Booksellers and the backdoor injunction

Solicitor David Hooper calls for reform of the libel laws

The letters sent out by Robert Maxwell to booksellers threatening to sue them for libel unless they undertake not to sell Tom Bower's book *Maxwell: The Outsider* raises once more the issues of *Goldsmith* v *Sperrings Ltd* [1987] 1 WLR 478.

Mr Maxwell has not issued quite as many writs. Sir James Goldsmith issued 74 writs against 37 subordinate wholesale and retail distributors of *Private Eye*. Mr Maxwell has to date sued five bookselling chains but he has despatched a number of letters or sales representatives to indicate the unwisdom of selling Mr Bower's book and the positive advantages of selling the Haines authorised biography (copyright Robert Maxwell).

Distributors and retailers find themselves in a very difficult position when they, through no fault of their own, become involved in this type of heavyweight libel litigation. The only certainty is that their prospective profits in distributing the allegedly libellous material are likely to be a fraction of the libel damages and costs they face. Their quandary may be further deepened by the prospect of the damage to future trading relations. They have no mechanism for deciding the strength or otherwise of disputed allegations of libel.

Perilous position

In English law their position is potentially perilous. The distributor by each act of distribution can be made liable for a further act of publication of the libellous material. The defence of innocent dissemination is a restricted one. The distributor has to show that he did not know that the book contained the libel complained of, that the publication was of such a character that it was likely to contain libellous material, and that this lack of knowledge was not due to any negligence on his part (*Vizetelly* v *Mudie's Select Library Ltd* [1900] 2 QB 170).

This presents little problem for the plaintiff armed with a good word processor and mailing list. In practice these fairly extreme measures against distributors to be undertaken only by wealthier litigants. There is no reason other than financial constraints why this course should not be more generally followed.

At this stage the allegations are likely to be unproved and may well be disputed. There is no requirement that any special reason to proceed in this way against distributors is necessary, such as that the defendants are people of straw and could not pay libel damages.

The result is scarcely satisfactory. Someone with sufficient resources can block a publication without having to prove his claim and without having to give the undertaking in damages that would be required if he obtained an injunction. Indeed, as in the Maxwell case, this step can be taken when the plaintiff fails to get an injunction under the principle of *Bonnard* v *Perryman* (1891) 2 Ch 299, whereby an injunction will not be granted if there is a plea of justification.

Backdoor injunction

Acting against distributors can provide a form of backdoor injunction with none of the drawbacks normally associated with obtaining an injunction. It remains a perfectly legitimate device. Even the liberal voice of Scarman LJ in the *Goldsmith* case pointed out that if this was a threat to freedom of the press, it came from the law itself in its provision of a cause of action not only against publishers but also against the distributors. Any change in that law was a matter for Parliament and not for the courts.

In the *Goldsmith* case, the issue of the writs was alleged to be an abuse of the process of the court and designed to effect the collateral purpose of suppressing *Private Eye*. That argument had some initial success, but the court accepted that Goldsmith's purpose was to vindicate his reputation and prevent further attacks on it. In the very nature of things it is likely to be extremely difficult to find evidence of a collateral purpose when an action has the legitimate primary purpose of protecting reputation.

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This is one more area of the law of libel which Parliament will need to reform. However, successive governments have shown little interest in reforming the law of libel and further attention may need to be paid to Lord Denning's dissenting judgment in the *Goldsmith* case which was felt to be somewhat eccentric at the time in that it was the result of his own researches, and dealt with relief that was not sought and was neither argued by Counsel for either party or put to Counsel. However, what Lord Denning said was that he doubted whether subordinate distributors of publications were *prima facie* liable to the plaintiff unless they knew or ought to have known that the newspaper or periodical contained a libel on the plaintiff which could not be justified or excused. Subordinate distributors, he said, had never been held liable to a plaintiff except where prior knowledge of the libel had been brought home to them.

American approach

The English courts could also look at the approach of the American courts. Although distributors can be liable in libel under the rule in the Re-statement (Second) Torts, Sec 581, whereby one who only delivers or transmits defamatory material published by a third person is subject to liability but only if he knows or has reason to know of its defamatory character, there is a much more stringent test before the distributor is fixed with such knowledge.

The matter was considered in a judgment handed down on 25th June 1986 in the South Dakota case of *Janklow* v *the Viking Press et al.* Governor Janklow was trying to prevent circulation of the book *in the Spirit of Crazy Horse* by Peter Matthiessen. The somewhat colourful allegations included "driving while drunk and nude"

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and, appropriately for a decision emanating from the Minehaha County Courthouse, Sioux Falls, that he "had fiercely prosecuted and triumphantly jailed Sara Bad Heart Bull".

Despite the serious allegations, the court held in giving summary judgment for the distributors that warnings by the plaintiff that the book contained libels were insufficient to fix them with knowledge of the book's allegedly libellous contents. If a plaintiff could stop a book in this fashion it would have a "chilling" effect on distributors and publishers. The burden lay on the plaintiff to establish a credible showing that the evidence was in his favour. The burden did not lie with the defendants to go and find out what the proof may or may not be. The calling up of booksellers and book distributors expressing a view that something in the book may be false was not adequate.

Even if one stops short of unfeigned admiration of the American rules regarding the defamation of public figures, there is much that we can learn from the law of libel in the US.

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Entries are invited for the £10,000 Commonwealth Writers Prize. In addition to the first prize, there is a runner up award of £1,000 and four regional prizes of £1,000 each for the best novel, full-length play, or collection of short stories or one-act plays by a Commonwealth citizen published during 1987. Preliminary heats will take place in four regional centres: Africa; the Caribbean and Canada; South East Asia and the South Pacific; and Eurasia. The regional winners will be announced in September and the winner presentations will take place in London on 30th November. The final entry date is 15th June and entry forms and details are available from Book Trust on 01-870 9055.