

**Australian Consolidated Press Limited** - - - - *Appellants*  
v.  
**Thomas Uren** - - - - - *Respondent*

FROM

**THE HIGH COURT OF AUSTRALIA**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 24TH JULY 1967

*Present at the Hearing :*

LORD MORRIS OF BORTH-Y-GEST

LORD PEARCE

LORD UPJOHN

LORD WILBERFORCE

SIR ALFRED NORTH

[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

On 14th February 1963 the respondent commenced an action in the Supreme Court of New South Wales claiming damages for defamation against the appellant Company. The respondent complained of certain passages which were printed in three newspapers published by the appellants. Damages were claimed in respect of words set out (1) in an issue dated 8th December 1961 of the "Daily Telegraph", (a morning newspaper distributed mainly in New South Wales) (2) in an issue dated 3rd November 1962 of "The Bulletin" (a weekly magazine distributed throughout Australia) (3) in an issue dated 10th February 1963 of the "Sunday Telegraph" (a Sunday newspaper distributed mainly in New South Wales) and (4) in a further edition of the "Sunday Telegraph" also dated 10th February 1963. The action was heard in February and March 1964 by His Honour Mr. Justice Collins and a jury of twelve persons. The trial occupied some thirteen days. The appellants denied that the matters complained of bore or were capable of bearing the meanings alleged by the respondent. They relied upon a defence of qualified protection, under section 17 (h) of the New South Wales Defamation Act 1958, that the publications were made in the course of the public discussion of subjects of public interest the public discussion of which was for the public benefit, and that insofar as the matters complained of consisted of comment, the comment was fair. By amended replication made at the trial by leave of the judge the respondent alleged that the publications were not made in good faith. It was a contention of the respondent at the trial that the conduct of the appellants in the period between publication and the termination of the trial showed that they were actuated by ill-will towards the respondent.

In his charge to the jury on 10th March 1964 the learned judge left it open to them in the event of their finding for the respondent to award punitive or exemplary damages. He said:—

"The plaintiff is entitled to compensation at your hands for the damage that has been done to his reputation. He is entitled to compensation, and that compensation to be awarded may be increased if you find that the publications were made with ill-will to the plaintiff, were made as part of a campaign. The damages may be aggravated by those circumstances. But in addition to compensatory damages, the law permits, in a case such as this, the award of what are called punitive damages; it permits a jury to award punitive

damages. It certainly does not require a jury to award punitive damages; it all depends on the view that the jury takes of the case. They are in addition to compensation; they are called by a number of names, two of which have been used in the course of the case, punitive damages and exemplary damages, damages awarded to punish, damages awarded to make an example of the defendant. They are awarded, of course, to the plaintiff. They are not in the nature of a fine, and they should only be awarded where the conduct of the defendant merits punishment, and this could only be considered to be so where its conduct has been malicious; that it has shown what has been described as contumelious disregard for the rights of the plaintiff, here, of the plaintiff's right to enjoy the reputation that he possesses.

Mr. Evatt has urged upon you that this is a case for punitive damages; Mr. Larkins has put to you that, in all the circumstances of this case, this is not one for punitive damages, that this is certainly not a case where punishment is called for, that compensation is sufficient. It is a matter for you. It has been said that exemplary or punitive damages are given to show the indignation of the jury in the case where they have been properly moved to indignation by the conduct of the defendant. That is a very broad statement. Emotion generally plays no part in judicial process, and you are here as judges, and it is not whether you feel emotions of indignation, but whether you think, in the exercise of your judicial function, you could see that you have been led to have feeling of judicial indignation by the conduct of the defendant in this case. If you do feel that, then it is a case in which you may award punitive damages, the amount again being a matter entirely for you."

On 11th March 1964 after a retirement of about 5 hours the jury returned a verdict for the respondent and awarded damages as follows:— £5,000 in respect of the "Daily Telegraph" issue of 8th December 1961, £10,000 in respect of "The Bulletin" issue of 3rd November 1962, and £15,000 in respect of the two issues of the "Sunday Telegraph" of 10th February 1963. The total was therefore £30,000. No objection to the direction of the learned judge in regard to exemplary damages had been taken. The speeches in the House of Lords in *Rookes v. Barnard* [1964] A.C. 1129 had only been delivered on 21st January 1964 and it can readily be appreciated that there had hardly been time for legal advisers in Australia to become familiar with their content.

