is a sphere of activity originally free from state interference.

Moreover, it would also be in conflict with the wording of Art. 10 itself, which in paragraph (1) expressly provides for certain freedoms "without interference by public authority", "sans qu'il puisse y avoir ingérence des autorités publiques", and in paragraph (2) merely allows the regulation by the state of the "exercise" of these freedoms - which hence must be considered as pre-existent.

194. It follows from the nature of paragraph (2) of Art. 10 as an exception clause that this provision must, according to a universally accepted rule, be strictly interpreted. This is especially true in the context of the Convention the object and purpose of which is to safeguard fundamental human rights. Strict interpretation means that no other criteria than those mentioned in the exception clause itself may be at the basis of any restrictions, and these criteria, in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning (cf. paragraph 44 of the Court's Judgment of 21 February 1975 in the Golder Case where the Court stated that the restrictive formulation used at paragraph (2) of Art. 8 left no room for the concept of implied limitations).

195. In the case of exception clauses such as Art. 10 paragraph (2) the principle of strict interpretation meets certain difficulties because of the broad wording of the clause itself. It nevertheless imposes a number of clearly defined obligations on the authorities of the High Contracting Parties which are subject to the supervision by the Convention organs.

196. The Commission now turns to the particular criteria which it must apply when exercising its supervisory function (Art. 19) in order to ensure the

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observance of the engagements undertaken by the High Contracting Parties in Art. 10 paragraph (2) of the Convention (1).

197. The Commission has first examined whether the interference with the applicants' freedom of expression constituted a "formality, condition, restriction or penalty prescribed by law".

198. The decisions of the domestic authorities in the present case were based on the common law principles of contempt of court, that means the applicants would have been found guilty of the common law offence of contempt of court if they had actually published the draft article in question during the period in which the injunction was in force.

199. Although the law of contempt belongs to the sphere of criminal law it is not a "penalty" of which the applicants complain, but rather a preventive measure. The interference with their exercise of the freedom of expression which this measure entailed took the particular form of a "condition" or "restriction" within the meaning of Art. 10 paragraph (2) of the Convention, namely that the publication of certain matter be postponed to a later date.

(a) Was the restriction "prescribed by law"?

200. It is not disputed between the parties that the common law principles applied by the House of Lords in reaching the decision which ultimately confirmed the above measure represent the law actually in force in England.

201. The Commission observes, however, that that law was apparently developed in the House of Lords' decision itself. The unsatisfactory state of the law has been criticised from various quarters, and even Lord Reid admitted in his speech in the House of Lords that the main objection to the existing law of contempt was its uncertainty.

202. The Commission notes that in the present case the House of Lords' decision not only reversed the unanimous decision of the Court of Appeal, but also rejected the reasons relied upon unanimously by the Divisional Court. The House of Lords was only unanimous in sharing the conclusion of the original decision, namely that the publication of the article must be restricted. The Lords were themselves divided as to the reasons to be adopted in support of this conclusion. As the Government have rightly pointed out, only a minority of the House of Lords shared the opinion of the Divisional Court that the draft article in question must be restricted as prejudicial because it put pressure on parties to civil litigation. The majority of the House of Lords rejected this view and substituted a new criterion, namely "prejudgment", that

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(1) Cf. paras. 48-49 of the judgment of 7 December 1976 which the E.C.H.R. gave in the Handyside Case

means expressing an opinion, or presenting evidence in such a way that conclusions can be drawn as to the legal issues in pending litigation the determination of which is reserved for the courts.

203. The Commission finds it difficult to accept that the clause "prescribed by law" in Art. 10 paragraph (2) should mean no more than a competence of the courts to develop an existing legal concept. In the Commission's opinion it means "pre-determined by substantive law", so that any court decisions and the reasoning supporting them can at least roughly be foreseen.

204. In its opinion the unsatisfactory state of law in the present case does not result from the fact that the applicable domestic law is not statute or other legislation, but common law. The uncertainty of the law rather seems to result from the incompleteness and inconsistency of the earlier case law, which allowed for extremely different interpretations.

205. The Commission proceeds on the assumption that the principles of the law of contempt as applied in the House of Lords' decision were "prescribed by law" within the meaning of Art. 10 paragraph (2) of the Convention.

(b) Was the restriction imposed on the applicants' freedom of expression necessary for any of the purposes enumerated in Art. 10 (2) of the Convention ?

206. The Commission now comes to the question whether the restriction imposed on the applicants' freedom of expression was necessary in a democratic society for any of the purposes enumerated in paragraph (2) of Article 10 of the Convention.

207. In its examination of that question the Commission must distinguish between two different conditions. In the first place the reason or reasons which have prompted the national authorities to take the measure complained of must be identified and it must be examined whether they are consistent with any of the grounds limitatively listed in para. (2) of Art. 10. The Commission must then consider whether, on the facts of the case before it, that measure was necessary for any of the grounds invoked by the Government and, in this context, it must have particular regard to the question whether the measure was proportionate to the aim which was sought to be realised (cf. para. 49 of the judgment of 7 December 1976 which the E.C.H.R. gave in the Handyside Case.)

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208. The decision by the Attorney-General to make an application to the courts for an injunction restraining the publication of the draft article was governed by considerations that the article might interfere with pending litigation and thus constitute contempt of court.

209. The Commission has therefore first examined the question whether restrictions imposed on the right to freedom of expression on the ground that they constitute contempt of court are covered by the terms of Art. 10 (2) of the Convention.

210. In this respect the Commission had in particular regard to the principles of the law of contempt as stated by the majority of the House of Lords which determined in the final and decisive way the area of activities forbidden to the applicants.

211. The particular grounds on which the House of Lords found the draft article to be in contempt of court were :

1. It "prejudged" the crucial issues in the thalidomide litigation ; and

2. It "dealt with evidence" related to these issues.

As already mentioned above, these elements have been combined to a single prejudgment criterion. In fact, each of the Lords circumscribed the meaning of prejudgment in a slightly different way.

212. The principles relied upon by the majority of the Lords may be broadly characterised as follows:

- the law of contempt is a means by which the law of England seeks to maintain and uphold the fair and proper administration of justice;

- the law of contempt is applicable in civil law cases;

- it protects pending litigation at all stages of the procedure, and even imminent litigation;

- it requires the restriction of publications which "prejudge" crucial issues in such litigation, or "deal with evidence" related to such issues;

- such publications must be postponed to a later date, unless the matter is already under public debate;

- the setting into operation of the restriction in the concrete case is a matter of public policy.

213. The Government have contended that it was the purpose of the law of contempt in general, and of the principles applied by the House of Lords in the present case in particular, to maintain and preserve the fair administration of justice. It was the primary purpose of the law of contempt to uphold the authority

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and impartiality of the judicial machinery and to preserve confidence in it. There was a further purpose, closely related to this primary purpose, namely the protection of the right of an individual litigant, whether plaintiff or defendant, to have the matter in dispute determined by the courts free from interference by third parties and in the confidence that there will be no usurpation of the court's function by any other person. These two closely related aspects of the law of contempt which were reflected in the judgments of the House of Lords were co-extensive with the purposes mentioned in Art. 10 paragraph (2) of the Convention, namely "maintaining the authority and impartiality of the judiciary" and the "protection of the rights of others", that is the procedural rights of litigants.

214. The Commission accepts that it is the general aim of the law of contempt to secure the fair administration of justice, and that it thereby seeks to achieve similar purposes as those envisaged in Art. 10 paragraph (2) of the Convention where it speaks of the maintenance of the authority and impartiality of the judiciary. The method by which the law of contempt seeks to achieve the above purpose, namely the reservation of issues in pending litigation for the exclusive province of the competent court, so that any public and prejudicial discussion of the merits or facts of the case before they have been determined by that court mean a usurpation of the latter's function ("trial by newspaper") may be considered an element contributing to the securing of a fair trial.

(aa) "Maintaining the authority and impartiality of the judiciary"

215. The Commission has therefore next examined whether, in the circumstances of the case before it, the restriction on the applicants' right to freedom of expression was necessary for maintaining the authority and impartiality of the judiciary.

The Commission observes that the Government have argued that it is not the impartiality of the courts but only their authority which is concerned in the present case. The Commission therefore, having regard to all the circumstances, does not find it necessary to go into the issue of impartiality at great length and will generally confine itself to the question of the authority of the courts.

216. In this connection the Commission had regard to

- the character of the litigation involved;
- the contents and purpose of the draft article; and
- the state of the proceedings at the time of the granting of the injunction concerned.

(i) The character of the litigation involved

217. In the present case the principle of contempt of court was applied in relation to civil litigation. The applicants have submitted that the law of contempt is not necessary insofar as it relates to civil litigation, which under English law is regularly dealt with by professional judges. In the applicants' view, which is to a certain extent supported by case-law of the English courts themselves and opinions contained in the Phillimore Report professional judges do not really need the law of contempt to assert their authority and impartiality.

218. It is true that the text of Art. 10 paragraph (2) envisages the "judiciary" as a whole, and that this term cannot be interpreted otherwise than including the civil law courts as one of the central branches of the administration of justice.

219. Nevertheless, the Commission is of the opinion that, on the question whether or not a particular restriction was "necessary" it is relevant to take into account the factor whether a court is dealing with a civil matter or whether it is dealing with a criminal case. Criminal courts are often composed of both professional judges and lay judges but the present case was reserved for a court dealing with civil matters and composed of professional judges only.

220. Professional judges have received a long and intensive training to keep an impartial and detached attitude even in circumstances which seem clearly to point one way or another. It can in no way be maintained that they are therefore infallible, but their authority and impartiality is protected by a number of specially designed legal institutions such as their irremovability and freedom from instructions, the possibility for the parties to object to judges whom they consider to be biased etc. Although it is not unreasonable to assume that under certain circumstances they should not be exposed to an excessive use of freedom of expression, such protection is, in the Commission's opinion, less needed for the professional judge deciding in a civil case than for the lay judge or juror sitting in a criminal case.

221. It may be mentioned here that in the Federal Republic of Germany criminal proceedings were instituted against the original producers of

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thalidomide in a quite comparable situation. They were eventually discontinued for lack of conclusive technical evidence by a decision of the Regional Court of Aachen. (1)

As the English law reserved the matter for the civil courts, it is not for the Commission to interpret the character of the litigation otherwise.

222. There remains the question, however, whether special conditions are prevailing in tort cases which would make it necessary to protect the judge in such cases against outside influences which might interfere with his authority or impartiality.

For, under English law, the civil responsibility of a manufacturer of drugs or other products for bodily harm caused to a person by some defect of those products is exclusively governed by the law of torts. This does not provide for some sort of objective liability of the manufacturer, but makes the success of claims for damages dependent on the establishment of negligence. Other titles of a claim could be breach of contract, or breach of duty. In each case, the burden of proof rests on the plaintiff, and the evidence taken into account by the court will be restricted to the evidence adduced in court by the parties.

223. The Commission considers that in the circumstances of the present case a particular concern for the authority and impartiality of the courts cannot be regarded as being unjustified simply by reason of the fact that the proceedings concerned relate to civil matters.

(ii) The contents and purpose of the Sunday Times' draft article

224. The article which the Sunday Times intended to publish contained mainly factual information in the form of a narrative of the history of the introduction of thalidomide in Britain. It appears that it distinguished itself from other publications on the topic circulating at the relevant time in England mainly by its comprehensiveness and systematic approach. The applicants have very much

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(1) Cf. Juristenzeitung 1971, at pp. 507 et seq.

insisted on the truth of the information contained in the draft article which they were prepared to prove in libel proceedings before a court. The Government have not directly disputed its truth, but stated that this was a question reserved for determination by the competent court. It is also generally accepted that the draft article was couched in moderate language, and even contained a summary of counter-arguments which might be adduced in favour of Distillers'.

225. Be that as it may, it cannot be denied that the draft article dealt with matters very closely related to the thalidomide litigation which at the relevant time was in the state of settlement negotiations approaching a tangible result. In fact, it was the avowed intent of the applicants to influence the result of these negotiations by putting the pressure of publicity on Distillers' to come forward with increased offers to the thalidomide parents.

226. The same purpose had already been pursued by the article of 24 September 1972 which the Attorney-General and the majority of the House of Lords had expressly excluded from the application of the law of contempt on the ground that putting pressure on a litigant was not as such inadmissible. This article clearly set out the enormous difficulties which the children's claims had to overcome in the English legal system. In this respect it should be noted that the difficulty in proving Distillers' negligence was, according to that article, by far not the only legal obstacle which had prompted the thalidomide children's parents to accept a rather unfavourable settlement in 1968.

227. The draft article with which the present application is concerned contained a detailed account of evidence relevant to the negligence issue. In itself, it bore a much less legal character than the above mentioned published article. It is true that the material was presented in such a way that it might lead the reader, and in particular the English public at the time of the intended publication, to certain conclusions about Distillers' attitudes with regard to the development and marketing of thalidomide. Both parties agree that the article tended to convey opinion and not only information. But the opinion expressed was certainly not a legal assessment of the merits of Distillers' case under the laws of England.

228. The applicants have therefore constantly emphasized that it only concerned Distillers' moral responsibility for certain shortcomings in connection with thalidomide. Indeed, it would seem difficult to maintain that the readers of the Sunday Times must have necessarily concluded that the draft article, if read against the background of the article of 24 September 1972, pressed particularly for the legal responsibility of Distillers'. In the circumstances, it could as well have been understood as dealing with a matter distinct from the legal questions which would have had to be decided by a court if the settlement negotiations had failed.

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229. It follows from the above description that the material contained in the draft article was not likely to influence the opinion of the competent judge in a direct way. The Government have stressed that an essential part of the information contained in the draft article had been obtained from an advisor to the thalidomide childrens' parents who had received it in the process of discovery of documents. It must therefore be assumed that the relevant information was available to both parties in the proceedings and would have been called as evidence in case of a court hearing. It is therefore difficult to imagine how it could have created a bias for the judge. It was the purpose of the draft article to influence the outcome of the settlement negotiations by the pressure of publicity ; it was not intended to influence the judge in a possible decision on the merits of the above issues.

230. Nevertheless, in view of this avowed purpose of the draft article and the respondent Government's main argument that this article would affect the authority of the judiciary rather then its impartiality, the Commission has next examined the restriction imposed on the publication in the light of the state of the proceedings in the thalidomide litigation in order to determine whether it was, in that context, a "necessary" interference with the applicants' right to freedom of expression.

(iii) The state of the proceedings in the thalidomide litigation at the time of the granting of the injunction concerned

231. The injunction characterised the thalidomide proceedings by the following criteria :

There were pending or imminent actions against Distillers' which concerned the development, distribution or use of the drug "thalidomide", and involved certain issues, namely negligence, breach of contract or breach of duty.

232. The concrete proceedings envisaged by the injunction were those actions by parents of thalidomide children against Distillers' which had remained pending after the 1968 settlement (5 actions), or were brought only after that event (261 cases in which leave to issue writs out of time was granted pursuant to the above settlement). The injunction did not cover the 123 further claims included in the settlement negotiations without the issue of writs, because there were no pending actions in this respect.

233. At the time of the granting of the original injunction by the Divisional Court, the parties in the above 266 pending actions were engaged in settlement negotiations. These seem to have come very close to a result in the autumn of 1972. In fact, the Sunday Times' article of 24 September 1972 anticipated that the terms of the settlement would be approved at the court term starting in October 1972. However, apparently due to the publicity which the matter received following the Sunday Times' article of 24 September 1972, the settlement failed at that juncture.

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234. The procedural situation in the thalidomide litigation then remained essentially unchanged until the House of Lords' decision when all 266 actions were still pending while settlement negotiations were taking place out of court. The House of Lords therefore granted the injunction in conditions which were formally the same with regard to all pending actions. This situation changed only shortly after the House of Lords' decision. A settlement which was acceptable to the great majority of the thalidomide parents was brought about and approved in court on 30 July 1973.

235. As regards the above settlement negotiations, the Commission observes that they took place between the parties' lawyers out of court. Any impact of a publication on the process of negotiating itself could therefore not be considered as involving the authority and impartiality of the judiciary (Art. 10 paragraph (2) of the Convention). This also follows from the House of Lords' decision itself which excluded from the notion of prejudgment the putting of pressure on a party to litigation.

236. Any prejudgment could therefore only be relevant to (a) the eventuality of a trial on the merits if the settlement failed ; (b) the approval of the settlement by the court.

