

The Court of Appeal has struck a blow for freedom of speech. **David Hooper** reports

## A kick for Big Brother

UNTIL now it was generally thought by libel lawyers that local councils could sue for libel. Councils could not sue on account of hurt feelings, but the courts considered they did have a governing or administrative reputation which they were entitled to protect. Their position was similar to companies which could sue for damage to their trading reputations if they are likely to be "injured in their pocket". With councils' deep pockets, even the threat of a libel writ would make people nervous of criticising them.

The Court of Appeal has held that Derbyshire County Council (DCC) could not pursue its libel action against the Sunday Times. The case has been dismissed and the council has been ordered to pay the costs. The council has leave to appeal to the House of Lords, both sides agreeing that this was a case of real constitutional and legal significance. The ruling also applies to government departments.

The Court of Appeal was prepared to give effect to the freedom of expression provisions in article 10 of the European Convention on Human Rights and in article 19 of the UN Covenant on Civil and Political Rights. Article 10 gives an absolute right of freedom of expression subject only to those restrictions necessary in a democratic society for the protection of the reputation and rights of others.

The convention recognises that government interference with freedom of speech is likely to have what is described as "a chilling effect" on the democratic exchange of ideas.

In September 1989 the Sunday Times published two articles which criticised controversial share deals by DCC's pension fund. The articles led to writs from DCC as well as from Owen Oyston, a Lancashire businessman, and David Bookbinder, the council leader. The council sued to protect its governing reputation. The council could not say that the superannuation fund had been damaged by the articles, only that its reputation as the council in charge of that fund was likely to have been damaged.

The consequences of the judgment for freedom of the press are considerable. Lord Justice Ralph Gibson stated that to allow a council to sue for libel would "impose a substantial restriction on freedom of expression"; he agreed with the judge in the leading American case of *New York Times v. Sullivan* that the fear of damages in a civil libel action could be more inhibiting than the fear of criminal prosecution, and that such a threat could lead to self-censorship.

The Court of Appeal has emphasised the importance of freedom of speech and gone a considerable way towards dispelling the often-stated view that the courts pay no more than lip service to freedom of speech and are not ultimately sympathetic to the press.

The approach of the English courts, especially in the Spy-

catcher cases, has always been to say that Article 10 of the Convention does no more than express existing English law.

But in this judgment one senses that the court was doing much more than this. It had been invited by Anthony Lester QC, counsel for the newspaper, to give full weight to the necessity for freedom of expression in article 10. In the absence of a written constitution, the provisions of article 10 have ever greater significance. The case is a further step towards upholding freedom of speech unless there is a compelling reason for not doing so. The decision will apply to all public authorities. Up till now, whether a government department could sue for libel depended on whether it had corporate status; whether it did or not often depended on an 1876 Act of Parliament. Until now, the Department of Education and Science could sue its critics; the Home Office could not. Now neither can.

Councils and other government bodies are not, however, left without remedies if false statements are made about them. If it was said of a council that it discriminated on racial or sexual grounds it would still have a remedy, to sue for the civil wrong of malicious falsehood. This is less advantageous to the council. First, the burden of proof (with all its potentially enormous cost) is shifted from the defendant critic to the plaintiff council. Second the council cannot, as in libel, simply rely on the fact that what was said was untrue; it will have to prove malice. Third, the council will need to prove that it has suffered actual damage, unless it can show that the words used were calculated to cause financial damage. In a libel action no such damage has to be proved. The justification for restricting the right of government bodies to sue appears to be that such bodies only hold power on behalf of the public who elected them; the people who put them there should be able to criticise them freely.

Councils can still bring criminal libel proceedings. These are rare and require the leave of a High Court judge. It will still be open to individual councillors to bring libel actions on their own behalf. If councils try to circumvent the effects of today's ruling by funding such actions the courts will be able to judicially review their position and could prohibit such funding.

The judgment amounts to a very significant recognition of the right of the public to criticise and of the potentially oppressive effect of councils or other government bodies in suppressing such criticism. This judgment may lead to changes in the law of libel enabling people to criticise public figures and raising matters of public interest more freely and openly. One feels that this is a decision of which the late Robert Maxwell would not have approved.

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