The appellants by Notice of Motion dated 1st April 1964 to the Full Court of the Supreme Court of New South Wales sought an order that the verdict be set aside and that a new trial should be granted. Included amongst the grounds for the order which was sought was that the learned judge at the trial had been in error in directing the jury that it was open to them to award punitive or exemplary damages. The Full Court held that the point could be argued on appeal. The appeal was heard in February and March 1965 by Herron C. J. Walsh and Wallace J. By Rule dated 4th May 1965 the Full Court unanimously set aside the verdict and by a majority decided that there should be a new trial limited to damages. Walsh J. would have ordered a general new trial. It is not necessary to refer to all the grounds for the Order made. While Herron C. J. and Walsh J. favoured the course of following the principles laid down in *Rookes v. Barnard* they did not consider that there was evidence justifying an award of exemplary damages. Wallace J. favoured the course of following the principles laid down by the High Court of Australia in preference to those laid down by the House of Lords in *Rookes v. Barnard*: he based his reason for ordering a new trial solely on the ground that the evidence did not justify an award of exemplary damages on the basis of the principles laid down by the High Court of Australia.

There was another appeal which was heard in the Full Court. It was heard before the hearing of the appeal of the appellants. That was an

appeal by a company John Fairfax and Sons Pty. Ltd., who were publishers of a Sunday newspaper called the "Sun Herald". The respondent had succeeded in an action against them for defamation in respect of matter published in the "Sun Herald" on 10th February 1963 comparable to that published on that date by the appellants in the "Sunday Telegraph". In that appeal it was argued on behalf of John Fairfax and Sons Pty. Ltd. as was argued on behalf of the appellants in their appeal that the principles laid down in *Rookes v. Barnard* in regard to awards of exemplary damages should be followed. The Full Court in that appeal ordered a new trial limited to damages.

Following the Order of the Full Court that there should be a new trial limited to damages the appellants applied *ex parte* to the High Court of Australia for leave to appeal from the refusal of the majority of the Full Court to order a general new trial. Leave was given. Similar leave was given to the Fairfax Company in their case. The respondent applied for and was granted leave to appeal in the two cases from the Orders of the Full Court setting aside the verdicts in favour of the respondent and ordering new trials. In each appeal the arguments were concerned *inter alia* with the question whether *Rookes v. Barnard* should be followed. Judgment in both appeals was delivered by the High Court on 2nd June 1966. The main reasoning in regard to the question whether *Rookes v. Barnard* should be followed was contained in the judgments delivered in the Fairfax case: that reasoning was then incorporated by reference in the judgments delivered in the present case. In the present case the appellants' appeal was by a majority allowed. A new trial on all issues was directed. The respondent's cross-appeal, by which he had asked that the verdict of the jury be restored, was dismissed.

There was a division of opinion in the High Court as to whether on the basis that exemplary damages are in law permissible the evidence which had been given in the case did or did not in fact justify the award of exemplary damages. But as regards the law their Honours all expressed similar opinions. McTiernan J. held that "the question whether there was proof of circumstances which would entitle the jury to award exemplary damages should be decided according to decisions" of the High Court of Australia. Taylor J. held that the categories of cases in which it is proper to permit an award of exemplary damages are not restricted in the manner laid down in *Rookes v. Barnard*. Menzies J. held that in a libel action the law permits the award, in addition to compensatory damages, of punitive damages and that the High Court should not follow *Rookes v. Barnard*. Windeyer J. held that in a proper case exemplary damages for defamation could be given and that the cases in which they may be given are not as limited as laid down in *Rookes v. Barnard*. Owen J. held that the right of a jury to award punitive damages in appropriate cases should not be limited as laid down in *Rookes v. Barnard*.

The appellants then presented a petition by which they sought special leave to appeal "from so much of the decision of the High Court of Australia delivered on 2nd June 1966 on the plaintiff's cross-appeal as held that *Rookes v. Barnard* was wrongly decided". The petition was heard on 20th July 1966 by Viscount Dilhorne and Lords MacDermott, Hodson, Donovan and Wilberforce. There was no appearance for the respondent. In the course of his submissions then made learned Counsel for the appellants stated that there was nothing contained in the Order of the High Court dated 2nd June 1966 that he wished to have altered. He had succeeded in obtaining an Order for a general new trial. The submissions of the respondent as to the principles which should govern damages at the new trial had however prevailed. He submitted therefore that it was desirable that he should have leave to appeal in order to seek a decision (which would govern the course of the new trial which had been ordered) that the law governing awards of exemplary damages was as laid down in *Rookes v. Barnard*. If leave was not given and if on the new trial any issue of punitive damages was left to the jury and if a

verdict for damages of over a certain amount was recovered by the respondent, the result would be that an appeal to Her Majesty in Council, could result in which the legal issue would then call for decision. So it was submitted that it was preferable in the interests of both parties to seek a decision at the earlier rather than at the later stage. Submissions were also made by learned Counsel in regard to the question whether having regard to the stage reached in the litigation it was competent for the Board to advise that leave to appeal should be given. Towards the end of the hearing of the petition acting on a suggestion of the Board leave was sought and then was obtained to amend the prayer of the petition so that it should relate to so much of the decision of the High Court of Australia delivered on 2nd June 1966 on the plaintiff's cross-appeal as determined that as a matter of law it was competent to award punitive damages in the case.