237. However, as regards the eventuality of a trial it was not in the least in sight with regard to the majority of the actions. All the circumstances at the material time were in favour of an early success of the settlement negotiations because both parties were interested in it and agreed that the 1968 settlement should serve as a model. Indeed it had been the Sunday Times' starting point in its article of 24 September 1972 that a settlement was about to be confirmed at the October 1972 court sittings. In these circumstances it would be unrealistic to allow the argument that the improbable eventuality of later court proceedings - which in fact never took place - necessitated the restriction of the applicants' freedom of expression in respect of the majority of cases which were actually settled on 30 July 1973.

238. The situation might be different with regard to the four individual actions of parents who as a matter of principle were not willing to opt for the settlement. At the time when the original injunction was granted and even at the time of the House of Lords' decision it could not be excluded that these parents would really go ahead with their actions. This would only have been the logical consequence of their fight for their re-institution as next friends of their children for the purpose of opposing the earlier settlement proposals.

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The small number of actions in this category could not make a difference, because the authority and impartiality of the judiciary must obviously be protected in every single case before a court. However, the actions were still in their initial stage, and even in case that they were pursued their preparation would have required a considerable period of time in view of the complexity of the matter and a court decision would not have been taken in the foreseeable future.

239. As regards the approval of the thalidomide settlement by a court, the Commission observes that this approval was only required in the present case because the settlement concerned the interests of the thalidomide children being minors. However, the rôle and task of a judge called upon to examine whether a given settlement is in the true interest of minors is wholly different from the rôle and task of the judge who eventually would have to decide on the merits of the dispute underlying that settlement. It would run counter to the whole object and purpose of the court supervision in the interest of minors if such supervision would be used as an argument in favour of the other party concerned, in order to justify the restriction of a publication whose declared aim it is to assist the minors in their plight against that party.

240. Moreover, the Commission observes that the judge approving the settlements in the present case was not directly called upon to pronounce himself on the question of Distillers' legal, or even moral, responsibility. It follows that a publication dealing with these questions could in no way undermine his impartiality or authority. In fact, even taking into account the shorter period of time until the approval of the settlements as compared to the time which would have been needed for any decision on the merits, the possible influence of the Sunday Times' draft article on the opinion of the judge approving the settlements could be no greater than that exercised on the judge who eventually would have to decide on the merits.

241. The Commission accepts that there may be situations in which it is necessary to protect the authority of the judiciary although there is no concrete danger for its impartiality.

242. However, given the fact that the litigation involved was civil in character, that the contents of the draft article need not necessarily be understood as passing legal judgment on the issues involved in the actions and was not aimed at directly influencing the opinion of the judge, and that at the time of the granting of the injunction the thalidomide proceedings were at the stage of settlement and no court action apart from the approval of the settlement because of the involvement of minors was likely to be forthcoming in the immediate future, the Commission finds that the authority of the judiciary was not directly put in question by the publication of the draft article at that time.

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243. There is an additional element in this case which the Commission has taken into account in this context. This relates to the fact that, under Art. 10 (2) of the Convention, the Commission must have regard to the duties and responsibilities which the exercise of the freedom of expression carries with it in a democratic society. In the present case the Commission therefore had regard to the very important function, in a democratic society, of the press in general and to the duties and responsibilities of individual journalists in particular.

244. The facts underlying the thalidomide litigation with which the Sunday Times wanted to deal in the proposed article were not just the ordinary type of issues between private parties to civil litigation. The clarification of issues of negligence in connection with private activities which have led to a public disaster is also a question of public concern, and the examination of responsibility in such a situation is, in itself, certainly a legitimate function of the press in a democratic society. This has not even been denied by the respondent Government who have emphasised that the main objection against the draft article was the time of its intended publication in relation to the state of proceedings in the thalidomide litigation.

245. It is true that at the time of the intended publication of the draft article the thalidomide affair was mainly an issue of civil litigation between the parents of the thalidomide children and Distillers'. But this was so partly for the reason that a public investigation of the causes of the thalidomide tragedy which had repeatedly been demanded had never been carried out; in fact, it was finally refused by the competent Minister after the discharge of the injunction against the Sunday Times in summer 1976. Insofar as Parliament is concerned, it impliedly renounced to an investigation when resolving to await the outcome of the civil litigation before considering whether the thalidomide children required additional State assistance.

246. As the matter was not being clarified by criminal proceedings nor by a public investigation, it was entirely left to the civil proceedings. These however need not necessarily bring to light all the relevant factors because they are in principle subject to the parties' disposition. In this respect it must be observed that already the 1968 thalidomide settlement which was meant to serve as a model for the current negotiations, had excluded the issue of negligence by the withdrawal of the relevant allegations by the parents.

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247. If the public interest to clarify matters of great importance cannot 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 can be sufficient to justify that the authorities stop information on matters the clarification of which would seem to lie 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 these persons are engaged. As has been shown above, this was not however the case here.

248. It follows that, in all the circumstances, the interference complained of was not justified as having been necessary for maintaining the authority and impartiality of the judiciary within the meaning of Art. 10(2) of the Convention.

(bb) "Rights of others"

249. The respondent Government have finally submitted that the restriction imposed on the applicants was not only necessary to maintain the authority and impartiality of the judiciary, but also to protect the "rights of others", namely the procedural rights of the litigant in the thalidomide litigation.

250, The Commission considers that a restriction of the exercise of freedom of expression under Art. 10(2) in order to maintain the authority and impartiality of the judiciary implies the protection of the rights of litigants, in particular their rights under Art. 6 of the Convention. However, the Commission notes that the application of the law of contempt is considered as a matter of public policy. The main concern is the protection of the reputation and fairness of the judicial system in general, which includes the protection of the rights and interests of the litigant in a particular case. The procedural rights of litigants are adequately protected by a fair and proper judicial system; they are not an aim in themselves. The protection of other rights of litigants outside the court proceedings, such as their right to ensure the truth and fairness of any press reports about their litigation by the law of libel etc., are wholly different matters irrelevant to the present application.

251. The Commission therefore considers that it is not called upon to examine separately whether it is a purpose of the law of contempt in general, and of its application in the present case, to protect the rights of others within the meaning of Art. 10 paragraph (2).

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c) Result

252. The Commission is therefore of the opinion that, in the circumstances of the present case, the restriction imposed on the publication of the draft article concerned was not necessary for the maintenance of the authority and impartiality of the judiciary or for any other reason stated in Art. 10 (2) of the Convention.

253. Since the restriction of the applicants' freedom of expression was already initially not justified under the provisions of Art. 10 paragraph (2) of the Convention, it is not necessary to examine whether the restriction was of excessive duration.

C. As to the alleged violation of Articles 14 and 18 read in conjunction with Article 10 of the Convention

254. In their submissions on the merits the applicants have extended their allegations of violations of the Convention to include certain violations of Articles 14 and 18 in combination with Article 10 of the Convention.

The Government have contested the admissibility of these arguments which are not covered by the Commission's decision on admissibility.

The Commission therefore must first decide whether it can look into the substance of the above arguments although they were presented only at the merits stage of the proceedings.

255. In this respect, the Commission first refers to its constant case-law according to which it is competent to consider, even ex officio, whether the facts referred to it in an application disclose violations of the Commission other than those of which the application complains. This opinion has been confirmed by the Court in its judgment of 27 June 1968 in the Neumeister case (para. 16 of the Law).

256. In its recent judgment in the Handyside case the Court drew a distinction between new complaints and legal submissions or arguments put forward along with others in relation to the same facts. The Court stated i.a. (para. 41): "Once a case is duly referred to it, the Court may take cognisance of every question of law arising in the course of proceedings and concerning facts submitted to its examination ... Master of the characterisation to be given in law to these facts, the Court is empowered to examine them, if it deems it necessary and if need be ex officio, in the light of the Convention and the Protocol as a whole ..."

257. The Commission considers that the same principle applies, mutatis mutandis, when it carries out its functions under Art. 31 of the Convention. Its task is to express a legal opinion whether the facts which have been ascertained under Art. 28a of the Convention as constituting the essence of the application "disclose a breach by the State concerned of its obligations under the Convention".

258. The Commission therefore considers that it must deal with the applicants' above arguments in this report.

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(1) As regards Art. 14 read in conjunction with Art. 10 of the Convention

259. The applicants have complained that it constituted discrimination contrary to Art. 14 of the Convention that only their draft article, and not other similar publications were restrained. They also complained of the distinctions which had been made between the duties and responsibilities of the "Sunday Times" as a large national newspaper, and those of other newspapers. Finally, they complained of the difference that existed between the rules applicable in Parliament in relation to pending litigation, and the rules of contempt of court as applied to the press.

260. The Commission notes that there were indeed a number of publications which also dealt with evidence relevant to the thalidomide litigation, and expressed positive or negative opinions with regard to Distillers' responsibility, some even in the form of legal opinions (cf. Annex IV).

However, the Commission also notes that the draft article in question distinguished itself from the other similar publications referred to by its comprehensiveness and systematic approach which created the impression that it was a full assessment of all available evidence. This was the feature which apparently made up the special character of the draft article which was so much stressed by the House of Lords and the respondent Government. The Government have left no doubt that under similar conditions the law of contempt would also have been applied in another case. The difference between the duties and responsibilities of a large national newspaper and other less influential publications was not relied upon as a decisive ground for restricting only the Sunday Times' draft article.

261. In these circumstances, the Commission considers that there has been no discrimination between the applicants and the publishers, editors and journalists of other newspapers with regard to the right to freedom of expression.

262. As regards the difference existing between the press and Parliament with regard to the expression of opinion in relation to pending litigation, the Commission considers that no issue under Art. 14 of the Convention arises, since journalists and politicians are no comparable groups within the meaning of this provision.

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(2) As regards Art. 18 read in conjunction with Art. 10 of the Convention

263. The applicants have alleged that it was the result of the injunction of which they complained that they were prevented from exercising their duties as journalists. Even if this was only a side-effect not directly intended by the authorities it was, in the applicants' opinion, contrary to the provisions of Article 18 of the Convention.

264. Art. 18 of the Convention provides that the restrictions permitted under the Convention to the rights and freedoms set forth therein shall not be applied for any purpose other than those for which they have been prescribed.

265. There is no indication that the authorities pursued any purpose different from that of "maintaining the authority and impartiality of the judiciary" or the protection of the rights of litigants.

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D. Conclusions

266. The Commission concludes, by eight votes against five, that the restrictions imposed on the applicants' right to freedom of expression was in breach of Art. 10 of the Convention.

267. The Commission concludes unanimously that there has been no breach of Articles 14 and 18 read in conjunction with Art. 10 of the Convention.

Secretary to the Commission — Acting President of the Commission

(H.C. KRÜGER) — (G. SPERDUTI)

Dissenting Opinion

by MM. Sperduti, Daver, Mangan, Polak and Frowein

1. The Sunday Times was prevented from publishing "any article ... 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 in any actions pending or imminent against Distillers ...".

It is clear therefore, that we are confronted with a restriction of the applicants' freedom of expression guaranteed by Art. 10 par. 1 of the Convention. We are of the opinion, however, that Art. 10 par. 2 covers this restriction.

2. Art. 10 par. 2 sets out three different requirements for any restrictions which, though closely interrelated, may be usefully distinguished and discussed separately. First, the restriction must be prescribed by law. Secondly, it must be directed to one of the aims especially mentioned. Thirdly, it must be "necessary in a democratic society" in the interest of those aims.

3. As the majority of the Commission has stated, the restriction was "prescribed by law". The uncertainty of the law in that area, clearly admitted by the House of Lords and rightly stressed in the report of our Commission (paras. 201-204), could create some doubts as to the existence of any "restriction prescribed by law". However, the existence of the rules of contempt of court as part of English law cannot be doubted. Although a clarification by statute would seem to be appropriate we agree with the majority that the restriction was prescribed by law.

4. The restriction was clearly aimed at maintaining the authority and impartiality of the judiciary. It is to be noticed in this context that Art. 10 par. 2 expressly recognises the possibility of restricting the freedom of expression "for maintaining the authority and impartiality of the judiciary". Since it is well known that most continental legal systems have never developed rules comparable to contempt of court in English law, an interpretation of the Convention must

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take into account that this restriction provided for in Art. 10 par. 2 was clearly meant to cover especially an institution peculiar to Anglo-saxon legal traditions. This has to be kept in mind when discussing the necessity of the restriction in the sense of Art. 10 par. 2. So far, it has been clarified that the restriction was applied for one of the aims mentioned in Art. 10 par. 2.

5. By far the most difficult point is reached where the question has to be answered whether this restriction was "necessary in a democratic society" for the functioning of the judiciary. The majority of the Commission has come to the conclusion that the restriction was not necessary having regard to all the circumstances of the case and the contents of the article, and since the Sunday Times pursued a legitimate goal in informing the public about the tragedy (para. 252 of the report).

Before approaching the question at issue here, two clarifications would seem to be appropriate. The first concerns the real scope of the restriction, the second the competence of the Convention organs, when reviewing the necessity of a restriction of the kind before us.

6. The Sunday Times was not prevented from reporting on the Thalidomide tragedy. It was not prevented from arguing that the English law as at present is inadequate for preventing such a disaster and for compensating the injured. The paper was not prevented from urging the amendment of the law or from even trying to influence the conscience of the public and of Distillers. Indeed, the Sunday Times had done all that in its earlier article of 24 September 1972. What the Sunday Times was prevented from doing was to convey to the public that the British company had been negligent. The injunction could not and should not take an issue away from public discussion. The possibility of negligence on the part of Distillers and the difficulties in proving it could very clearly be expressed.

7. When the Convention organs are faced with the question whether a restriction was necessary or not they do not take the place of the national organs. They rather have to review the decisions of the national organs which

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they delivered in the exercise of their power of appreciation (comp. European Court of Human Rights, Handyside Case, Judgment of 7 December 1976, para 50 and passim). This power of appreciation of the national organs is all the more important where a specific kind of restriction clearly covered by Art. 10 para. 2 is unique to the legal tradition of the common law. We cannot accept the argument that since no comparable restrictions on freedom of the press exist in most Convention countries this restriction is not necessary. Art. 10 para. 2 leaves it to the competent national organs in a democratic system to decide whether a restriction is necessary or not. The restrictions possible under Art. 10 para. 2 must not necessarily be the same in all Convention countries. That is the consequence of the important differences existing among the Convention countries concerning the different areas covered by para. 2 of Art. 10. The Court has accordingly recognised that there is no uniform European conception of morals (Handyside Judgment, loc. cit. para. 48-57). There is likewise none which would show what kind of protection the functioning of the judiciary requires. The systems of litigation being basically different, no common standard should be expected.

8. As to the reasons on which the House of Lords itself relied when granting the injunction, it is evident that they included a discussion of the element of "necessity" as laid down in Art. 10(2) of the Convention. The House of Lords in fact discussed thoroughly and in detail the necessity of giving maximum scope to the freedom of speech which the Lords considered as a public interest competing with the public interest of securing the fair administration of justice. It is only because of the very special character of the draft article in question that the House of Lords felt that the balance pointed in favour of the restriction of the freedom of speech. We consider that the balancing method is appropriate in a case like the present one. If one of two conflicting public interests prevails it is of course necessary that the other must give way.

9. The draft article in question used moderate language and contained a summary of counter arguments. It is not disputed that its contents may have been true. But all this could only add to rather than detract from the detrimental effect which it would have had for the authority of the judiciary. What matters is that the article purported to assess the evidence with which the courts alone would have to deal. It did so in such a way that a coherent picture of Distillers' activities and

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attitudes in relation to thalidomide seemed to emerge, a picture which clearly tended to convey the impression that Distillers had been negligent. It is irrelevant in this respect that the draft article was not of a particularly legal character. Negligence is as such a legal issue and it cannot be denied that the applicants were aware of its importance in the pending litigation. They deliberately commented on this issue, and it was not unreasonable for the authorities in these circumstances to find that the proposed publication would amount to interference with the due course of justice and was liable to prohibition by injunction.

10. As regards the state of proceedings in the thalidomide litigation, we observe that at the material time it was thesame with regard to all pending actions. It is recalled that we are not concerned with claims in respect of which no writs had been issued, nor with imminent actions. In the 266 pending actions, settlement negotiations were taking place throughout the duration of the proceedings on the injunction against the Sunday Times. These negotiations led to an agreement in the great majority of cases only shortly after the House of Lords' decision. At that time it could be expected that some at least of the parents would not accept the settlement, and in this respect there was a real possibility that contradictory proceedings would shortly take place in Court. At the time of the House of Lords' decision this eventuality was of importance not only to the prospective parties of the few remaining actions, and in particular Distillers as the defendants in these actions. At the same time there was also the need to protect the interests of the majority of parents who wanted to come to a quick settlement. The proposed article thus would also have interfered with their procedural position, which likewise required the exclusion of any foreign intruders from the proceedings until a settlement had been approved in court.