The Board reported to Her Majesty as their opinion that leave ought to be granted to enter and prosecute an appeal against so much of the decision of the High Court of Australia delivered on 2nd June 1966 as determined that it was competent to award punitive damages in the case. It is clear that the advice to Her Majesty was only tendered after the Board had considered whether there would be jurisdiction to hear an appeal. There is no suggestion that the Board were under any misapprehension as to any of the circumstances or as to the limited nature of what the appellants sought to establish. No leave was reserved to the respondent to raise a preliminary point at the hearing (see *Dennis Hotels Pty. Ltd. v. State of Victoria* [1962] A.C. 25). As has been stated however there was no appearance by and therefore no argument on behalf of the respondent. Thereafter an Order in Council was made on 28th July 1966 in accordance with the Report presented by the Board. Their Lordships sat to hear the appeal as directed by the terms of that Order.

When the appeal was being opened Counsel for the respondent took a preliminary objection. He contended that the appeal was not within the jurisdiction of the Judicial Committee under s.3 of The Judicial Committee Act 1833. He contended that the Order of the High Court of Australia merely directed that there should be a new trial on all issues and that the High Court had not determined that it was competent to award punitive damages in this case. Reliance was placed upon what was said in *Commonwealth of Australia v. Bank of New South Wales* [1950] A.C. 235 where in delivering the judgment of the Board Lord Porter (at p. 294) in reference to the words in s.74 of the Constitution restricting appeals in *inter se* questions viz. the words "no appeal shall be permitted to The Queen in Council from a decision of the High Court upon any question, howsoever arising as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council" said that an appeal is the formal proceeding by which an unsuccessful party seeks to have the formal order of a court set aside or varied in his favour by an appellate court and that it is only from such an order that an appeal can be brought. Reference was also made to the judgment of the Privy Council in *Rasul Khan v. Manik Chand* 30 Indian Appeals 35 where in considering the meaning of the word "decision" in s. 596 of the Code of Civil Procedure it was said that the natural obvious and *prima facie* meaning of the word "decision" is decision of the suit by the Court.

A plea to the jurisdiction may always be made and the mere circumstance that special leave to appeal has been granted does not ordinarily preclude a respondent from raising a challenge to the jurisdiction (see *Zahid Husain v. Mohammed Ismael* 57 Indian Appeals 186, *Mukhlal Singh v. Kishuni Singh* 57 Indian Appeals 279, *Nelungaloo Pty. Ltd. v. Commonwealth of Australia* [1951] A.C. 34, 53, *Patterson v.*

*Solomon* [1960] A.C. 579). If however on a petition for special leave a question as to the Board's jurisdiction to hear the appeal is disclosed and if the Board then hear argument on that question they might give a final decision on the point before advising the grant of leave (see *Dennis Hotels Pty. Ltd. v. State of Victoria* [1962] A.C. 25, 59). In the present case the Board on 20th July 1966 when deciding whether to advise the grant of leave to appeal gave consideration to the question whether there would be jurisdiction to hear the appeal. As however the respondent was not then present their Lordships have proceeded on the basis that they would not in the circumstances of this case regard the decision on 20th July 1966 to advise the grant of leave to appeal as having been a final decision on any question as to the Board's jurisdiction. It is however to be noted that this is not a case where on a full investigation of facts or on a further elucidation of facts any different state of affairs is revealed than that which with every frankness was put forward on behalf of the appellant when leave to appeal was sought on 20th July 1966.

In the view of their Lordships leave to appeal was granted in the present case under the ample powers of the prerogative. Within those powers the grant of leave to appeal endowed their Lordships with jurisdiction. Their Lordships so ruled. The question as to the extent to which any ruling as to principle should be given became a matter of discretion.

In *Hull v. McKenna* [1926] Irish Appeals 402 Viscount Haldane pointed out in the Judicial Committee of the Privy Council that save to such extent as it might be modified by statute (as for example that which dealt with constitutional questions in Australia) the Sovereign retained the prerogative of justice.

While their Lordships will adhere to their practice of declining to give speculative opinions on hypothetical questions their Lordships cannot think that the questions now raised are to be regarded as hypothetical. In *Attorney-General for Ontario v. Hamilton Street Railway Co.* [1903] A.C. 524 the Lord Chancellor in delivering the judgment of the Board pointed out that it would be worthless and furthermore "contrary to principle inconvenient and inexpedient" that opinions should be given on hypothetical questions as opposed to questions arising in concrete cases and involving private rights. The present appeal relates to the decision of the High Court as to the law to be applied in an actual case which is shortly to be re-tried. The circumstances differ from those in *R. v. Louw* [1904] A.C. 412 where it was sought to have determination of "an abstract point of law which did not arise in the case".

The contention advanced on behalf of the respondent that "the appeal herein is not within the jurisdiction of the Judicial Committee under s. 3 of The Judicial Committee Act 1833" is in their Lordships' view not valid. That section is as follows:—

"All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute or custom, may be brought before his Majesty or His Majesty in Council from or in respect of the determination, sentence, rule or order of any Court, judge or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of his Privy Council, and that such appeals, causes and matters shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to His Majesty in Council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by His Majesty to the whole of the Privy Council or a committee thereof (the nature of such report or recommendation being always stated in open Court)."

It is to be observed that the section is not primarily dealing with any question as to what appeals will be entertained by the Sovereign but is a section which enacts that appeals which may be brought will be referred by the Sovereign to the Judicial Committee of the Privy Council.

The words of the section are wide: they cover "all appeals" and also all "complaints in the nature of appeals whatever" which may be brought before the Sovereign (either by virtue of that Act or by virtue of any law, statute or custom) either "from" or "in respect of" the determination, sentence, rule or order of any court. The section does not purport to be a definition of the range of appeals which will be entertained and is not a section which purports to contain any restriction upon or to impose any limitation upon any right to bring any appeal or complaint in the nature of appeal before the Sovereign. Nor does the section either expressly or impliedly impose any limitation upon the prerogative rights and powers of the Sovereign. The word "determination" is a wide one but in their Lordships' view no present occasion arises to consider its scope.

It is clear that the judgments in the High Court delivered on 2nd June have laid it down that what are known as exemplary or punitive damages may be awarded in a libel action in Australia if the facts and circumstances justify such an award and that the limiting circumstances suggested in *Rookes v. Barnard* need not be applied. On a re-trial of the respondent's action against the appellants a learned judge would follow the guidance given by the High Court. If there were a decision adverse to the appellants they would wish by appropriate appeal procedure to seek to obtain a judgment of the Privy Council that the directions of the learned judge were incorrect. It cannot therefore be said that the issue which the appellants have raised is merely academic. Though when leave to appeal was granted it was expressed as being related to so much of the decision of the High Court as determined that "it was competent to award punitive damages in this case" Counsel for the appellants made it clear that what he sought was a ruling as to whether it would be competent to award punitive damages in the future course (*i.e.*, the re-hearing) of this case. The matter in issue would seem therefore to be within the scope of what was referred to in *Reg. v. Bertrand* L.R. 1 P.C. 520 where the prerogative was described as "the inherent prerogative right and on all proper occasions, the duty, of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, as far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally".

In circumstances which are somewhat special and are not often likely to arise their Lordships held therefore that they had jurisdiction to hear the limited matter referred to them. Its limits are manifest. Their Lordships are in no way concerned to express any opinion as to whether if punitive damages can in some libel cases be awarded, the evidence that was given on the hearing of this case before the Supreme Court was such as to justify an award of that nature. Their Lordships were not referred to the evidence previously given and have not seen it. It would not have been appropriate to have invited their Lordships to consider it. A new trial has been ordered and is to take place. The evidence which will have to be considered will be the evidence that will then be given. Their Lordships indulge in no surmise as to what that evidence will be. They give no ruling on the basis of any assumed or possible or probable content of that evidence. All that Counsel for the appellants now seek is that their Lordships should hold that the High Court erred in law in that they should have laid it down that punitive or exemplary damages in a libel action can only be awarded if a case can be brought within one of the categories described by Lord Devlin in his speech in *Rookes v. Barnard*.

In a careful and painstaking argument Counsel for the appellants analysed in detail the judgments delivered in the High Court. He submitted that if he could show that the expressed considerations or criticisms or some of them which led the majority to reject *Rookes v. Barnard* were not well founded then that case should have been followed on the basis that it was correct. Without commenting as to the logic of

such an approach their Lordships consider that the present enquiry must begin at an earlier stage. It is necessary to consider whether in Australia in the years before 1964 the law concerning the award of exemplary damages in a libel action was settled.

In *Whitfield v. De Lauret & Co. Ltd.* (1920) 29 C.L.R. 71 it was clearly recognised that exemplary damages may in certain circumstances be awarded. The case was not one in which the tort of defamation was involved but in regard to the awarding of damages in tort Knox C. J. said: "Damages may be either compensatory or exemplary. Compensatory damages are awarded as compensation for and are measured by the material loss suffered by the plaintiffs. Exemplary damages are given only in cases of conscious wrongdoing in contumelious disregard of another's rights." The judgment of Isaacs J. contained a valuable exposition of certain features of the law relating to damages. "Damages" he said "are in their fundamental character, compensatory. Whether the matter complained of be a breach of contract or a tort, the primary theoretical notion is to place the plaintiff in as good a position, so far as money can do it, as if the matter complained of had not occurred (see per Lord Blackburn in *Livingstone v. Rawyards Coal Co.* 5 Appeal Cases 25, 39). This primary notion is controlled and limited by various considerations, but the central idea is compensation, or, as Blackstone (Vol. II. p. 438) says—'compensation and satisfaction'." He then proceeded to point out that in certain cases (mainly torts) and in certain circumstances it had for long been accepted "by very eminent judges" that exemplary damages could be awarded and that such damages had been considered "to be punitive for reprehensible conduct and as a deterrent". He cited various descriptive words and phrases which had been employed judicially in reference to exemplary damages.