11. For the above reasons, we consider that in all the circumstances the restriction of the applicants' freedom of expression could be justified as a measure necessary for "maintaining the authority of the judiciary", and for the "protection of the rights of others" within the meaning of paragraph (2) of Article 10.

12. We further consider that the duration during which the injunction remained in force was not excessive. As has been noted above, the procedural situation in the thalidomide litigation changed shortly after the House of Lords' decision. After the approval

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of the majority settlement, the injunction remained in force only in relation to the few remaining actions. In one of these actions, some pleadings took place in 1974, then nothing more happened. But in view of the complexity of the matter and the apparent legal difficulties which had been described in the Sunday Times article of 24 September 1972, it was not unreasonable to assume that the minority parents, if they had really decided to go ahead with their action, would require a considerable time of preparation. The authorities therefore waited sufficiently long to give them a chance to do this. Only when it became apparent that the actions were not, in fact, diligently pursued did the balance of public interest shift the other way and required that the freedom of expression should now prevail. This has been clearly expressed in the Attorney General's move for the discharge of the injunction.

13. Since the injunction was originally justifiable under Art, 10(2) of the Convention, and was discharged as soon as it could no longer be justified, we conclude that there has been no breach of the applicants' freedom of expression as guaranteed by Art. 10 of the Convention.

Annexes

I	History of proceedings
II	Decision on admissibility
III	The Sunday Times' draft article
IV	Press comments quoted in Mr. Evans' affidavit of 30 January 1973
V	Headnotes of the relevant English court decisions
VI	Friendly settlement (separate document)

Annex I

History of Proceedings

Item	Date	Note
Examination of admissibility		
Introduction of the application	19.1.1974	
Registration of the application	26.2.1974	
Preliminary examination of the application by a Rapporteur under former Rule 45(1) and (3) of the Commission's Rules of Procedure	5.4.1974	
Commission's deliberations; decision to inform the respondent Government and to request them to submit written observations on admissibility before 30 July 1974 (former Rule 46(2)b of Rules of Procedure)	28.5.1974	Sperduti Fawcett Welter Busuttil Kellberg Opsahl Mangan Custers Nørgaard Polak Frowein Jörundsson
Decision of the Acting President, at the Government's request, to extend the time limit for the submission of the written observations on admissibility until 30 August 1974	1.8.1974	
Decision of the Acting President, at the Government's request, to grant a further extension of the time limit for the submission of their observations until 25 September 1974	30.8.1974	
Government's observations on admissibility	23.9.1974	Sent to applicants for written observations in reply by 11 November 1974
Commission's deliberations and decision as to the terms on which it will accept at the proposal of the respondent Government the Sunday Times draft article and its use in any decision or report of the Commission	8.10.1974	Sperduti Fawcett Ermacora Triantafyllides Welter Kellberg Daver Opsahl Mangan Custers Nørgaard Polak Frowein Jörundsson

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Decision of the Acting President, at the applicants' request, to grant an extension of the time limit for the submission of their observations in reply until 11 December 1974	4.11.1974	
Submission by the Government of the draft article	11.11.1974	
Applicants' observations in reply to the Government's observations on admissibility	3.12.1974	
Examination by the Rapporteur pursuant to Rule 40(1) and (3) of the Rules of Procedure	18.12.1974	
Commission's decision on admissibility	21.3.1975	Sperduti Fawcett Triantafyllides Welter Busuttil Kellberg Daver Opsahl Mangan Custers Nørgaard Polak Frowein Jörundsson

Examination of the Merits

Decision of the Acting President that the applicants should submit their written observations on the merits by 13 May 1975	1.4.1975	
Decision of the Acting President, at the applicants' request, to extend the above time limit until 13 June 1975	5.5.1975	
The applicants submit their Memorandum on the merits	10.6.1975	
Decision of the Acting President fixing 31 July 1975 as the time limit for the submission of the Government's Counter-Memorial	16.6.1975	
Decision of the Acting President, at the Government's request, to grant an extension of the above time limit until 4 September 1975	25.7.1975	

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The Government submit their Counter-Memorial on the merits of the application	2.9.1975	
Decision of the Commission to hold an oral hearing on the merits	6.10.1975	Sperduti Fawcett Nørgaard Ermacora Triantafyllides Busuttil Kellberg Daver Opsahl Mangan Custers Polak Frowein Jörundsson Tenekides Trechsel Klecker
Decision of the Commission fixing 11 December 1975 as the date for the oral hearing	10.10.1975	Sperduti Fawcett Nørgaard Ermacora Triantafyllides Daver Opsahl Mangan Custers Polak Frowein Jörundsson Tenekides Klecker
Oral hearing on the merits	11.12.1975	Sperduti Fawcett Triantafyllides Kellberg Daver Mangan Custers Polak Frowein Jörundsson Dupuy Tenekides Trechsel Klecker

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Commission's deliberations: provisional opinion on the merits and decision to initiate friendly settlement proceedings (Rules 46 and 47 of the Rules of Procedure)	12.12.1975 and 18.12.1975	Sperduti Fawcett Ermacora Triantafyllides Busuttil Kellberg Daver Mangan Custers Polak Frowein Jörundsson Dupuy Tenekides Trechsel Klecker
Applicants' letter on friendly settlement	22.12.1975	
Government's letter on friendly settlement	1.3.1976	
Commission's deliberations and decision to adjourn further examination of the case until its session in July 1976	10.3.1976	Sperduti Fawcett Nørgaard Ermacora Triantafyllides Busuttil Kellberg Daver Opsahl Mangan Custers Polak Frowein Jörundsson Dupuy Tenekides Trechsel
Letter from the Agent of the respondent Government concerning friendly settlement	2.7.1976	

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Commission's deliberations and decision to communicate the information received from the Government to the applicants for their comments	14. .1976	Sperduti Fawcett Busuttil Kellberg Daver Mangan Custers Polak Frowein Dupuy Tenekides Trechsel Klecker
Applicants' comments on friendly settlement	14.9.1976	
Commission's deliberations and decision to proceed to the preparation of the Report under Art. 31 of the Convention	6.10.1976	Sperduti Fawcett Nørgaard Busuttil Kellberg Daver Opsahl Mangan Custers Polak Frowein Jörundsson Dupuy Tenekides Trechsel Klecker
Commission's deliberations on its draft Report under Art. 31 of the Convention	8-9.3.1977	Sperduti Fawcett(not on 9.3) Busuttil Kellberg Daver Mangan Custers Polak Frowein Jörundsson Tenekides Trechsel Klecker
Commission's deliberations and adoption of the Report	18.5.1977	Sperduti Fawcett Ermacora Kellberg Daver Mangan Custers Polak Frowein Dupuy Tenekides Trechsel Klecker

Annex II

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY

of Application No. 6538/74
by 1. TIMES NEWSPAPERS LTD.
2. THE SUNDAY TIMES
3 MR. HAROLD EVANS
against the United Kingdom

The European Commission of Human Rights sitting in private on 21 March 1975, the following members being present:

MM. G. SPERDUTI, Vice-President, Acting President (Rules 7 and 9 of the Rules of Procedure)
J.E.S. FAWCETT
M.A. TRIANTAFYLLIDES
F. WELTER
E. BUSUTTIL
L. KELLBERG
B. DAVER
T. OPSAHL
K. MANGAN
J. CUSTERS
C.A. NØRGAARD
C.H.F. POLAK
J.A. FROWEIN
G. JORUNDSSON

Mr. A.B. McNULTY, Secretary to the Commission

Having regard to Art. 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 19 January 1974 by 1. Times Newspapers Ltd., 2. The Sunday Times, and 3. Mr. Harold Evans, against the United Kingdom and registered on 26 February 1974 under file No. 6538/74;

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Having regard to the first report submitted by the Rapporteur in accordance with Rule 45 of the Rules of Procedure of the Commission (old version) on 5 April 1974;

Having regard to the Commission's decision of 28 May 1974 that notice of the application be given to the Government of the United Kingdom who should be invited to submit their written observations on admissibility (Rule 46, para. 2 b of the Rules of Procedure, old version), and that these observations should also deal with the question which of the applicants, if any, should be regarded as the proper party in these proceedings, having regard to the terms of Art. 25 of the Convention;

Having regard to the respondent Government's written observations on admissibility dated 23 September 1974, and the annexes thereto;

Having regard to the applicants' written observations in reply, dated 3 December 1974;

Having regard to the Rapporteur's second report, delivered in accordance with Rule 40 of the Commission's Rules of Procedure (new version) on 18 December 1974;

Having deliberated;

Decides as follows:

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THE FACTS

The application was introduced on 19 January 1974 by Mr. Harold Evans, a United Kingdom citizen, born in 1928 and resident in London. He is the Editor of The Sunday Times, being a weekly newspaper which is published and owned by Times Newspapers Ltd. He made the application both in his personal capacity and as Editor of The Sunday Times (hereafter called the third applicant), on behalf of The Sunday Times as a group of journalists (hereafter called the second applicant), and on behalf of Times Newspapers Limited (hereafter called the first applicant).

The application was registered on 26 Feburary 1974 in the name of all three applicants who are represented in these proceedings by Mr. Antony Whitaker, Legal Manager of Times Newspapers Limited.

The facts of the case, as they have been presented by the parties, may be summarised as follows:

The applicants' claim is that an injunction, issued by the High Court and upheld by the House of Lords, to restrain them from publishing an article in The Sunday Times dealing with thalidomide children and the settlement of their compensation claims in the United Kingdom constituted a breach of Art. 10 of the Convention.

The background and the facts of the application as they were presented to the Commission in the form of a 156 page loose leaf printed report by The Sunday Times headed "The Thalidomide Children and the Law", and as they have been set out in the report of the proceeding in the House of Lords, may be stated as follows:

> "(a) Between 1958 and 1961 Distillers Co. (Biochemicals) Ltd. ("Distillers") manufactured and marketed in the United Kingdom drugs which contained an ingredient known as thalidomide which had initially been produced by a German manufacturing company. The drugs were prescribed as sedatives for, among others, expectant mothers. In the year 1961 a number of mothers to whom the drugs had been administered gave birth to children suffering from severe physical deformities. In the same year Distillers withdrew all drugs containing thalidomide from the market.
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> (b) Following that withdrawal, claims were made against Distillers in respect of the malformed children on the basis that the cause of the deformities was the effect on the foetus of thalidomide administered to the mother during pregnancy. Actions were also brought in respect

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of persons alleged to have suffered peripheral neuritis as a result of the use of the drugs. Between the years 1962 and 1966 the parents of 70 of the deformed children issued writs against Distillers on behalf of the children and on their own behalf alleging, inter alia, negligence in the production, manufacture and marketing of the drugs containing thalidomide. Distillers by their defences in each of the actions denied, inter alia, that they had been negligent and put in issue the legal basis of the claims. Extensive particulars of the claims were sought and given.

(c) Following negotiations between the parties' legal advisers, on February 19, 1968, Hinchcliffe J. approved terms of settlement in 62 cases involving living malformed children on the basis that Distillers paid 40 per cent of the amount of damages to which each plaintiff would have been entitled if wholly successful in the proceedings. On July 30, 1969, by agreement between the parties, Hinchcliffe J. assessed damages in two representative actions on the assumption of full liability on the part of Distillers (S. v. Distillers Co. (Biochemicals) Ltd. /1970/ 1 W.L.R. 114). Subsequently, damages in a further 56 out of the total of 62 cases were agreed and approved by the court. Of the remaining four cases, it was agreed in the case of one child that the deformities were not caused by thalidomide; one child died before the amount of damages could be approved by the court; and in two actions the amount of damages is still being negotiated.

(d) Of the other eight actions brought prior to 1968, three were included in the settlement of 1968 but, since the children concerned had died before the date of settlement, the approval of the court was not required and the cases were not listed with the 62 actions brought before the court. The writs in the remaining five actions were not issued within the limitation period of three years, and accordingly those cases were not included in the 1968 settlement.

(e) Following the settlement of the actions in 1968 and the statement made in court on behalf of Distillers on that occasion, further claims were made against Distillers by the parents and guardians of other deformed children. In 261 cases leave to issue writs out of time was granted ex parte by the court on various dates pursuant to the Limitation Act 1963. These actions and the additional five actions referred to in paragraph (d) remained pending before the Court. In addition to the 266 pending actions, claims on behalf of a further 123 children and their parents were advanced against Distillers but by agreement between the parties no writs were issued.

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(f) In the latter part of 1971, Distillers, with a view to settlement of the 389 outstanding claims, put forward a scheme to establish a charitable trust fund to be administered for the benefit of the deformed children but subject to the condition that it was accepted by all the plaintiffs. The parents of all but five of the children concerned accepted the scheme and the terms of settlement offered by Distillers. The refusal of the parents of five children to agree to the scheme resulted in an application being made to the court to remove them from the office of next friend and to appoint the Official Solicitor in their respective places. On March 22, 1972, Hinchcliffe J. granted the application and substituted the Official Solicitor as next friend in each case. On April 12, 1972, the Court of Appeal (Lord Denning M.R., Edmund Davies and Lawton L. JJ.) reversed the decision of Hinchcliffe J. and reinstated each of the parents as next friend (In re Taylor's Application /1972/ 2Q.B. 369).

(g) Following the decision of the Court of Appeal in In re Taylor's Application, the five parents remained unwilling to accept the proposed scheme for establishing a charitable trust and this accordingly did not proceed. Further without prejudice negotiations ensued, however, with a view to reaching a settlement of the 389 claims and on June 29, 1972, Distillers put forward fresh proposals for settlement of the claims."

The facts relating to children born between 1959 and 1962 and alleged to have been deformed as a result of their mothers having taken thalidomide as a tranquilliser or sleeping pill in pregnancy, had been reported regularly in The Sunday Times since 1967. In 1971/2 the paper decided to campaign for these children more directly and forcefully, in a series of investigative and leading articles. A number of such articles appeared and apparently brought about response at different stages from the public, Parliament, press and television, the City of London and also Distillers. The latter, who had always denied negligence, had made it clear that they would regard any comment or inquiry on the cases as contempt of court, but in 1973 nevertheless put forward a new settlement offer which was considerably above the original offers.

One of the proposed settlements was analysed by The Sunday Times of 24 September 1972 in an article headed: "Our Thalidomide Children: A Cause for National Shame" and at the end of this article the newspaper announced that it intended next to publish a long article tracing the history of the tragedy and the manufacture and testing of thalidomide in 1958-61. It was this future article whose publication was subsequently enjoined by order of the High Court.

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The proceedings in the High Court were preceded by an exchange of letters in September/October 1972 between the Solicitor-General and the Attorney-General on the one side and Mr. Harold Evans on the other side relating to the publication in question. Following the publication of the article on compensation on 24 September, Distillers had made a formal complaint to the Attorney-General claiming that the article constituted contempt of court in view of the litigation still outstanding. However, by letter of 9 October 1972 the Attorney-General informed the Legal Adviser to Times Newspapers Ltd., that he did not propose to take action over the matter already published and suggested that a copy of the proposed article should be sent to Distillers.

On 11 October 1972 The Sunday Times was informed by the Attorney-General's Office that representations had been made on behalf of Distillers and that the Attorney-General had decided to apply to the High Court for an injunction to restrain publication of this article. On 12 October the Attorney-General issued a writ against Times Newspapers Ltd.

The hearing before the High Court of Justice, Queens Bench Division, took place from 7 to 9 November 1972. On 17 November 1972 the Court decided that publication should not be allowed and that the injunction should be granted. The Divisional Court, presided over by Lord Widgery, found that the proposed article constituted contempt of court in that its avowed purpose was to persuade Distillers to pay more, or to settle for a higher figure than they would otherwise have been minded to settle for. The means by which this result was intended to be achieved was not by supplying the children's advisers with additional and valuable information, but by supplying that information to the public so that public opinion might be brought to bear on Distillers' attitude to this case. In a matter of "contempt of court" the court's concern was with ensuring that justice should be administered impartially in the court. Unilateral comment prior to the conclusion of the court hearing might prevent the due and impartial administration of justice in three principal ways: (1) it might affect and prejudice the mind of the tribunal itself even where, as in civil cases nowadays, juries were employed less and less; (2) it might affect witnesses who were to be called, and (3) it might prejudice the free choice and conduct of a party himself, causing that party to abandon his claim or to settle his claim for a lower figure than he would otherwise have been prepared to accept. As regards the argument that there were two competing public interests, namely the protection of the administration of justice on the one hand, and the right of the public to be informed on the other, the Divisional Court held, that it was not for a court to balance such competing public interests which was an administrative rather than a judicial function. Furthermore, the issue in the present

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case was not whether the full story of thalidomide should be told or withheld for all times, but whether it should be told now rather than after the determination of the pending cases. There was no public interest in immediate disclosure which could possibly outweigh the public interest in preventing the application of pressure to the parties to pending litigation. The Court concluded that publication of the article complained of would create a serious risk of interference with Distillers' freedom of action in the litigation and it would therefore be a clear contempt.