Without referring more elaborately to that decision their Lordships consider that at its date (1920) it was firmly accepted by the High Court that in cases of tort marked by conscious wrongdoing in contumelious disregard of another's rights it would be permissible in law for damages to include an element described broadly as being exemplary or punitive.

In *The Herald and Weekly Times Ltd. v. McGregor* 41 C.L.R. 254 which was a libel action there was a firm recognition of the principle that penal or vindictive damages could be awarded. There was a difference of opinion as to whether the summing-up had been correct or sufficient as to the way in which the jury should have taken into account the effect of a plea of justification. It was however accepted by all the judges that vindictive damages could be awarded if there was malice at the time of publication.

*Smith's Newspapers Limited and Another v. Becker* 47 C.L.R. 279 was a libel action in which many points were involved but the case proceeded on the basis that vindictive damages could be awarded in a libel action. Dixon J. in his judgment at p. 300 said that only by the exercise of a discretionary judgment could the question be solved as to what amount of damages "awarded to the victim of a public outrage is enough to serve at once as a *solatium*, vindication and compensation to him and a requital to the wrongdoer". McTiernan J. in his judgment (at p. 315) spoke of "the deserts of the respondent".

*Triggell v. Pheeney* 82 C.L.R. 497 was another libel action in which various points were involved but which proceeded on the basis that exemplary damages could be awarded in a libel action.

Their Lordships do not find it necessary to refer in any detail to cases relating to other torts (such cases as *Williams v. Hursey* 103 C.L.R. 30 and *Fontin v. Katapodis* 108 C.L.R. 177) which proceeded on the basis that exemplary damages could be awarded.

It would seem to be clear that it has been accepted by the High Court of Australia that if the circumstances give warrant for it there can in libel actions be awards of damages which in their assessment include both compensatory and exemplary elements. The exemplary element (as in cases of conscious wrongdoing in contumelious disregard of another's rights) has been variously described by the use of words such as vindictive, retributory, punitive.

A sustained argument was addressed to their Lordships to the effect that certain phrases or words used by the judges in 1920 in *Whitfield v. De Lauret* (supra) were the words or phrases used by Sir John Salmond in the then current edition (the 5th) of his authoritative Treatise on The Law of Torts and that by using them they were intending to adopt the theory of damages which underlay the passage in which Sir John Salmond employed them. In the 5th Edition at p. 129 is the passage:—

“Damages are further distinguishable as being either compensatory or exemplary. The latter are also known as vindictive or punitive. Compensatory damages are awarded as compensation for, and are measured by, the material loss suffered by the plaintiff. Exemplary damages, on the other hand, are a sum of money awarded in excess of any material loss and by way of *solatium* for any insult or other outrage to the plaintiff's feelings that is involved in the injury complained of. Thus, an assault may do no physical harm whatever; it may amount, for example, to a mere threat of violence; yet if it is committed in such a manner or in such circumstances as to be a grave attack upon the dignity of the plaintiff, he may recover very substantial damages for it. So a trespass to land may be committed with such insolent defiance of the rights of the plaintiff that a jury will be justified in awarding heavy damages although no actual loss is proved. So in an action by a father for the seduction of his daughter, the only actual loss which gives him a right of action is the loss of his daughter's services; yet damages are not limited to the amount of this loss, but are awarded in respect of the injury to his parental feelings and personal dignity. Exemplary damages, therefore, are given only in cases of conscious wrongdoing in contumelious disregard of another's rights.”

It was submitted that Sir John Salmond regarded exemplary damages as being only by way of *solatium* for the actual hurt to a plaintiff's feelings since he continued at p. 130 “It is often said that exemplary damages are awarded not by way of compensation for the plaintiff but by way of punishment for the defendant. It seems more accurate however to regard them as a *solatium* for wounded dignity and feelings: as a remedy for *injuria* in the sense in which Roman lawyers used that term.” Another argument was that words had been adopted by the Court from Sir John Salmond's treatise without a correct appreciation of the sense in which Sir John Salmond had employed them. It was submitted that error had crept into the law and that there had been perpetuation of error. Their Lordships were referred to many of the subsequent editions of Sir John Salmond's work and it was contended that though in later editions modifications of the passages cited were made they were made in order to accord with judicial utterances. The law had proceeded, it was submitted, without the adequate analysis which it received in *Rookes v. Barnard*.