Times Newspapers Ltd. appealed against this judgment to the Court of Appeal which heard the case on 30 January and 1 and 2 February 1973. On 18 February 1973 the Court of Appeal composed of Lord Denning, Master of the Rolls, Lord Justice Phillimore and Lord Justice Scarman unanimously reversed the order of the Divisional Court for principally two reasons:

Firstly, the prohibition of unilateral comment applied only when litigation was perding and was actively in suit before the courts, and there had to appear to be a real and substantial danger of prejudice. However, in the present case, writs had been issued in 266 cases in 1968. In one case a statement of claim had been filed and a defence delivered in 1969, and in many cases, by agreement, no pleadings had been served. Nothing more had been done in these actions. The article which the Sunday Times proposed to publish drew attention to the moral responsibility of Distillers for all the 451 children, not merely the 266 who had issued writs. It did not prejudice pending litigation because that litigation was dormant and had been so for years. Although the article might have been intended to bring pressure to bear on Distillers to increase their offer, that pressure was legitimate in view of the fact that these claims ought to have been settled a long time ago and on generous terms.

Secondly, the House of Commons had debated the whole subject on 29 November 1972 and these debates had been published. There had been two articles in the Daily Mail which in effect reproduced the article prepared for The Sunday Times and banned by the order of the Divisional Court. Although it was a different matter for Parliament to discuss a subject than for newspapers, the subjudice rules applied in the Houses of Parliament and in the courts should be broadly in line. To attempt to maintain the injunction in the face of what had been said in Parliament would mean that the courts were seeking to impose a standard at variance with that imposed by Parliament. In the light of the newspaper comment which had followed the debate it would be unfair discrimination to prohibit the defendants by injunction from publishing the article.

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It appears that, although the Court of Appeal had refused the Attorney-General leave to appeal against their judgment to the House of Lords, the Attorney-General appealed successfully against this refusal and the hearing of his main arguments before Lords Reid, Morris of Borth-y-Gest, Diplock, Simon of Glaisdale, and Cross of Chelsea began in May 1973. On 18 July 1973 the Law Lords issued their judgment unanimously allowing the Attorney-General's appeal from the appeal court ruling on the following grounds:

Generally, the law of contempt of court was founded entirely on public policy. It was not there to protect the private rights of parties to a litigation or prosecution. It was there to prevent interference with the administration of justice and should be limited to what was reasonably necessary for that purpose. Public policy generally required a balancing of interests which might conflict. Freedom of speech should not be limited to any greater extent than was necessary but it could not be allowed where there would be a real prejudice to the administration of justice. 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; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute had been submitted to a court of law, they 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.

On the other hand, the public interest in freedom of discussion stemmed from the requirement that members of a democratic society should be sufficiently informed that they might influence intelligently the decisions which might affect themselves. The public had a permanent interest in the general administration of justice and the general course of the law. But, as regards particular litigation, society, through its political and legal institutions, had established the relevant law as a continuing code, and had further established courts of law to make the relevant decisions on the basis of such law. The paramount interest pendente lite was that legal proceedings should progress without interference. Once the proceedings were concluded, the balance of public interest shifted. The paramount interest of the public then was that it should be fully apprised of what has happened and hear unhampered debate on whether the law, procedure and institutions which it had ordained had operated satisfactorily. There was one particular situation where the law might strike the balance between the competing interest either way but in fact struck it in favour of freedom of discussion. This was true where a matter was already under public debate when litigation supervened which the continuance of the debate might interfere with. However, this applied only where the discussion might, as an incidental but not intended by-product, cause some likelihood of prejudice to a person who happens to be a litigent.

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In the present case, the projected article was avowedly written with the purpose and object of arousing public sympathy with, and support for, the claims that were being made and in order to bring pressure upon Distillers to pay more. In the pending litigation one of the issues was whether Distillers had been negligent. The projected article had gone too far because, with much elaboration of facts and suggestions, while not asserting a settled conclusion, it, in effect, conveyed the message to all who would read the article that an examination of the issue as to negligence showed that there was a considerable case that could be presented against Distillers. It was not possible to say, that there was no contempt of court because the litigation in which it was seeking to interfere was "dormant". Even though no procedural step in the actions was being currently taken, the parties were in negotiation towards a settlement; and interference with such negotiation, by holding one of the parties up to obloquy in order to cause him to abandon some position which the law vouchsafed him, would amount to interference with the due course of justice, since the due course of justice included negotiation towards a settlement on the basis of the ordained law. It would be setting a bad example to discourage the settlement of civil actions by suspending the right of the parties to any remedy for contempt of court, so long as negotiations for a settlement were pending. In these circumstances the Divisional Court had been right in granting the injunction and nothing that had happened since had altered that position. In particular, the discussions in Parliament had not done so as these concentrated almost entirely on the moral obligation of Distillers. There was therefore no need to consider whether, if members of Parliament had taken it on themselves to discuss the legal issues in the case, that fact ought to have affected the attitude of the Courts to similar discussion in the Press.

On 25 July 1973 the Law Lords made an order that the cause be remitted to the Divisional Court with a direction to grant an injunction in the following terms: "That the defendants, Times Newspapers Ltd. 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) Ltd. in respect of the development, distribution or use of the drug 'thalidomide', with liberty to apply to that court."

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Complaints

The applicants complained that the decision of the House of Lords and the principles upon which it is founded amounted to a violation of the right to freedom of expression within the meaning of Art. 10 of the Convention.

They considered that in the twelve years since the thalidomide tragedy occurred there had been no public discussion of its causes and that, on present information, this prohibition would continue for several more years. This was a classic case where the English interpretation of the laws of contempt - in contrast to that of a number of other countries - was contrary to the public interest and a breach of Art. 10 of the Convention.

They asked the Commission to direct, alternatively to request, the United Kingdom Government to introduce legislation over-ruling the decision of the House of Lords and bringing the law of contempt into line with the Convention.

Proceedings before the Commission

The Commission examined the application on 28 May 1974. It decided to give notice thereof to the United Kingdom Government and to invite the parties, in accordance with Rule 46, 2 b) of the Rules of Procedure (now Rule 42, 2 b)), to submit written observations on its admissibility. The Commission further indicated that these observations should also deal with the question which of the applicants, if any, should be regarded as the proper party in these proceedings, having regard to the terms of Art. 25 of the Convention

The United Kingdom Government submitted their written observations on 23 September 1974 and the applicants' counsel replied on 3 December 1974.

In a letter preceding the submission of their written observations on admissibility, the Government informed the Secretary of the Commission that they wished to make available to the Commission, as an annex to their observations, the draft article which had been the subject of the domestic proceedings.

The Government stated that it would make this draft article available to the Commission on certain conditions relating to its use in any decision or report of the Commission. The Commission subsequently decided on 8 October 1974 that, as a matter of principle, it could not accept any conditions regarding the use in its decisions or reports of documentary material submitted other than those relating to the confidentiality of any proceedings before it.

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In view of the Commission's decision, the Government then made the draft article available to the Commission while expressing the hope that regard would be had to the desirability of restricting references to the details of the draft article in any decision or report of the Commission (letter of 11 November 1974).

In their reply of 3 December 1974 to the written observations of the Government, the applicants drew the attention of the Commission to the report of a government-appointed committee charged with a comprehensive review of the law of contempt which was shortly to be published but not yet available at the date of their reply. They reserved the right to rely on the recommendations for the reform of the law of contempt made by that committee. The Report of the Committee on Contempt of Court (Cmnd. 5794, hereafter cited as the report of the Phillimore Committee) was submitted to the Commission by the applicants on 13 December 1974.

Submissions of the parties

A. The respondent Government

In their observations on admissibility the Government cited the decision of the Commission concerning application No. 290/57 (Yearbook 1960, p. 214), where the Commission had held that in a case submitted under Art. 25 the Commission could examine the compatibility of domestic legislation with the Convention only with respect to its application to a person, non-governmental organisation or group of individuals and only insofar as its application was alleged to constitute a violation of the Convention in regard to the applicant person, organisation or group in question, while it was not competent to examine in abstracto the question of the conformity of domestic legislation with the provisions of the Convention. The Government thought the principles set out in this decision were relevant both to the question of the proper party in the present application and to the scope of the application.

As to the proper party the Government explained that the injunction granted by the House of Lords applied to "Times Newspapers Ltd. by themselves, their servants, agents or otherwise". They concluded that, save to the extent that the application was made by or on behalf of the first applicant, it was incompatible with the Convention ratione personae and therefore inadmissible under Art. 27 (2). The second applicant had no natural or legal personality or corporate entity and was therefore not entitled to make an application under Art. 25 (1). The third applicant had not proposed to publish the draft article on his own behalf or otherwise than in the Sunday Times. He was therefore only concerned as the servant or agent of the first applicant and had no interest or capacity separate from that of the first applicant so as to enable him to claim to be a victim of a violation of the Convention in respect of the decision of the House of Lords.

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As to the scope of the application the Government explained that they considered it inadmissible under Art. 27 (2) insofar as it related to any matter other than the specific decision of the House of Lords to grant an injunction. In particular, the Government submitted that the application was inadmissible insofar as it related to the principles upon which the decision of the House of Lords was founded. The domestic law applicable in the present case was not statute or other legislation, but common law. However, no distinction should be drawn between statutes or legislation on the one hand and the rules of the common law on the other hand in view of the above-cited jurisprudence of the Commission. Both were normative and both were to be distinguished from the application of the law in particular instances. The principle that an abstract problem relating to the compatibility of the domestic law with the provisions of the Convention could not be decided by the Commission or the Court (reference to the de Becker Case, Yearbook 1962, p. 320) therefore also applied to the common law.

The Government submitted further that the law of contempt of court in force in England and Wales, as it had been applied in the present case was in line with the provisions of the Convention. Art. 10 of the Convention was to be read as a whole, and its para. 2 expressly accepted conditions and restrictions to the right of freedom of expression when they were necessary "for maintaining the authority and impartiality of the judiciary". Such conditions and restrictions were also necessary to ensure the right to a fair trial for which provision was made in Art. 6 of the Convention. The law of contempt of court had the same object.

In the present case, the Lords of Appeal had given full recognition to the capacity of the law of contempt to restrict freedom of speech and to the necessity of balancing the public interest in preserving freedom of speech with the public interest in preserving the authority and impartiality of the judicial function and judicial process. Extensive extracts from the speeches in the House of Lords were quoted by the Government in order to support this view. The Government submitted that it was apparent that, in their examination of the content and object of the law of contempt, the Lords had expressly considered and applied the principles defined in Art. 10 of the Convention. They had stayed within the margin of appreciation allowed to States (Application No. 1167/61, Yearbook 1963, p. 204) when they had come to the conclusion that in the present case there was contempt of court because the article in question contained matter which prejudged the issue of pending litigation or was likely to cause public prejudgment of that issue. The Government maintained that there were sound reasons for this conclusion. From amongst the considerations that had prompted the House of Lords they cited the following as being the most essential:

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a) Even though no procedural step was currently being taken the litigation in which the article intended to interfere could not be considered as "dormant". The parties were in negotiations towards a settlement on the basis of ordained law. The due course of justice included such negotiation, and interference with it therefore amounted to interference with the due course of justice.

b) The material to which the injunction applied consisted in the main of detailed evidence and argument intended to show that Distillers had not exercised due care to see that thalidomide was safe before they had put it on the market. That the article was in a different category than earlier publications on thalidomide because it included evidence relating to the issue of liability had also been admitted by the third applicant. Now, this very issue was one of the main subjects of the pending litigation. The article constituted contempt of court because it discussed prejudicially the facts and merits of Distillers' defence to the charge of negligence brought against them in the actions before these have been determined by the court or the actions disposed of by settlement.

The Government therefore submitted that the application of the law in the United Kingdom in the present case accorded with Art. 10 of the Convention and accordingly the application was manifestly ill-founded and should be declared inadmissible under Art. 27 (2) of the Convention.

B. The applicants' observations in reply

In their observations in reply of 3 December 1974 the applicants first took up the Government's argument concerning the proper party of the application. They submitted that it was wrong to confine the locus standi before the Commission to the first applicant because only "Times Newspapers Ltd. by themselves, their servants, agents or otherwise" had been mentiond in the injunction. They cited the Acrow (Automation) Ltd. v. Rex Chainbelt case (1971) as authority that not only those expressly named by an injunction were under an obligation to comply with it and were in contempt if they did not do so, but also anyone who, knowing of its existence, did anything to frustrate it. Referring to the publicity the injunction concerning the thalidomide article had received both in England and abroad they doubted that any newspaper, magazine or book publisher or any distributor of foreign publications in England was not as fully bound by the injunction as Times Newspapers Ltd. itself. Moreover, the injunction was not confined to the draft article but covered any publication of the same kind, and not only in the Sunday Times or in the course of any particular individual's employment by Times Newspapers Ltd. There were

plans for the publication of a book on thalidomide and those at the Sunday Times who were involved in the thalidomide investigation had a desire to continue their research, whether in public or private, and whether as professional journalists or as private individuals. Any apparent absence of concrete proposals to publish should be treated by the Commission exclusively as evidence of a willingness on the part of the applicants to obey the law for the time being, though they considered it as unsatisfactory and unacceptably restrictive. The same was true with regard to the refusal by the third applicant to make comments or give details which were forbidden by the injunction, although he had been invited and pressed to do so in England and in the United States and had been heavily criticised for acquiescing in what the critics regarded as censorship, without he or the Sunday Times being able to make any effective reply. But an applicant could not be expected to show himself prepared to break the law in order to qualify to make an application to the Commission. It would be wholly against the spirit of the Convention to introduce such an element into its jurisprudence. The applicants therefore submitted that Mr. Harold Evans in his personal capacity and the staff of the Sunday Times as a group of journalists had also a locus standi before the Commission.

The applicants did not accept the distinction which had been drawn by the Government in their observations between the specific decision of the House of Lords on the one hand and the principles upon which it was founded on the other hand, the compatibility of the latter with the Convention allegedly being an abstract question falling outside the competence of the Commission. The applicants considered this distinction as being unreal, capricious and as leading to absurd results. The principle that the Commission could not give a decision "in abstracto" meant that it could not decide a hypothetical question unrelated to the issue before it. It was open to the Government to argue that an application in abstracto was being made if the applicants sought a ruling from the Commission that Article 10 had been violated in some respect not dealt with by the decision of the House of Lords, e.g. that the English law of contempt curtailed their freedom to publish elsewhere than in England or the question whether the injunction operated in rem or in personam. But in the present case there was no application in abstracto to the Commission. The issue between the applicants and the United Kingdom concerned the compatibility of those principles of the law of contempt involved in and necessary to the decision of the House of Lords with the Convention, to the extent that such principles and their operation inhibited the applicants from voicing both orally and in writing the results of their research into, and their opinions about, the drug thalidomide and the behaviour of those who had manufactured it. The applicants submitted that the principles involved and their application were inseparable, the principles being incapable of formulation except in relation to the particular facts. In their opinion, the Commission should therefore give full consideration to all the principles discussed in the House of Lords and the lower Courts if it was to make an adequate appreciation and proper assessment of the applicants' case.

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The applicants further stated that they could not accept the Government's view that the application was manifestly ill-founded. They thought that the restrictions of English law of contempt on freedom of expression as laid down by the decision of the House of Lords went far beyond what was necessary in a democratic society and fell well outside the national authorities' margin of appreciation under Art. 10 of the Convention.

Firstly, the decision of the House of Lords was not as plainly and unambiguously correct as the Government wanted to make it appear. It could not be overlooked that it was directly opposed to the unanimous decision of the Court of Appeal to permit the publication of the draft article. One of the judges of the Court of Appeal, Lord Phillimore, had been invited by the Government to lead a Committee of Inquiry into the law of contempt, whose report and recommendations were shortly to be published.

Secondly, the Lords had failed to give proper weight in their speeches to such factors as the independence of the judiciary, the lack of any public discussion of the causes of the thalidomide tragedy, the lack of any official inquiry into the matter and especially to the time factor. The decision of the House of Lords was made over ten years after proceedings by parents in the thalidomide actions had first been commenced and nearly twenty years after the drug had first been developed. The unfairness of the decision also consisted in that it effectively enabled a single litigant to silence comment on the issues involved in his case for as long as he cared to pursue it. Presently, there was only one action still in existence, but others, e.g. between Distillers and their insuring underwriters, could come up and the matter could easily drag on indefinitely.