Their Lordships must observe that they are concerned in this case with the law as laid down by the High Court of Australia. Without citing passages in detail it seems clear that it has been considered in Australia that in libel actions damages may exceed the figure which would be assessed solely by reference to the hurt to a plaintiff's reputation or to his actual feelings. It would have been misleading to have indicated that in certain circumstances damages could be intended to operate as a deterrent if their assessment had solely to have reference to actual harm suffered by a plaintiff. Whatever force there may or may not be in the submission that an alternative approach might have been desirable their Lordships



cannot think that there is any doubt as to the basis upon which the High Court have proceeded. Furthermore their Lordships cannot think that words or phrases denoting a punitive or deterrent element have been used other than deliberately and advisedly and with appreciation of their meaning.

If this be so then the question now arising would seem to be whether the High Court were in error in choosing to re-affirm Australian law as they had held it to be rather than to adopt the view proclaimed by the House of Lords in *Rookes v. Barnard*. Two conclusions are to be noted which were expressed by Lord Devlin in his speech (see p. 1226): the first was that the House "could not without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognise the exemplary principle": the second was that "there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal". It is quite clear that in so referring to the exemplary principle and to exemplary damages Lord Devlin was speaking of awards of damages which could not be explained as or be regarded as being compensatory. Lord Devlin denoted as exemplary damages the sort of damages referred to by Pratt C.J. in *Wilkes v. Wood* (1763) Lofft 1 when he said: "Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."

The issue before their Lordships becomes therefore whether the High Court while being abundantly justified in recognising "the exemplary principle" in the award of damages ought to have agreed that such awards of exemplary damages should only be made in cases falling within the limited categories which were described in *Rookes v. Barnard*. It was recognised in *Rookes v. Barnard* (see p. 1226) that an acceptance of the described or defined categories would "impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range".

The first category was "oppressive, arbitrary or unconstitutional action by the servants of the government". Such a category does not call for consideration in the present case. Cases in the second category were defined as being "those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff". In reference to this category it was said (see p. 1227):—

"It is a factor also that is taken into account in damages for libel: one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object—perhaps some property which he covets—which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay."

It was pointed out that to the two defined categories there should be added cases in which exemplary damages are expressly authorised by statute.

Various submissions were made to their Lordships. It was contended that what was said in *Rookes v. Barnard*, in so far as related to any tort other than that of intimidation, was *obiter*. It was contended further that the passage quoted above denoted that libel cases were virtually being segregated into a special or limited category of their own and were not

to be regarded as within the second defined category. It was said that libel cases had always been regarded as illustrations *par excellence* of cases in which exemplary damages could properly be awarded. Thus in the 12th Edition of Mayne & McGregor on Damages (1961) it is stated on p. 196 and p. 197 in reference to exemplary damages: "Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights. . . . Such damages are recognised to be recoverable in appropriate cases of defamation." It was contended that the opinion of Lord Devlin, having admitted in general terms the fact that libel actions against newspapers came within the second category (by virtue of the fact that all newspaper libels were in general the selling of a man's reputation for a profit) was not intending to deal with them in detail or to affect the existing law with regard to them and for that reason did not refer to them in detail. It was pointed out however that it had been accepted by the Court of Appeal in England that libel actions should be regarded as now being governed by what was said in *Rookes v. Barnard*. (See *McCarey v. Associated Newspapers Ltd.* [1965] 2 Q.B. 86; *Broadway Approvals Ltd. and Another v. Odhams Press Ltd. and Another* [1965] 1 W.L.R. 805.) A further contention related to the question as to how far there had been pronouncements in regard to damages in libel actions in the House of Lords. In *Rookes v. Barnard* it was said (at p. 1221): "There is not any decision of this House approving an award of exemplary damages and your Lordships therefore have to consider whether it is open to the House to remove an anomaly from the law of England." It was contended that though only one libel case was referred to in *Rookes v. Barnard*, that one (*Ley v. Hamilton* 153 L.T. 384) was a case in which the House in upholding the dissenting judgment of Scrutton L. J. in the Court of Appeal (151 L.T. 360) did in fact approve an award of exemplary damages. Submissions were made in regard to passages in the speech of Lord Atkin at p. 386 and it was contended that Lord Atkin was indicating that where exemplary damages can be and are to be awarded by a jury the figure of the award is not in fact reached by assessing a separate figure to represent the element of compensation and another separate figure to represent the punitive element and then adding those two separate figures together but rather by taking both elements into account in the process of arriving at one original figure. Reference was made to the speech of Lord Loreburn L. C. in *E. Hulton & Co. v. Jones* [1910] A.C. 20 in which he said (at p. 25): "In the second place the jury were entitled to say this kind of article is to be condemned. There is no tribunal more fitted to decide in regard to publications, especially publications in the newspaper Press, whether they bear a stamp and character which ought to enlist sympathy and to secure protection. If they think that the licence is not fairly used and that the tone and style of the libel is reprehensible and ought to be checked, it is for the jury to say so. . . ." It was contended that Lord Loreburn was either expressly or impliedly recognising that in the assessment of damages in libel the punitive as well as the compensatory element may be regarded.