Thirdly, a comparison with the laws of other democratic countries showed that it was possible for justice to be properly administered where much more freedom of expression was tolerated.

Fourthly, a reform of the law of contempt was being considered in the United Kingdom and important recommendations regarding the principles that had been applied in the present case were contained in the report of the Phillimore Committee.

The applicants therefore submitted that their application should be held admissible by the Commission.

THE LAW

1. The Commission has first considered the question which of the applicants, if any, can be regarded as the proper party or parties in the present case.

The respondent Government have submitted that, insofar as the injunction granted by the House of Lords applied to "Times Newspapers Ltd. by themselves, their servants, agents or otherwise", it was only the first applicant who was the proper party in this case having regard to Art. 25 (1) of the Convention. The second applicant had no natural or legal personality or corporate entity and was therefore not entitled to make an application under Art. 25. The second and third applicants had not proposed to publish the draft article on their own behalf or otherwise than in The Sunday Times and had therefore no interest or capacity separate from that of the first applicant in respect of the injunction concerned. Therefore, the application was incompatible ratione personae insofar as it was submitted by the second and third applicants.

The applicants have submitted that they were all proper parties in the present proceedings. The injunction was not confined to the draft article but covered any publication of the same kind, and not only in The Sunday Times or in the course of any particular individual's employment by Times Newspapers Ltd. Indeed, there were plans for the publication of a book on thalidomide and those journalists at The Sunday Times who were involved in the thalidomide investigation wished to continue their research and to publish the results, whether as professional journalists or as private individuals. Furthermore, the third applicant had been personally criticised in public for acquiescing in what the critics regarded as censorship without having been able to defend himself effectively. Therefore, both he personally and as Editor of The Sunday Times and The Sunday Times as a group of journalists were entitled under Art. 25 of the Convention to bring the present case before the Commission.

The relevant passage in Art. 25 (1) provides as follows:

"The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention ...".

In order to come within the terms of this provision, two conditions must be satisfied: the claimant must fall within any of the categories of petitioners mentioned in Art. 25 and he must prima facie be able to claim to be a victim of a breach of the Convention.

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As regards the first applicant it is clear that both conditions are satisfied, and this is not in dispute between the parties. Times Newspapers Ltd. is a legal person under English law, a company with corporate capacity and limited liability, created by registration under the relevant statute. As such it falls clearly within one of the categories of petitioners set out in Art. 25 of the Convention as a "non-governmental organisation". Furthermore, it was the party in the domestic proceedings concerned in the present case and the injunction granted by the House of Lords expressly applies to it. It follows that the first applicant may clearly claim to be a victim of a breach of Art. 10 of the Convention notwithstanding the fact that it possesses legal and not natural personality (cf. also Decisions on the admissibility of Applications No. 2690/65, T.V. Televizier v. the Netherlands, Yearbook 9, p. 512 and No. 5178/71, De Geillustreerde Pers N.V. v. the Netherlands, Collection of Decisions 44, p. 13).

As regards the second applicant it is clear that The Sunday Times as a printing product, owned and published by the first applicant, does not as such fall within any of the categories of petitioners set forth in Art. 25 of the Convention, nor can it claim as such to be a victim of a breach of Art. 10.

However, in the present case, the application has been introduced by "The Sunday Times as a group of journalists". The name "Sunday Times" thus simply describes a group of individuals who are claiming themselves, as journalists, to be victims of a breach of Art. 10. In these circumstances the Commission finds that the second applicant also falls within the categories of petitioners mentioned in Art. 25 of the Convention provided that the individual members of the group have been identified (1). The Commission is further satisfied that the members of this group of journalists have put forward a reasonable claim to be victims of a violation of Art. 10 of the Convention by alleging that the injunction in question prevents them from continuing, in whatever capacity, their investigative journalism concerning the drug thalidomide, including their plans to publish a book on the matter.

Finally, the third applicant brought the application in his personal capacity and as editor of The Sunday Times. It is clear that Mr. Harold Evans as a natural person falls within the categories of petitioners included in Art. 25 of the Convention. The Commission also finds that he has put forward a reasonable

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(1) On 12 April 1975 counsel for the applicants informed the Commission that the journalists concerned are MM. Harold Evans, Phillip Knightley, Bruce Page and Ms Elaine Potter.

claim to be a victim of a violation of Art. 10 of the Convention by alleging that he is prevented, as editor of the Sunday Times and in his personal capacity, to make comments or give details which the injunction forbids, and from replying to criticism aimed at him for feeling bound by that injunction.

It follows that, for the reasons given, all three applicants are to be regarded as proper parties under Art. 25 of the Convention in the present case. In arriving at this conclusion the Commission sees no need to determine the full effect of the injunction at the present stage of the procedure, nor does it seem relevant to the Commission whether or not the claims of the first, second and third applicants to be victims of a violation of Art. 10 of the Convention are independent from each other.

2. The Commission has next considered the admissibility of the application under Art. 10 of the Convention which protects, subject to certain limitations, the right to freedom of expression.

The respondent Government are of the opinion that the application should be declared incompatible with the Convention insofar as it is directed against the principles of the English law on contempt of court which are at the basis of the House of Lords' decision, this being an abstract question. They have further submitted that any interference with the right to freedom of expression in the present case had been fully justified as having been necessary for maintaining the authority and impartiality of the judiciary within the meaning of para. (2) of Art. 10. Indeed, in balancing the public interest in preserving freedom of speech with the public interest in preserving the authority and impartiality of the judicial function and judicial process, the courts had stayed within the margin of appreciation allowed to them under the Convention when they had come to the conclusion that in the present case there was contempt of court because the article in question contained matters which prejudged the issue of pending litigation or was likely to cause public prejudgment of that issue. For these reasons the application, the scope of which was limited to the specific decision of the House of Lords granting the injunction, was manifestly ill-founded within the meaning of Art. 27 (2) of the Convention.

The applicants think that the principles on which the decision of the House of Lords was based must necessarily be included in the examination of the case, and that there is no question of the application being, even partially, of an abstract character. They have further submitted that the interference complained of by them could not be justified under para. 2 of Art. 10. In their view, and for various reasons

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indicated, the restrictions of the English law of contempt on freedom of expression as laid down by the decision of the Hou .e of Lords went far beyond what was necessary in a democratic society and fell well outside the national authorities' margin of appreciation under Art. 10 of the Convention. Their application was therefore not manifestly ill-founded under Art. 27 (2) of the Convention.

The Commission finds that there is no doubt that the applicants' freedom of expression has been restricted by the decision of the House of Lords. This is also admitted by the respondent Government. The only question before the Commission is whether in the circumstances of the present case this restriction of the freedom of expression can be justified under Art. 10 (2) of the Convention. It is in this context that the rules of the common law on contempt of court which are at the basis of the injunction enter the scene. In other words, the question before the Commission is whether the rules of contempt of court as applied in the decision of the House of Lords granting the injunction are a ground justifying the restriction under Art. 10 para. (2). This is not an abstract question in the meaning of the Commission's earlier case-law, including the decision on Application No. 290/57 which was cited by the respondent Government.

Art. 27 (2) in requiring the Commission to declare inadmissible any application from an individual, a non-governmental organisation or group of individuals which it considers to be manifestly ill-founded, does not permit the Commission at the stage of admissibility, to reject a complaint which cannot be so described (see, for example, decisions on the admissibility of Applications No. 5100 to 5102/71, 5354/72, 5370/72, Five Soldiers v. the Netherlands, Yearbook 15, pp. 508 556, with further references).

In the present case the Commission has carried out a preliminary examination of the information and arguments submitted by the parties. The Commission finds that these raise substantial issues under Art. 10 of the Convention whose determination should depend on an examination of their merits. It follows that the application cannot be regarded as manifestly ill-founded within the meaning of Art. 27 (2) of the Convention, and no other ground for declaring it inadmissible has been established.

For these reasons, the Commission

DECLARES ADMISSIBLE and retains the application submitted by all three applicants, without in any way prejudging the merits of the case.

Secretary to the Commission — Acting President of the Commission

(A. B. McNULTY) — (G. SPERDUTI)

Annex III

The Sunday Times' Draft Article

Thalidomide was launched in Britain in April, 1958. On November 27, 1961, three and a half years and about £m. pounds worth of sales later, it was withdrawn. No one knows the full extent of the damage to human lives thalidomide caused during those three and a half years. The best guess of an early Ministry of Health survey was that 200 to 250 babies survived with the typical and horrible thalidomide deformities. On the other hand, the Thalidomide Appeal Fund now estimates there were perhaps 450 such children. Whether any more children have died, or were killed at birth, or are still living undiscovered, will probably never be known.

As for the lesser harm caused by the drug one count claimed at least 461 cases of nerve damage in adults and children associated with the taking of thalidomide. The tragic irony is that this damage - peripheral neuritis in medical language - was in fact so serious that DCBL was actually considering withdrawing thalidomide from the market in Britain when the first reports arrived of its infinitely more horrible effects on unborn children.

Clearly then the tragedy was on the scale of a national disaster. What went wrong? How could this have possibly occurred? Our investigations suggest that the manner in which DCBL went about marketing thalidomide in Britain left a lot to be desired.

The British company:

- Relied heavily on the German tests and had not completed full trials of its own before marketing the drug.

- Failed to uncover in its research into medical and scientific literature the fact that a drug related to thalidomide could cause monster births.

- Before marketing the drug did no animal tests to determine the drug's effects on the foetus.

- Accelerated the marketing of the drug for commercial reasons. Were not deflected by a warning from one of its own staff that thalidomide was far more dangerous than had been supposed.

- Were not deflected by the discovery that thalidomide could damage the nervous system, in itself a hint that it might affect the foetus.

- Continued to advertise the drug as safe for pregnant women up to a month from when it was withdrawn,

Drugs were not really Distillers's line. They are much more at home with spirits. They make vodka, gin, and several brands of whisky, a diet on which they have swollen without a great deal of effort into a £180 million company, the 24th largest in Britain.

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Distillers' sideline in drugs arose during the war. It was a lean time for whisky magnates so Distillers decided to apply their skill in fermentation to the new and highly-profitable "wonder drug", penicillin. At the end of 1947 they bought from the Ministry of Supply at the knock-down price of £1.3 million the biggest penicillin factory in the world: a collection of huts at Speke, seven miles from Liverpool. It was the beginning of Distillers Company (Biochemicals) Limited, DCBL as it was known to its employees.

But almost from the start Distillers seem to have been disappointed with their new investment. Running mournfully through their company statements is a refrain by the chairman about the "uneconomic prices" and "highly-competitive conditions" in the drug industry. In fact drugs never produced more than about five per cent of Distillers's turnover. Nevertheless Speke did give Distillers one or two useful drugs - including the first oral penicillin.

Then at the beginning of 1956 the company started a re-organisation. W.P. Kennedy, a former Ministry of Health principal medical officer, joined the company as chief medical adviser, and a forceful salesman, C.A. Barnes, became Home sales manager. An obvious area for expansion was the antibiotics field and here the drive and resourcefulness of the German firm of Chemie Gruenenthal, one of the products of the post-war economic miracle, attracted Kennedy's attention, and in the first week of June, 1956 he flew to Germany to assess which Gruenenthal products might be worthwhile manufacturing in Britain.

Kennedy came away without any antibiotics but with an exciting report of a new sedative which Gruenenthal had labelled for convenience "k17", later to become notorious as thalidomide. Kennedy reported to DCBL director E.G. Gross: "K17...has been licensed in America but not yet in England. If all the details about this are true then it is a <u>most</u> remarkable drug. In short it is impossible to give a toxic dose; it has no narcotic effect; it has no influence on breathing or circulation; no ganglion blocking properties, nor does it produce muscle relaxation....If these details are exact it is, in fact, unique."

Kennedy's enthusiasm is easy to understand. At this time between one in six and one in ten of all National Health prescriptions were for sedatives and about one million people in Britain every night were taking some sort of pill to help them to sleep. The most common type of pill, the barbiturate group, had one main disadvantage: it was poisonous if taken in large quantities. If what Gruenenthal claimed were true - that it was impossible to take an overdose of K17 - then they (and DCBL if it could get the rights) were on a real winner and the barbiturates market was worth £2 million a year.

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Kennedy's glowing account of K17 arrived at a crucial moment. It coincided with some fundamental thinking at the parent company, Distillers, sparked off by none other than Aldous Huxley. Huxley had been writing a series of articles for The Sunday Times and in the last article which appeared on June 10, 1956, he predicted the benefits the inhabitants of his Brave New World would enjoy from a new drug which he called "Soma". Huxley said that from earliest times man had taken mind-transforming drugs: alcohol, nicotine, opium, and cannabis. Now science offered the possibility of safer and more powerful drugs. "Will the pharmacologist be able to do better than the brewers and distillers?" Huxley asked. "It seems reasonable to suppose it."

This excited the interest of Mr. N. A. Herdman, of Distillers. He wrote enthusiastically to Gross, at DCBL. "The ultimate target would be the production of the ideal tranquillising agent to replace alcohol among those people who would prefer to "transform their minds" by this alternative means", he said, exhibiting a visionary capacity of a kind which seems out of place in the dour world of distilling.

"I would put forward the suggestion that DCL through DCBL should engage forthwith in an extended programme of fundamental pharmacological research. As a halfway target this research should be able to produce for marketing by DCBL a number of products "of a therapeutic nature." So, incredible as it may seem, one of the factors that led to thalidomide being marketed in Britain was the belief that it might eventually become an alternative to whisky.

Gross took the point, and thought of K17. He also saw the need for speeed. He wrote back to Herdman: "I have a feeling that the market is already becoming a little overcrowded and it will not be long before there are as many of these things as there are brands of whisky". He also got off a memorandum to DCBL's technical director, J. J. H. Hastings. "If we decided to launch this product we should have to do it quickly." By July 5 Gross was on a plane for Germany hoping to bring back a bulk sample of K17 for testing. The first steps towards marketing thalidomide in Britain had begun.

The main thing that Gross brought back from Germany was the transcript of the K17 symposium which had been held at Gruenenthal's headquarters in Stolberg the previous year. Although this symposium was largely a public relations exercise to arouse interest among doctors and pharmacists in Germany, it was to become regularly referred to by DCBL.

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Gross read it and then went straight to work on what he clearly saw as the most important task if DCBL was to get hold of this valuable property: the task of convincing the German manufacturers that DCBL, a relative newcomer to the pharmaceutical industry, had the resources and the drive to exploit the British and Commonwealth market to the full. So on August 9 he wrote to Gruenenthal expressing keen interest in K17 and promising to send examples of DCBL's promotional literature "in order to give you and your colleagues an idea of our energetic, although ethical, approach to the medical profession."

Eleven days later he sent off another letter with details of DCBL's sales staff, marketing agreements, turnover, and promotion budgets. There can be no mistaking its tone of eagerness. "We spend about £40,000 per annum on sales promotion", Gross wrote, "divided approximately into home market (£25,000) and export markets (£15,000)". (This was a slight exaggeration of the real figures which were £23,000 and £14,000). Gross went on to say that he would hire more sales representatives to bring DCBL's sales force up to 38, and he enclosed a draft agreement.

This was to last five years during which the two companies would swap future discoveries free of royalties. DCBL would pay a 5 per cent royalty on the sales of K17. Clearly DCBL had decided that it wanted to go ahead with marketing thalidomide in Britain. Yet at this stage it had seen no technical information on the drug except the German symposium and it had carried out no independent tests. (Dr. Kennedy, an asthma sufferer, had tried the drug on himself and reported that Mrs Gross had taken it for nervous tension, but these can hardly be considered independent trials).

Yet not only did DCBL appear ready to go ahead without tests, there is evidence that it was their very belief that thalidomide would not need elaborate tests that made the drug so attractive to the company. DCBL had been considering other continental drugs for sale in Britain under licence and had looked at certain products of the Union Chemie Belge, the Belgian drug manufacturers. Dr. C.N. Brown, Kennedy's deputy in the medical department of DCBL, came down squarely in favour of thalidomide because "the three UCB products will require pharmacological and clinical trials" - the implication being that thalidomide would not.

DCBL had set a target marketing date for thalidomide for January 1958, and realising that it would have to give the new drug some tests wrote to Gruenenthal on March 8 ordering 6,000 tablets for clinical trial and 500 grams of pure substance for "animal experiments, formulation, etc." By May the drug had been issued to five specialists but by mid-September the results were still not available and "may not be available in time for marketing in January." No chemical or pharmacological studies had been undertaken and the literature search, started in April, was still going on. It is worth pausing here to examine the depth and extent of this literature search because it could, at this early stage, have averted the tragedy which followed.

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It is usual for pharmaceutical firms when about to market a new drug to make a search of chemical, biological, medical, and general literature to discover what, if anything, is known about the drug's properties, or properties of drugs similar in composition. DCBL had quite properly instituted such a search. Here we enter a disputed area: what could DCBL have reasonably been expected to have discovered? Briefly, thalidomide, known chemically as alpha phthaloyl glutarimide, is a derivative of glutamic acid, of glutamic imide, and of phthalic acid. What would a search under these headings have revealed?

It seems certain that a completely exhaustive search would have shown that a well-known derivative of glutamic acid was a chemical called aminopterin. Aminopterin is a close relative of thalidomide and it had been known since 1950 that it had teratogenic properties - that it could cause monster births. This had been discovered by Dr. J.B. Thiersch, then of the Department of Pathology at the University of Washington medical school. Dr. Thiersch had injected some pregnant rats with aminopterin. He found that the foetuses were absorbed back into the mother's tissues or were killed in the womb. Thiersch reasoned that aminopterin would make a good drug for inducing abortions and tried it on 12 women who had to have therapeutic abortions because they were suffering from serious illnesses. In ten cases, as Thiersch had expected, the babies died in the uterus and spontaneously aborted.
The remaining two were surgically aborted. Three of the 12 foetuses showed significant malformations.

One had an improperly formed skull, with the brain protruding. The second had an enlarged and collapsed cranium and the third had a cleft palate and a hare lip. In a report in the American Journal of Obstetrics and Gynaecology in 1950 Thiersch warned "The occurrence of malformation is highly significant. This observation suggests the necessity for completion of the abortion once the drug has been given to a patient in order to avoid the development of defective infants or monsters".

Should DCBL have found this report and thus have been alerted to the danger that thalidomide as a related compound might have had the same effect on unborn children as aminopterin? Or in the light of knowledge and methods at this time was it unreasonable to have expected DCBL to have found Thiersch's work? Dr. R.L. Smith of St. Mary's hospital, London a biochemical pharmacologist and a recognised expert on thalidomide, says that there was no reason at the time to expect trouble from thalidomide because nothing like this had happened before. Other drugs, such as the sedative Doriden were on the market and had caused no difficulty. The American Journal of Obstetrics and Gynaecology - which had carried Thiersch's findings on aminopterin - was not the type of journal that a chemist working on a sedative would be likely to consult.

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Dr. Smith says that the factor common to thalidomide and aminopterin, the glutamic molecule, was not the one which caused the damage to the foetus and there was every reason at the time to think thalidomide was very different from aminopterin: aminopterin was a dangerous poison, thalidomide was considered to be completely non-toxic.

Professor J.B.E. Baker, professor of pharmacology at Charing Cross hospital, London, author of a long paper on "The Effects of Drugs on the Foetus", disagrees. He says that a careful researcher would have found Thiersch's paper and points out that in 1956 when working on his own research he found Thiersch's report. If he, not a trained teratologist (an expert in monster births) could find the report then surely it was reasonable to expect chemists working on a drug which was to be marketed as safe for pregnant women to have found it also. "They should have turned up aminopterin and then have become suspicious. Then if they had done tests for teratological effects they would have got results which would have averted the disaster."

But did such tests exist in 1957? Thiersch himself says that they did. He says that he had personally tested drugs for teratogenic properties for at least five major pharmaceutical companies. "The methods available to examine fatal abnormalities of foetuses did not differ in the years after 1959 to the methods used before." Thierch's conclusion is: "A very careful and observant investigator in the 1950s would have considered thalidomide suspect as a teratogen." But he adds, "I don't think it ever occurred to them."

In October 1957, Chemie Gruenenthal, the German discoverers of thalidomide began to market it in Germany. The trade name the Germans had chosen was Contergan. Before the drug was withdrawn it had been marketed by various companies in 11 European, seven African, 17 Asian, and 11 American countries. In addition it was produced under licence under a total of 51 names, (a fact which made it difficult to withdraw quickly, and some mothers took thalidomide after its dangers were known because they did not realise it was thalidomide.) At its peak in Germany alone one million people a day were taking thalidomide. Chemie Gruenenthal had sensed the extent of this bonanza and had driven a hard bargain with DCBL, the British licencees.

Gruenenthal had cornered DCBL into signing a contract not for the five years DCBL had wanted, but for the unusually long term of 16 years. There was to be an advance royalty payment of 234,000 DM (then about £20,000). The price was to be 300 to 350 DM per kilogram (which would give DCBL a gross profit margin of about 570 per cent) and DCBL could start making the drug themselves when their sales reached 150 kilograms a month, which was estimated to be in three years. But of all the clauses in the contract the most startling was that DCBL agreed to begin marketing thalidomide within nine months of the date of signature. Since the contract was signed in July 1957, this meant April 1958. Accordingly, the whole complicated process of getting the drug on to the market had to be done swiftly. DCBL had committed itself to a timetable.

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The first matter to be attended to was payment of advance royalties, a negotiation which needed Foreign Exchange approval. The Bank of England baulked at this, but agreed to consider the opinion of the Ministry of Health. This turned out to be unhelpful. The Ministry felt that it could not recommend that the Bank agree to DCBL's application on the basis of clinical information available. In other words the Ministry felt that DCBL had not told it enough about thalidomide to justify the Ministry giving its support. Kennedy tried harder. He listed for the Ministry three doctors who were testing the drug: Dr. Dudley Hart, Sub Dean of Westminster Hospital, Dr. W.M. Fort Robertson, of Long Grove Hospital, Epsom, and Dr. James Murdoch of the department of Therapeutics, University of Edinburgh. He suggested that the Ministry write to these doctors for their views.

Two replied. Dr. Dudley Hart offered luke-warm approval. Dr. Ford Robertson stressed his "still somewhat limited experience" with the drug said it showed promise, and added that it would be a pity to miss the opportunity of making "much more extensive trials". Dr. Murdoch, for reasons we shall soon see, did not feel able to support DCBL's application.

Gross, DCBL director, had in the meantime turned for help to Chemie Gruenenthal and they came up with an idea. The American pharmaceutical company, Smith Kline and French had expressed interest in marketing thalidomide in the United States and had conducted clinical trials with it. These trials had revealed that 85 per cent of 347 patients taking the drug as a sedative hypnotic tranquilliser had shown a beneficial effect. Side effects had hit only 12 per cent, the most noticeable factor being drowsiness or hangover. In toxicity tests on ten male and ten female patients, side effects noticed were oedema of the extremities, drowsiness, dryness of the mouth, constipation, and blurring of vision. Smith Kline and French found that "in no instance were these side effects of sufficient severity to necessitate withdrawal of the medication. The side effects were no greater at the highest dose than at the lowest."

Gruenenthal got Smith Kline and French's permission to pass these results to DCBL but by the time that had arrived the Ministry of Health had given its approval to the Bank of England which in turn gave permission for DCBL to make the advance royalty payment to Gruenenthal. It should be stressed that this was not really an opportunity for the Ministry to have prevented the disaster which followed. At that time it had no powers to insist what tests were made on new drugs and it could not with-hold its approval for DCBL's financial transaction with Chemie Gruenenthal without being unreasonably obstructive.

On September 4, 1957 the executives of DCBL and the executives of Chemie Gruenenthal met formally for the first time. DCBL's home sales manager, C.A. Barnes, later expressed his doubts about Gruenenthal's ethical attitude: The intention is to launch this product with so called scientific data and literature to the medical profession. There appeared to be no medical objection to blatant claims which might not be able to be wholly substantiated .....

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But if these doubts caused any second thoughts at DCBL there is no evidence of it, for by November the company was preparing its own propaganda campaign to launch thalidomide on the British market. The name Distaval had been chosen and the theme of the campaign decided. It was to be absolute safety. Advertisements were to stress this with the phrase "free from side effects", which DCBL knew was simply not true, because the clinical trails conducted by Smith Kline and French, had mentioned side effects in 12 per cent of cases, and DCBL had received reports of these trials from Chemie Gruenenthal.

To his credit one man at DCBL expressed misgivings about this misleading advertising. The development manager, Mr. R. Grasham, wanted the phrase "free from side effects" replaced with "side effects are rare and slight", a much more accurate statement in the light of what DCBL knew at the time. Grasham also thought "no known toxicity" was "rather sweeping" and wanted it replaced with "exceptionally low toxicity". But his recommendations were not adopted. The actual wording in advertisements became "side effects are virtually absent" and thalidomide was described as "non-toxic" until DCBL was forced by events to suspect that their new product was by no means the wonder drug they had hoped it would be.

As far as clinical trials were concerned, things were behind. DCBL were still hoping to market thalidomide on 17 February but by the end of November Kennedy had to confess that of 16 doctors carrying out clinical trials only one had progressed sufficiently to have a paper prepared for publication and that this was, it appeared, not entirely favourable.

The programme for the launch still went ahead as planned. DCBL was by now fully aware that thalidomide was the biggest operation it had ever mounted and that "Distaval will offer us the first real opportunity to assess the effectiveness of our propaganda efforts". But at the factory at Speke little was going right. The development team was dismayed to find that the first batches of thalidomide it produced to the Gruenenthal formula were of very poor quality "unsuitable for sale". In desperation, with time running short, the team abandoned Gruenenthal's formula and devised a better one of its own. So even in this relatively simple aspect of the drug manufacturing business, DCBL had been forced to recognise that Gruenenthal's work was unsatisfactory.

Another blow was that DCBL lost out in a battle with Gruenenthal over selling areas. It had hoped to include Australia, New Zealand and South Africa in its territory but Gruenenthal quickly killed this idea. "In respect of South Africa", Gruenenthal wrote, "we have to reserve ourselves exclusive rights for this territory .... I have also thoroughly studied the question of Australia and New Zealand. Also in this case

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I regret we cannot grant you distribution rights."

Although Gruenenthal later relented and gave DCBL rights in Australia and New Zealand, the effect of this decision at this time must have been to give DCBL an incentive to push thalidomide harder in the market it did have: Britain.

Results of the first British trials of thalidomide were published in the British Medical Journal on January 10, 1958. They came from a respected quarter of the medical world: James Murdoch and G.D. Campbell, then respectively senior registrar, and research fellow, in the department of therapeutics at Edinburgh university and at the Royal Infirmary, Edinburgh. Murdoch in particular, was an acknowledged authority on tranquillisers, and his boss, Professor Sir Derrick Dunlop, was a powerful figure in medical circles.

From DCBL's point of view the report was not favourable. Murdoch had written "It would seem unjustifiable to use the drug for long term sedative or hypnotic therapy, pending the results of a more detailed study of its long term effects in a larger series of patients, notably those suffering from mild or moderately severe hyperthyroidism". The key point was that Murdoch had found that thalidomide suppressed the work of the thyroid gland. Indeed, in patients dosed with more than 200 mgms of the drug their thyroids did not function at all for up to two hours.

Murdoch pointed out that the way thalidomide worked was unknown. And - a very telling cut - he put "a tendency to sleep in five patients", a reaction DCBL considered to be the drug's main purpose,under the heading "Side Effects".

There is evidence that Murdoch's findings were originally phrased in more forthright language, but were watered down at DCBL's request. Four month's earlier, in August 1957, Murdoch had sent a draft of his report to Kennedy, the former Ministry of Health man who had become DCBL's principal medical officer. The final sentence came as a bombshell to Kennedy. As Kennedy recalled later, "There was another sentence suggesting that the manufacturers should not go ahead with things of this kind until extensive trials had been done..." Murdoch had hit on the vital weak spot in the whole DCBL involvement with thalidomide.

Kennedy read the draft report and immediately wrote a stiff note to Murdoch, whom he knew very well, "With regard to your final sentence I can assure you that it is our definite intention to treat this whole matter with restraint and complete professional propriety". (It was, of course, not lack of propriety which Murdoch was criticising, but lack of knowledge.) But the only counter to Murdoch's report which Kennedy could muster was, "I am sure you will agree that drug action in acute or advanced conditions is not to be equated with trials on healthy volunteers". This was not really much of an argument since Murdoch's basic point still stood - the drug's method of action was unknown. Kennedy concluded, "I hope.... you will be able to delete or modify that final dig."

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Murdoch, not impressed agreed only that he would "attempt to modify the final sentence". Kennedy had to return to the attack. "With all respects, I must say that I think your last sentence in the discussion might be omitted. I am quite prepared to accept that it is a reasonable recommendation for you to put to us as a responsible party but I feel that to publish it to all and sundry is, shall we say, unnecessary .... I cannot help feeling that your admonition is a bit of a swipe at us, and while I am sure that it is a good-natured one on your part, I am doubtful that all readers of the Journal would take it in the same way." Murdoch relented, and deleted the sentence.

Kennedy did not pass immediately to his Managing Director Murdoch's recommendation that more testing was needed before launching the drug on the market.

In a memo to his managing director, D.J. Hayman, Kennedy somewhat underplayed Murdoch's conclusions. "Dr. Murdoch only warns against the possibility of trouble in long term therapy," he wrote, "While many of the cases will be short term." This was true, but the crucial point was that some cases would be long term. And then Kennedy added reassuringly "The name Distaval does not appear in the (Murdoch) paper and the chemical name used is the German one....."

No doubt Kennedy considered he had justification for his action: he genuinely thought that Murdoch's work was wrong. He based this conclusion on two things. The first was a trial he had himself urgently instigated at the first whiff of the contents of Murdoch's report. The second was an assurance from the German manufacturers, Gruenenthal, that Murdoch's findings had not been confirmed by results in Germany.

The trial which Kennedy instigated himself was arranged with Dr. Raymond Greene, of Harley Street. Greene agreed to do some trials at New End Hospital, North London to check the anti-thyroid effect of thalidomide using a technique known as iodine uptake. When Murdoch's paper appeared in the BMJ, DCBL put its position to Greene in a frank manner. "I do not know whether you are in a position to make any comment at this stage", Kennedy's assistant Dr. Brown wrote, "and if so whether you would think it worthwhile to make it in the form of a letter to the BMJ".

Brown even gave a hint of the line he hoped the letter might take. "I think it is a little unfortunate that in Dr. Murdoch's paper the effects which we consider to be the main pharmaceutical action of the drug are described under the heading of 'side effects' and the anti-thyroid effect, which we would like to think is a side effect of no great significance in normal dosage, is featured as its main action". Three days later Greene's letter went off to the BMJ: "We are not yet ready to pronounce a final judgment but our preliminary results suggest that the effects of the drug (on the thyroid)... are negligible compared with those of carbimazole". And later "Is it not a little

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unfair to describe as side effects these actions for which the drug was introduced." (The fact that carbimazole is a well-known goitrogen not a sedative, that one would expect thalidomide's action to be negligible compared with so potent a chemical, and that the thyroid is a dangerous and difficult gland appears to have concerned no one.)

The supporting evidence from Germany was equally flimsy. Gruenenthal's managing director Dr. Hoinrich Muckter read a copy of Murdoch's draft paper and according to Kennedy said simply that its conclusions had not been borne out by results which had been obtained in Germany.

This was an amazing claim for Muckter to have made because no work had been done in Germany on the action of thalidomide on the thyroid, as Muckter admitted himself nine months later: "We are at the moment trying to set up an experiment on the question of the influence of iodine absorption of the thyroid gland under Contergan (the German trade name for thalidomide)... with this we want to come to grips with the experiments of Murdoch and Campbell who, through their hasty conclusions, found some trouble here". So if in September 1958 Muckter was trying to set up an experiment on thalidomide's effect on the thyroid, where, nine months earlier, were the German results which contradicted Murdoch's paper?

DCBL should have been suspicious that Gruenenthal was not correct on this point because on a visit to the German factory in July they had learnt that Gruenenthal had received many letters from doctors asking for assurance over Murdoch's warnings and had been able to muster only "Gruenenthal are at present co-operating in a clinical trial along similar lines to that of Murdoch and they hope it will be published in a month or two." But if the British company was suspicious then there is no evidence of it and the so-called German results which supposedly did not support Murdoch's findings became a cornerstone of DCBL's approach.

It was used, for example when one of the top pharmacologists at the Ministry of Health, Dr. Roy Goulding, wrote to Kennedy at DCBL after reading Murdoch's paper to enquire if this "modified at all" DCBL's plans to market thalidomide in Britain. Kennedy's reply mentioned the German view and the trials being done by Dr. Greene, "whom I am sure you know". and confided. "I may tell you in confidence that Murdoch's paper is not affecting our intention the drug will shortly be put on the market under the name of Distaval".

To sum up: DCBL had been warned that thalidomide might affect the thyroid, that the way in which it worked was unknown, and that pending more study on its long-term effects it should not be marketed.