Their Lordships do not find it necessary to record an opinion in regard to all these contentions. They might arise for consideration in some future case in England. The present case relates to the law in Australia and raises the question whether, if for the purposes of this case it be assumed that *Rookes v. Barnard* has categorised the cases in which in England exemplary damages may be awarded in libel cases, the High Court of Australia were wrong in deciding not to change the law in Australia as it had been understood to be. There are doubtless advantages if within those parts of the Commonwealth (or indeed of the English speaking world) where the law is built upon a common foundation development proceeds along similar lines. But development may gain

its impetus from any one and not from one only of those parts. The law may be influenced from any one direction. The gain that uniformity of approach may yield is however far less marked in some branches of the law than in others. In trade between countries and nations the sphere where common acceptance of view is desirable may be wide. Thus in *Monarch Steamship Co. Ltd. v. Karlshamns Olje-Fabriker (A/B)* [1949] A.C. 196 Lord Wright in his speech (at p. 231) expressed the view that it is desirable that as far as possible there should be uniformity between the law merchant as administered in the United States and in Britain. To a similar effect were the words of Viscount Simonds in his speech in *Riverstone Meat Co. Pty. Ltd. v. Lancashire Shipping Co. Ltd.* [1961] A.C. 807 at 841 when rejecting a view which involved a departure from "the prevailing harmony" of the law of England and the United States in relation to the carriage of goods by sea. But in matters which may considerably be of domestic or internal significance the need for uniformity is not compelling. Furthermore a decision on such a question as to whether there may be a punitive element in an assessment of damages for libel must be much affected by the fact, if fact it be, that in a particular country the law is well settled. There may be difficulty in a libel action in putting the measure of hurt to a plaintiff into money terms (whether the hurt can or can not be regarded as being of an aggravated nature). To seek to translate an injury to reputation into money terms imposes a task which is akin to that of equating incommensurables. There is however no difficulty in distinguishing between the notion of awarding money to a plaintiff solely to compensate him for his hurt and the notion of awarding money to him of an amount which may be increased because in assessing its amount regard may have been had to the conduct of the defendant.

The distinction between an award of damages which includes a punitive element and an award which is only designed to compensate was well in the mind of Lord Greene M.R. when in *Rooke v. Fairrie* (1941) 1 K.B. 507 he said at p. 516:—

"In a case of personal injury, apart possibly from the element of pain and suffering, the injury complained of is one which can be linked with a pecuniary valuation according to ordinary notions to a greater or less extent, but when you are dealing with damages in a libel case you are endeavouring to express in terms of money several different things which are not really susceptible of a money valuation in any true sense. You are considering the injury which the plaintiff has suffered which may or may not be capable of pecuniary valuation. You are considering the conduct of the defendant, because you may award punitive or exemplary damages against him. You are considering the deterrent effect, and so forth."

It is argued that it is an anomaly to allow the intrusion of any punitive element: such it is said ought more properly to be the concern of the criminal law. Here however is an issue which is resolved not so much by asserting that reasoning can lead to only one conclusion but rather by coming to a decision as to what the policy of the law should be.