The warning about the thyroid had particular relevance because it was known at that time that drugs which effected the thyroid could cross the placental barrier and effect the unborn child.

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This does not mean that DCBL should have instantly suspected the terrible truth about the drug they planned to market. But it is reasonable to argue that on the evidence before them the British company should have shown greater awareness of the dangers thalidomide might have and at least have delayed launching the drug pending further tests. But they had too readily accepted Gruenenthal's soothing words. By the time DCBL finally agreed that more tests were indeed necessary, it was already too late.

When Thalidomide went on sale in Britain on April 14, 1958, it was known as Distaval. Later it was called Asmaval, Tensival, Valgis, and Valgraine. It was recommended for use in psychiatry, geriatrics, neurology, dermatology, paediatrics, obstetrics, and dentistry. It was advertised as "completely safe", even for pregnant women and nursing mothers, and an answer to the "mounting toll of deaths due to barbiturate poisoning."

That so much had been taken on trust from the German company which discovered thalidomide is evident from the remarks of DCBL's pharmacologist, Dr. G.F. Somers, four days after the new drug went on the market.

When asked to prepare a summary of what was known about thalidomide he replied: "I have not carried out a great deal of research with this compound because really the work of Kunz Keller and Muckter dealt pretty thoroughly with it and I have had to concentrate my attention on more pressing and urgent matters."

But "the work of Kunz Keller and Muckter" on which Dr. Somers at first relied was at the best inadequate and at the worst culpably misleading. It was described by Dr Robert Nilsson of the University of Stockholm in 1965: "The number of animal experiments in the toxicity tests was far too small; that because of this a low frequency of side effects could not be detected; that these are important for a sedative like thalidomide and very necessary if the substance is to be declared unpoisonous. The conventional toxicological and pharmacological tests are most unsatisfactory. Kunz Keller and Muckter tried to hoodwink the reader by creating a false impression of the scope of their tests."

Dr. Somers seems to have felt professionally uneasy about not having carried out sufficient research of his own with thalidomide and - until it was withdrawn three years later - often urged caution on his DCBL colleagues about dosage, marketing techniques, and general usage of the new drug. For example, when Kennedy was brushing aside Dr. Murdoch's warnings about thalidomide's side effects on the thyroid, Somers was urging: "I agree with the BMJ report that we must take caution in this matter.... a decision on the dosage being limited to 200 mgs and for avoiding prolonged administration is probably wise at present until we have more experience with the drug."

But Somers was later to discover something much more alarming about thalidomide than Murdoch's suspicion that it could affect the thyroid. The drug which had been trumpeted as "non-toxic" and "completely safe" was, he found, in certain circumstances highly poisonous.

In his laboratory at Speke Dr. Somers and three assistants carried out a series of tests with thalidomide in powder form compounded with sugar and other sweeteners. The German company, Gruenenthal, already had a liquid or suspension version of thalidomide on the market called "Contergan Juice" and was pushing it as a safe and reliable sedative for children. Some German parents were using it to keep their children quiet while they went to the cinema, and - even more amazingly - in a children's clinic in Dortmund it was being administered to noisy new-born infants. DCBL was interested in entering this lucrative side of the thalidomide market too, and had ordered some of the Gruenenthal preparation for testing.

The results of these tests, in November and December 1959, must have stunned Somers. The liquid preparation of thalidomide was highly poisonous. The reason thalidomide had been believed non-toxic was, it turned out, because not enough of it was absorbed into the bloodstream. Microfining it and mixing it with a sugar solution allowed it to be absorbed more easily and once absorbed it was poisonous. In Somer's own carefully-considered but highly-alarming words written later: "We do not therefore regard the formulated suspension as prepared by Gruenenthal to be a safe preparation like the tablets and we are of the opinion that there is a very real danger of deaths occurring following overdosage."

This was a new blow to DCBL. Sales, especially to hospitals, had been poor. This had been attributed to the fact that sales representatives had no published work to which they could refer to support their claims except "Continental reports which are so lightly regarded." Now Somers had to tell the New Products Committee of DCBL that thalidomide liquid was toxic and that this fact was "of primary importance... in relation to our advertising claim for Distaval". In other words, how long could DCBL go on saying that Distaval was non-toxic when there was evidence that this was not true?

Somers was by now a deeply worried man. Some of the liquid had gone out for clinical trial and he was perturbed that this had occurred before he had done his tests. He tackled Kennedy about it. "The results, you will appreciate, might have been dangerous, in particular because people regard Distaval as being a non-toxic drug."

To add to Somers's worrries, early in 1959 a doctor had reported the case of a young man taking thalidomide who had complained he experienced an itching in the palms of his hands and the soles of his feet. Somers decided to look at the effects thalidomide might have on the nervous system and

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by mid-1960 DCBL's medical department had on record reports of five patients who were suffering from peripheral neuritis - intermittent severe pins and needles or cramp in fingers and toes - after prolonged use of Distaval.

If there had been closer consultation between the British and the German company then DCBL might have learnt that Chemie Gruenenthal had received a series of reports of thalidomide having caused peripheral neuritis, rashes, loss of speech and epilepsy. But even from its own experience DCBL now knew that its wonder drug, the major selling point of which was its safety and almost complete absence of side effects, was in fact both dangerous and could cause serious illness. What did it do about it?

Throughout June, 1960, a series of memos flew between DCBL executives. Surprisingly they seem mainly concerned not as one might imagine, with giving serious consideration to withdrawing the drug pending further tests, but rather with anticipating publication in medical journals of the fact that Distaval was toxic. Brown thought that the time had come when it would be "wise" to modify DCBL's claims for Distaval. He suggested substituting for "no demonstrable toxicity" the phrase "low or very low toxic effects." It was decided that all references such as "non-toxic" and "free from toxicity" would be deleted from DCBL publications about Distaval, but only when next reprinting. This can only be interpreted as suggesting that DCBL saw no great urgency in the matter.

Somers was the only DCBL man out-of-step and was pressing for publication of all his findings: "I think you are of the opinion that a danger exists and we should present the facts as soon as possible." But DCBL was unhappy about losing their major claim for Distaval - that it was a safe sedative or hypnotic. At least one, the managing director, D. J. Hayman, made it clear he was against too much watering down of the safety angle. In fact as late as May, 1961, more than a year after Somers had discovered that thalidomide in sugar solution was toxic, Hayman admitted that DCBL was still circulating from time to time an abstract of Somers's earlier report which said that he had been unable to find that thalidomide had any lethal dose whatsoever.

Somers appears to have done his best to persuade DCBL to publish all his latest findings. He tried the "self-interest" approach: "Some day someone is going to make the observations we have made with different formulations of thalidomide. They may publish them and cause us some damage. If we have already drawn attention to these matters... we will be in a much stronger position." Hayman was unmoved: "I cannot see any reason why we should extend the debate

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outside the scope of Gruenenthal-DCBL". Hayman won and Somers's report was never published.

In fact Hayman saw no reason why the liquid version of thalidomide should be kept off the market, despite the fact that it was toxic, and was all for pressing ahead despite Somers's findings. "...I really feel that the dangers of issuing a product of this nature have got out of perspective... Gruenenthal have sold many thousands of bottles of a product less satisfactory than our own formulation.. we should take immediate steps to market a preparation of this type at the earliest possible date..."

So the liquid version of thalidomide went on sale in Britian in July 1961. As we have seen DCBL's own pharmacologist, Dr. Somers, had described this preparation as unsafe and that "there is a very real danger of deaths occurring following overdosage". Yet DCBL's marketing line for the liquid version of the drug was to describe it as "specially flavoured to suit all palates" and to recommend it as being "particularly suitable for administration to children."

The issue of the British Medical Journal for December 31, 1960 brought into the open the other problem which had been worrying Somers: peripheral neuritis. Dr. A. Leslie Florence of Aberdeen, wrote to the editor placing on record four cases where patients had reported symptoms of the complaint after using Distaval over a long period.

The BMJ has an international circulation, and in the United States Dr. Florence O. Kelsey, of the Food and Drug Administration, read Dr. Florence's letter. She was especially interested in it because at the time she was dealing with an application to the FADA from a company called Richardson-Merrell for permission to maket thalidomide in America. Dr. Kelsey now decided to hold up this application. She and her husband had demonstrated in 1943 that drugs which affect the nervous system might also affect the unborn child and Dr. Kelsey now reasoned that if thalidomide could cause peripheral neuritis - a complaint of the nervous system - then it might also cross the placental barrier and affect the child in its mother's womb.

Dr. Kelsey was still sitting on the Richardson-Merrell application when the first reports of thalidomide births confirmed that she had made the right decision. Thalidomide was never marketed in the United States (although it went out to some doctors for clinical trials) and a tragedy which could have been greater than that in Britain or Germany was largely averted. It must be fair, therefore, to ask: if Dr. Kelsey suspected that thalidomide could have adverse effects on the foetus, why did not DCBL?

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The first reason is that after a doctor had reported in 1959 that thalidomide used in labour had no adverse effect on mother or child, DCBL assumed that the drug was safe at all stages of pregnancy. So when a salesman asked in August - three months before the drug was withdrawn - whether Distaval crossed the placental barrier, the medical department replied that it almost certainly did "but no adverse effects on the foetus have been noted". Dr. Brown had gone even further in March in a letter to another doctor: "So far as I know Distaval has no specific effect on the uterus and can be used quite safely in pregnancy and during labour."

Also DCBL was now heavily occupied with a sudden flush of reports of more cases of peripheral neuritis. January and February, 1961, saw more and more doctors concerned with this severe and sometimes incurable side effect of thalidomide. February alone brought eight definite and five suspected cases to the London office of DCBL in Wimbledon, and the company began to consider at last making "a little more emphasis" of the risk of peripheral neuritis "in the hope that the number of cases will diminish if doctors are aware of the possibility".

This plan did not meet with the unqualified approval of the sales side of the company. "It is not our job to educate the medical profession how to look out for various conditions. From a sales promotion point of view, the more we write on this side effect the more it is likely to get out of perspective."

It is not hard to speculate as to the sales section's reasons for this alarming attitude. By the end of March 1961, DCBL had sold nearly 64 million thalidomide tablets. April turned out to be the best month for sales in three years. So the sales representatives were instructed: "(The) possible occurence of peripheral neuritis is a remote one and in no way detracts from the main selling point of Distaval... It has a toxic effect of which you should be aware.. but there is no need to alarm the medical profession or discuss the matter unless it is raised."

But by July DCBL knew of over 100 cases of peripheral neuritis in Britain. August brought 15 more cases, September a further 13. Doctors began to complain that DCBL had tried to conceal important information from the medical profession and that Distaval advertisements were misleading. Some doctors had used Distaval themselves and at least one had contracted peripheral neuritis. He was naturally rather angry. "Your ads in the BMJ and literature gave a clear indication that there were no side effects. Pictures of children playing with a Distaval bottle indicated absolute safety", he wrote. "Will you please inform me what steps I should take to rid myself of this neuritis".

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Another complained that he had received two brochures from DCBL both stressing the proven safety of Distaval but "omitting any reference to the neurotoxic effect about which there have been several publications in the medical press". And on July 15 the Pharmaceutical Journal reported that a death from suicide had been recorded as having been due to an overdose of Distaval.

But Brown, for one, remained optimistic. Despite the evidence that Distaval was toxic, dangerous and deadly if taken to excess, he wrote in August, "In spite of the doubt about this case it seems there is nothing we can do about the verdict...so I think we must proceed with care in making claims about no untoward results being recorded after overdosage with Distaval. The drug is so firmly established now that with a little care in re-wording our claims I think we can still tell essentially the same story as before".

And, this is what DCBL proceeded to do. In October (by which time it knew of over 100 cases of neuritis) it issued a brochure called "A new assessment of Distaval". It recommended Distaval for every age group from infants and pregnant women to geriatric cases and stressed its consistent safety and its low toxicity. It admitted some cases of peripheral neuritis had been reported but dismissed them with "... it arises only in a small percentage of cases and can be expected to resolve provided the drug is withdrawn promptly on the onset of symptoms."

In the November issue of the BMJ the British company stretched truth to its limit with an advertisement which read in part, "There is no case on record in which even a gross overdosage with Distaval has had harmful results. Put your mind at rest. Depend on the safety of Distaval". Unfortunately for DCBL the very same issue carried three more letters describing cases of peripheral neuritis. This discrepancy brought a complaint to the editor of the BMJ from a Dr. E.C.O. Jewesbury.

DCBL withdrew the advertisement for revision and there is evidence that it began to have serious thoughts about withdrawing Distaval from the market. The disappearance of the advertisement prompted a letter from Dr. Mark Fraser of Victoria Hospital, Fife, which knocked away the last prop of DCBL's advertising theme. One of the company's favourite advertisements had shown a child at a medicine cabinet with a caption reading: "This child's life may depend on the safety of Distaval". The copy line stressed that barbiturates ranked high among the fatal poisons of childhood. As Dr. Fraser pointed out, this was simply not true, as DCBL could have learnt if it had taken the trouble to consult the annual reports of the Registrar General. Dr. Fraser wrote, "The tolerance of children for barbiturates is relatively high. Young children often swallowed these tablets but they seldom come to any harm from it."

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While DCBL had been occupied with the problems posed by peripheral neuritis, the fuse that was eventually to destroy the drug had been burning shorter. We have seen now how Dr. Kelsey of the American Food and Drug Administration had held up approval of thalidomide because she was worrried that a drug which could cause peripheral neuritis might also damage the unborn child. Early in 1961 children were born in various parts of Britain suffering from the deformities which are now associated with thalidomide.

At the time there was nothing to connect these monster births with Distaval. Until DCBL representatives began to call on doctors in late 1961 and early 1962 and ask if any patients had given birth to deformed children and whether the mothers had taken Distaval during pregnancy, there was no reason for doctors attending such births to believe that they were anything other than a statistical tragedy.

The first such case which we have been able to trace was a child born at Stockport on March 24, 1961 but quite possibly there were earlier cases. In the event the link between deformed babies and Distaval was established not here, but in Australia, where William McBride, a highly-respected Sydney doctor, had become suspicious that Distaval, rather than being a wonder drug, would go down in medical history as being responsible for terrible tragedy.

McBride saw his first monster birth on May 4, 1961, at the Women's Hospital, (Crown Street) Sydney. On 24 May there was another case and on 8 June a third. All three babies had a bowel atresia and upper limb abnormalities with absence of the radious bone in each forearm. All three died. McBride began a detailed investigation looking for common denominators. Luckily the mothers had been attending hospital regularly and all their records were available for study. All three had taken Distaval early in pregnancy. Over the weekend of June 10, 11 and 12 (a public holiday) McBride studied the case histories and read on the causes of bowel atresia and limb abnormalities. On Tuesday, June 13, McBride told the medical superintendent at his hospital of his suspicion that Distaval was responsible for these abnormal births. McBride, the medical superintendent, and the hospital's chief dispenser conferred and agreed that the use of Distaval at the hospital should be suspended immediately.

McBride told DCBL's office in Sydney* of the decision to withdraw the drug at Crown Street and of his suspicions about its safety. He says he was told that the drug had been thoroughly tested and that it had been on sale in Germany for several years without any ill-effects - both incorrect statements.

* "Licensee undertakes to maintain in Australia a company of Distillers own employing at least 12 detailmen...."

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On the day thalidomide was withdrawn at Crown Street, McBride started animal experiments using pregnant white mice and guinea pigs. These were fed high doses of thalidomide mixed with their food. The white mice were allowed to go to term. The guinea pigs were sacrificed after four weeks. None of the offspring of these animals showed any abnormality. McBride then submitted a paper to the Lancet outlining his findings to date in the hope of stimulating further research but on July 13 the assistant editor rejected McBride's paper.

In October McBride saw three more monster births, making six in all. In all cases the common factor was that the mothers had taken Distaval during pregnancy.

McBride again contacted DCBL's Sydney office and reported these new cases. This time the Sydney office acted. McBride's findings were airmailed to London where they arrived on Tuesday, November 21. It was met with mixed emotions. Dr. Brown thought it was "a rather disturbing report" but Hayman, the managing director felt at first that there was no cause for alarm. By Thursday, November 23, Somers had arranged to examine the effects of thalidomide on the development of the foetus in rats and McBride's conclusions had been passed to Chemie Gruenenthal in Germany for their comments.