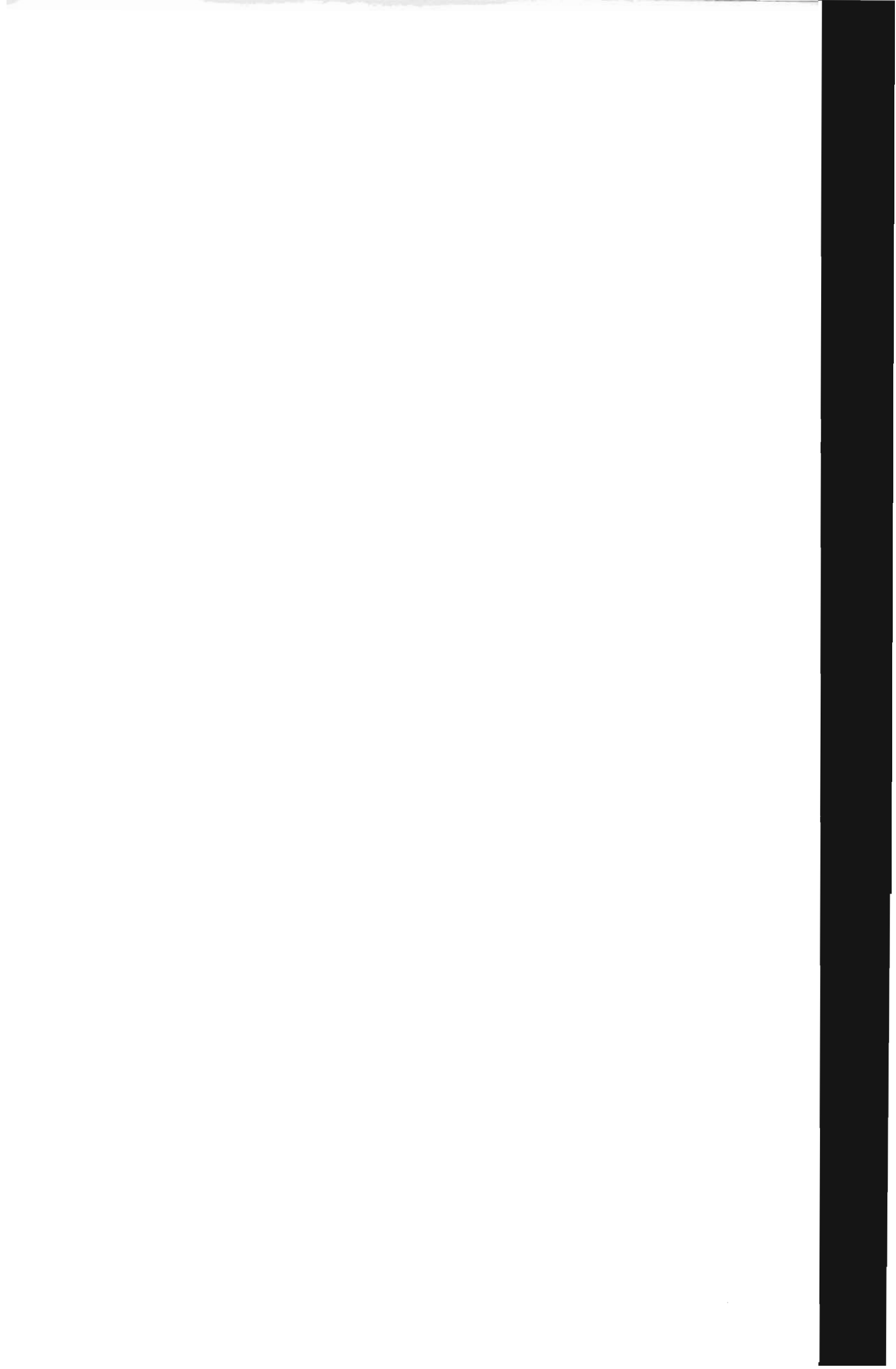
Their Lordships have expressed the view that it is not open to doubt that it was generally understood in Australia, in the years before *Rooke v. Barnard* was decided, that the awarding of exemplary damages in libel cases was not so circumscribed as to be permissible only within the limits of the categories defined in that case. Nor have their Lordships been able to accept that the law was laid down in Australia with imperfect appreciation of what it involved.

In analysing the nature of the damages which are awarded to a plaintiff for an injury to his reputation Windeyer J. pointed out that the amount of a verdict will often be the product of a mixture of inextricable considerations and that though the intentions and conduct of the defendant (in particular whether he was actuated by express malice) have always been regarded as important in estimating damages the harm that a plaintiff

suffers cannot be measured by and will not necessarily depend upon the motive or intentions of the defendant. There may be cases in which the existence of express malice in a defendant will bring it about that the plaintiff's feelings will be all the more hurt. But there may be cases in which the existence of express malice in a defendant will not in fact have added to the hurt experienced by the plaintiff. In such cases unless the existence of the malice is to be ignored, which would hardly be reasonable, the effect of considering it when assessing damages must be to introduce an element which is punitive rather than compensatory.

In addition to the submission that there was no sufficient reason why the right of a jury to award exemplary damages in appropriate cases should be placed within such narrow limits as the categories which were defined in *Rookes v. Barnard* it was also contended that there would be considerable difficulties and uncertainties in libel actions in bringing a case within the second category. "Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff." How it was asked is a plaintiff to prove that the defendant ever made such a calculation? How is he to prove that a defendant set out to make some specific profit or some direct pecuniary benefit out of the publication of the words complained of? Does "calculation" denote a deliberate mental process in a defendant involving firstly an assessment of the amount that a jury would or might award for the libel complained of assuming that exemplary damages cannot be awarded and secondly an assessment of the financial gain solely attributable to the publication of the libel? It was said that the words in the later sentence viz "Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrong-doing will probably exceed the damages at risk . . ." showed that a deliberate calculating process was denoted. Does that mean, it was asked, that a defendant who was indifferent to financial results and had no thought at all of profit but was actuated by venomous malice towards the plaintiff would be absolved from any risk of having to pay exemplary damages? Reference was made to the view expressed by Taylor J. when he said: — "I am quite unable to see why the law should look with less favour on wrongs committed with a profit-making motive than upon wrongs committed with the utmost degree of malice or vindictively, arrogantly or high-handedly with a contumelious disregard for the plaintiff's rights."

Their Lordships recite these various contentions but find it unnecessary to record final opinions in regard to them. The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processes of faulty reasoning or had it been founded upon misconceptions it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion it became a question for the High Court to decide whether the decision in *Rookes v. Barnard* compelled a change in what was a well settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable. Accordingly their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.



In the Privy Council

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AUSTRALIAN CONSOLIDATED PRESS  
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v.

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