They arrived there in time for the final crisis. Professor Widukind Lenz, head of the University Clinic for Children, Hamburg, had become interested in the sudden increase in monster births in Germany during the previous six months. By mid-November he had found no fewer than 14 cases in which the mothers of deformed babies had either definitely or very probably taken thalidomide during pregnancy. Lenz confronted Chemie Gruenenthal with his discoveries and a series of arguments culminating in an angry meeting at the Ministry of the Interior, Dusseldorf, on November 24, had taken place. This meeting had ended with the Ministry telling Chemie Gruenenthal: either withdraw the drug of your own free will or we will ban its sale.

At a meeting the following morning at Gruenenthal's Stolberg office DCBL's letter with McBride's conclusions was read out. The case against the drug now seemed conclusive but Gruenenthal still hesitated to withdraw it. Next morning, Sunday, events were taken out of Gruenenthal's hands when the German newspaper Welt Am Sonntag appeared with a story reporting Lenz's suspicions about thalidomide. Gruenenthal's directors met the same day and decided to take thalidomide off the market.

Gruenenthal telephoned DCBL in London on Monday morning to tell them of the decision and to assure the British company that it was taking

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immediate steps to investigate the evidence. DCBL's managing director, Hayman, spent the morning on the telephone speaking with Gruenenthal, DCBL's medical advisers, and his fellow directors. Finally, at a meeting of the management committee, his recommendation that Distaval and its associated products be withdrawn was accepted.

Once DCBL decided to end the sale of thalidomide it moved with commendable speed. Letters announcing the decision went off to the BMJ and the Lancet and were published on Friday, December 1. "We feel that we have no alternative but to withdraw the drug from the market immediately pending further investigation." A letter in similar terms went to all doctors in the UK, and drug wholesalers, retailers, and hospitals were advised of the decision. Subsidiary companies in Australia and New Zealand, and other export markets were also notified.

While Gruenenthal rushed ahead with tests to see whether thalidomide could cross the placenta, DCBL totted up the damage. The withdrawal of the drug left it with stocks at home and overseas worth about £165,000. It was clear that before it could hope to put Distaval back on the market a lot of expensive research would be involved, and in the end it might not be worth it.

Some executives nevertheless remained optimistic. Others were depressed. Hayman wrote, "..... We have received a great deal of sympathy and praise for our action. Although this is very gratifying it does not of course change the profit picture at the end of the day....."

The final crunch was just around the corner. Gruenenthal's researchers using a radioactive version of thalidomide tracked its passage in the bloodstream of mice to see whether the drug corssed the placenta. It did. And in Liverpool Dr. Somers gave four white rabbits thalidomide from their eighth to the sixteenth day of pregnancy. Of the 18 baby rabbits born, 13 bore the horrible and characteristic deformities now associated with thalidomide.

Somers was the first researcher to reproduce the thalidomide malformations in animals and with a scientist's regard for the truth he wrote immediately to the Lancet setting out his findings. His letter was published on April 28, 1962, to the anger of some of the directors of his parent company, Distillers Limited. A directive went out rigorously controlling the publication of letters on Distaval. As one DCBL director remarked: "It is clear that the senior directors..... have become hypersensitive..... and in future those concerned at working level must be prepared to steer a very careful course between the advancement of scientific knowledge through scientific publications and the bad publicity for the company that these are likely to generate through the popular press and elsewhere."

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Although DCBL had withdrawn Distaval from public sale it decided to try to keep selling it to hospitals. So while Somers was conducting his tests, sales representatives continued to do the rounds of the hospitals. Results were disappointing and the representatives were told to try harder. "Representatives should, from now on, take every opportunity of informing members of the hospital medical staff that Distaval is again available for use in hospitals where the administration to pregnant women or those likely to become pregnant, can be avoided."

Clearly DCBL was not giving Distaval up without a fight. It now tried to create a demand for thalidomide to be put on the market again and tried to enlist the help of the Lancet. At the 17th monthly meeting of the medical department on March 2, 1962, Brown said that he had spoken to the Lancet's editor, Dr. Munro. "If doctors wishing Distaval replaced on the market will write in asking for it, Dr. Munro will do his best to stimulate discussion and get the subject ventilated in the Lancet." DCBL decided to instruct their sales representatives to try to persuade doctors to write such letters, but the effort proved useless and sales continued to slump. In December, 1962, DCBL finally decided to end its sales even to hospitals, and the wonder sedative finally vanished from the market.

Could the whole tragic mess have been avoided? The new Medicines Commission has, like the American Food and Drugs Administration, power to ban a drug if the manufacturers have not proved it to be safe. Nothing like this existed at the time thalidomide came on to the British market. (When on March 5, 1962, Mrs. Joyce Butler asked the Minister for Health what action he was taking to ensure that all new drugs were submitted to immediate independent and reliable scrutiny before use in the National Health Service, Mr. Powell, the then Minister, replied, "I have no powers to do this".)

So the burden of making certain that thalidomide was safe fell squarely on DCBL. How did the company measure up to this heavy responsibility? It can be argued that:

1. DCBL should have found all the scientific literature about drugs related to thalidomide. It did not.

2. It should have read Thiersch's work on the effects on the nervous system of drugs related to thalidomide, have suspected the possible action on unborn babies and therefore have done tests on animals for teratogenic effect. It did not.

3. It should have done further tests when it discovered that the drug had anti-thyroid activity and unsuspected toxicity. It did not.

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4. It should have had proof before advertising the drug as safe for pregnant women that this was in fact so. It did not.

For DCBL it could be argued that it sincerely believed that thalidomide was free from any toxicity at the time it was first put on the market in Britain; that peripheral neuritis did not emerge as a side effect until the drug had been on sale in Britain for two years; that testing for teratogenic effects was not general in 1958; that if tests had been done on the usual laboratory animals nothing would have shown because it is only in the New Zealand white rabbit that thalidomide produces the same effects as in human beings; and, finally, that in the one clinical report of thalidomide being given to pregnant women no serious results followed (because thalidomide is dangerous only during the first 12 weeks of pregnancy).

DCBL set out this defence in an internal memorandum:

"Pharmacological investigation for teratogenic effects is not standard practice. Since the withdrawal of the drug DCBL laboratories have spent many months in an attempt to produce congenital malformations in off-spring of female animals to whom thalidomide was administered in high doses during early pregnancy." The first tests had failed, the memorandum says, but later ones, succeeded. "From a clinical trial point of view a human trial to test teratogenic effects would, for obvious reasons, not be considered. Investigators must necessarily rely on animal experiments and observations on pregnant women who were given the drug for its normal therapeutic effect." In a nutshell, DCBL's main argument is that they could not have done tests on human beings for teratogenic effects, that it was not customary at that time to do such tests on animals, so they did not do them; and further that even if they had done such tests nothing would have shown because thalidomide only effects the offspring of the New Zealand white rabbit.

There appears to be no neat set of answers. DCBL, the firm which produced thalidomide for the British market, which felt that it had no cause to reproach itself, left the pharmaceutical business in 1962 selling out to Eli Lilly of the United States. Many of the main characters who figured in this narrative are now in other employment, thalidomide is only a painful memory. Of the original cast of the tragedy only the victims still occupy the stage.

Annex IV

Press comments denying Distillers' responsibility as quoted by Mr. H. Evans in an affidavit which was read in the Courtof Appeal (1)

"(a) Daily Telegraph, January 4th, 1973

Anthony Partridge, FRCS : 'The Thalidomide disaster is just an extreme example of what is happening every day of the week. Because it is so pathetic and involves children it creates a lot of emotion, and immediately Distillers are condemned as guilty by many people ..... If Distillers are held to be guilty, then so is every other pharmaceutical firm, together with every doctor who has had the misfortune of injuring a patient with a drug.

'To the best of my knowledge the Distillers Company is a highly responsible, ethical company. It has produced and marketed a lot of drugs. Thalodomide was marketed in good faith. There was no wilful negligence shown.'

(b) The Daily Telegraph in an editorial, January 5th, 1973.

'This issue is not to be looked at now as a legal one. What Distillers legal liability, if any, might be, nobody knows and the advancement of medicine could well be disastrously impeded if the idea gained ground that drug manufacturers, doctors, and others, could be held liable for any unexpected side effects of a drug without any 'recklessness' (strongly, and probably with reason denied by Distillers in this case) on their part. The thalidomide case in all its circumstances is a very special one ...'

(c) The Economist, January 6th, 1973.

'No serious evidence has been led to suggest that the Distillers board was negligent, according to the standards of the times, when thalidomide was manufactured and sold in this country. The German tests had not been controverted, the British standards were adhered to, and the providential hesitation about the drug in the United States was concerned with some quite different, and far less damaging, side-effects. There is no apparent moral responsibility on the shoulders of the Distillers' directors.

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(1) cf. para 46 of the Report. The text is reprinted from 'The Thalidomide Children and the Law.' pp. 76-77

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(h) The Times, January 9th, 1973.

Professor Leonard B. Strang, Professor of Paediatrics, University College Hospital Medical School: 'It is difficult for me to see that Distillers have any special liability for the fate of the thalidomide children over and above that shared by the rest of the community ... So far as I know, Distillers marketed the drug in good faith, believing it to be a good and useful substance on criteria that were considered generally acceptable at the time. I cannot see that they carry any more responsibility for the ensuing disaster than do members of my own profession ...

'We may argue now that the manufacturers should have done more careful testing ... but we are able to do so only with hindsight; the relevant information was not available at the time.'

(i) The Times, January 9th, 1973.

Professor A.W. Woodruff, The Athenaeum, Pall Mall, London, S.W.1: 'Thalidomide was introduced after careful assessment by the acceptable means then in use. Effects entirely unforeseen by the experts concerned can hardly be considered to arise from those who introduced the drug but from the state of knowledge at the time of its introduction. If society now feels outraged by these effects and wishes to ensure that they are adequately compensated, then the logical thing is for society to do the compensating rather than to shriek at the firm that was merely the vehicle whereby the drug reached them.'

(j) Law Society's Gazette: Editorial of 17th January, 1973.

'Another, just as speedy, development is instanced in the Thalidomide affair. Here a company marketed a drug under licence believing that it had been properly tested. The drug caused damage, actions were started, some were compromised, others were not. And then what happened?

'An active pressure-group began to talk, or rather shout, about moral responsibility and to persuade sympathisers to enforce economic sanctions, share-holders panicked and the company was coerced into making a greatly increased offer of settlement.

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(d) Sunday Telegraph, 7th January, 1973.

Peregrine Worsthorne: 'Distillers produced and marketed thalidomide in the manner required by British law, after accepting in good faith the precautionary tests which had been carried out in Germany. The appalling consequences of the drug were, therefore, in the strict sense, accidental, i.e. unforeseeable ... The Distillers Company are being asked to accept responsibility for developments which the nation as a whole has willed ... Few spectacles are more nauseous than that of society seeking to escape its own responsibilities by shuffling them on to the shoulders of a particular individual or group ...'

(e) Daily Telegraph, January 8th, 1973.

Article by Kenneth Fleet, City Editor (quoting letter by lecturer in Organic chemistry): 'It should also be emphasised that though Distillers are morally responsible they were not in any normal sense of the term negligent. At the time it was standard medical dogma that the foetus was effectively isolated. We now know better, but one cannot attribute negligence in the light of this later knowledge.'

(f) Daily Express, January 8th, 1973.

Sir James Marjoribanks, a director of the Distillers Company in a statement to the Daily Express, January 8th, under the heading 'Distillers director hits out' said: 'what had to be remembered is that we were not negligent over the distribution of this drug. We went through all the necessary tests at the time. We could not have done more.'

(g) Daily Telegraph, January 9th, 1973.

Dr. J.B. Harman, treasurer of the Medical Defence Union and chairman of the British National Formulary Committee, which advises doctors on the use of drugs, said in a statement to the Daily Telegraph, January 9th, that he regretted Distillers had given in to the pressure they had been subjected to. He did not believe they had been negligent. Any company putting a new drug on the market in future would have to think long and hard about the implications of the thalidomide case, possibly with the result that a potentially valuable drug would not be marketed.

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ANNEX V

Bibliographical references and headnotes of the relevant English Court decisions

1. Decision of the Divisional Court of the Queen's Bench Division (Lord Widgery, C.J., Melford Stevenson and Brabin, JJ. - 17 November 1972):

/1972/ 3 W.L.R. 855

/1972/ 3 All E.R. 1136

2. Decision of the Court of Appeal (Lord Denning, M.R., Phillimore and Scarman, L.JJ - 18 February 1973):

/1973/ 1Q.B. 710 (including a reprint of the Divisional Court's decision)

/1973/ 2 W.L.R. 452

/1973/ 1 All E.R. 815

3. Decision of the House of Lords (Lord Reid, Lord Morris of Borth-y-Gest, Lord Diplock, Lord Simon of Glaisdale and Lord Cross of Chelsea - 18 July 1973:

/1974/ A.C. 273

The headnote summarises the case history and the principal reasoning of the House of Lords as follows:

" Between 1959 and 1961 a company made and marketed under licence a drug containing thalidomide. About 450 children were born with gross deformities to mothers who had taken that drug during pregnancy. In 1968, 62 actions against the company begun within 3 years of the births of the children were compromised by lump sum payments conditional on the allegations of negligence against the company being withdrawn. Thereafter leave to issue writs out of time was granted ex parte in 261 cases, but apart from a statement of claim in one case and a defence delivered in 1969 no further steps had been taken in those actions. A further 123 claims had been notified in correspondence. In 1971 negotiations began on the company's proposal to set up a £3 1/4 million charitable trust fund for those children outside the 1968 settlement conditional on all the parents accepting the proposal. Five parents refused. An application to replace those parents by the Official Solicitor as next friend was refused by the Court of Appeal in April 1972. Negotiations for the proposed settlement were resumed.

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On September 24, 1972, a national Sunday newspaper published the first of a series of articles to draw attention to the plight of the thalidomide children. The company complained to the Attorney-General that the article was a contempt of court because litigation against them by the parents of some of the children was still pending. The editor of the newspaper justified the article and at the same time sent to the Attorney and to the company for comment an article in draft, for which he claimed complete factual accuracy, on the testing, manufacture and marketing of the drug. On the Attorney-General's motion, the Divisional Court of the Queen's Bench Division granted an injunction restraining publication on the ground that it would be a contempt of court.

After the grant of the injunction on November 17, 1972, and while the newspaper's appeal was pending, the thalidomide tragedy was on November 29 debated in Parliament and speeches were made and reported which expressed opinions and stated facts similar to those in the banned article. Thereafter there was a national campaign in the press and among the general public directed to bringing pressure on the company to make a better offer for the children and their parents and the company in fact made a substantially increased offer.

The Court of Appeal having discharged the injunction, the Attorney-General appealed to the House of Lords:-

Held, that it was contempt of court to publish material which prejudiced the issue of pending litigation or was likely to cause public prejudgment of that issue, and accordingly the publication of this article, which in effect charged the company with negligence would constitute a contempt, since negligence was one of the issues in the litigation.

Per Lord Reid. As a general rule it may be permissible by fair and temperate comment and without any oblique motive to urge a party to litigation to forgo his legal rights.

Per Lord Morris of Borth-y-Gest. Full, free, yet temperate comment would have been permissible on the questions whether the legal principles touching the assessment of damages were not inadequate or unfair; whether it was the fault of the legal system if too much time elapsed before agreements or adjudications and whether the company, regardless of their legal liability, should make generous payments on the basis that what they had sold had produced unfortunate consequences.

Per Lord Diplock and Lord Simon of Glaisdale. Contempt of court in a civil action is not restricted to conduct calculated to prejudice a fair trial by influencing the tribunal or the witnesses, but extends to conduct calculated to inhibit suitors from availing themselves of their constitutional right to have their legal rights determined by the courts by holding them up to public obloquy for doing so or exposing them to public and prejudicial discussion of the merits or the facts of the case before the action had been disposed of in due course of law. Yet if the discussion of topics of legitimate public concern has the indirect effect of bringing pressure to bear on a particular litigant to abandon his action, that must be borne because of the greater public interest of maintaining freedom of discussion on matters of public concern.

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Per Lord Diplock. A distinction is to be drawn between private persuasion of a party not to insist on relying in pending litigation on claims or defences to which he is entitled under the existing law and public abuse of him for doing so.

Per Lord Simon of Glaisdale. Private pressure on a litigant is in general an impermissible interference with the course of justice and can only be justified within narrow limits as when there exists such a common interest that fair, reasonable and moderate personal representations would be appropriate, e.g. a genuine, unofficious and paramount concern for the welfare of the litigant.

Per Lord Cross of Chelsea. It is not wrong to seek to influence a litigant; if the writer states the facts fairly and expresses his view temperately the fact that the publication might bring great pressure to bear on a litigant should not make it a contempt of court.

Per curiam. The Attorney-General has a right to bring before the court any matter which he thinks may amount to contempt and which he considers should, in the public interest, be brought before the court.