Uren v John Fairfax & Sons Pty Ltd - [1966] HCA 40

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Malik v Syed [2025] NZCA 417 -
Northern Territory of Australia v Austral [2025] NTCA 3 (28 March 2025) (Grant CJ; Reeves and Burns JJ)

> 87. As adverted to in the consideration of the previous ground of cross-appeal, aggravated damages differ from exemplary damages. The purpose of an award of exemplary damages is to punish the wrongdoer and such damages are not awarded to compensate the wronged individual. In *Uren v John Fairfax & Sons Pty Ltd* , Windeyer J described the difference in the following terms:
>
> > [A]ggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment-moral retribution or deterrence. [53]
>
> *via*
>
> [53] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149.

Northern Territory of Australia v Austral [2025] NTCA 3 (28 March 2025) (Grant CJ; Reeves and Burns JJ)

> *Ali v Hartley Poynton Limited* [2002] VSC 113, *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419, *Binsaris & Ors v Northern Territory of Australia* (2020) 270 CLR 549, *Bird v DP (a pseudonym)* (2024) 98 ALJR 1349, *Byrnes v The Queen* (1999) 199 CLR 1, *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 , *Channel Seven Sydney Pty Ltd v Mahommed* (2010) 278 ALR 232, *Cheng v Farjudi* (2016) 93 NSWLR 95, *Fontin v Katapodis* (1962) 108 CLR 177, *Fox v Percy* (2003) 214 CLR 118, *Gipp v The Queen* (1998) 194 CLR 106, *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857, *Gray v Motor Accident Commission* (1998) 196 CLR 1, *Grierson v The King* (1938) 60 CLR 431,

Harvard Nominees Pty Ltd v Tiller (No 4) [2022] FCA 105, *Henry v Thompson* [1989] 2 Qd R 412, *House v The King* (1936) 55 CLR 499, *JB & Ors v Northern Territory of Australia* [2019] NTCA 1, *Lacey v Attorney-General* (Qld) (2011) 242 CLR 573 , *Lackersteen v Jones* (1988) 92 FLR 6, *Lamb v Cotogno* (1987) 164 CLR 1, *LO & Ors v Northern Territory of Australia* (2017) 317 FLR 324, *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, *New South Wales v Ibbett* (2006) 229 CLR 638, *New South Wales v Ibbett* (2005) 65 NSWLR 168, *Pollack v Volpato* [1973] 1 NSWLR 653, *State of New South Wales v Riley* (2003) 57 NSWLR 496, *Sweeney v Fitzhardinge* (1906) 4 CLR 716, *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 , *Victoria v Horvath* (2002) 6 VR 326, *Warren v Coombes* (1979) 142 CLR 531, *White & Ors v South Australia* (2010) 106 SASR 521, referred to.

Northern Territory of Australia v Austral [2025] NTCA 3 -
Northern Territory of Australia v Austral [2025] NTCA 3 -
Northern Territory of Australia v Austral [2025] NTCA 3 -
Rock v Henderson; Rock v Henderson (No 2) [2025] NSWCA 47 -
R v Skapik [2025] NSWCCA 19 -
State of New South Wales v JR; State of New South Wales v Dickens; State of New South Wales v Jensen [2024] NSWCA 308 (20 December 2024) (Gleeson, White and Stern JJA)

226. Aggravated damages are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like: *Lamb v Cotogno* (1987) 164 CLR 1 at 8; [1987] HCA 47. Aggravated damages are given to compensate the plaintiff when the harm done to him or her by a wrongful act was aggravated by the manner in which the act was done: *Uren v John Fairfax & Sons Pty Ltd* (1996) 117 CLR 118; [1966] HCA 40 (Windeyer J) .

State of New South Wales v JR; State of New South Wales v Dickens; State of New South Wales v Jensen [2024] NSWCA 308 -
Bishop of Wagga Wagga v TJ (a pseudonym) [2024] VSCA 262 (08 November 2024) (Beach and Orr JJA; J Forrest AJA)

Australian Consolidated Press Ltd v Uren (1967) 117 CLR 221; *Australian Iron and Steel Ltd v Greenwood* (19 62) 107 CLR 308; *Backwell v AAA* [1997] 1 VR 182; *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 ; *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211; *David Syme & Co Ltd v Mather* [1977] VR 516; *Gray v Motor Accident Commission* (1998) 196 CLR 1; *L amb v Cotogno* (1987) 164 CLR 1; *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332; *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208; *Swain v Waverly Municipal Council* (2005) 220 CLR 517; *Triggell v Pheeney* (1951) 82 CLR 497; *Tzouvelis v Victorian Railways Commissioners* [1968] VR 112; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 ; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, referred to.

Bishop of Wagga Wagga v TJ (a pseudonym) [2024] VSCA 262 -
Howe v Zuchowski [2024] VSCA 56 -
State of New South Wales v Madden [2024] NSWCA 40 -
State of Queensland v Morecroft & Anor [2024] QCA 11 (09 February 2024) (Morrison and Boddice JJA; Applegarth J)

62. The State relies on the decision in *Zhu* for the proposition that "it is possible to protect one's contractual rights by injunction even though they create no proprietary right". [48] There is no dispute about the correctness of that proposition, and therefore it is unnecessary to dwell on the facts of *Zhu* . It concerned a defence of justification for the tort of interference with contract. In the passage relied upon, the Court was concerned with the type of right that would be capable of supporting injunctive relief to restrain another party from exercising the contractual rights subjected to interference. The proposition that I have quoted from *Zhu* wa

s derived from the judgment of Windeyer J in *Brown v Heffer* . [49] In *Brown v Heffer* the Minister's consent was required for a transaction to be effective. The relevant right was the purchaser's right to have the vendor do nothing to his prejudice.

State of Queensland v Morecroft & Anor [2024] QCA 11 -
State of Queensland v Morecroft & Anor [2024] QCA 11 -
State of Queensland v Morecroft & Anor [2024] QCA 11 -
State of Queensland v Morecroft & Anor [2024] QCA 11 -
State of Queensland v Morecroft & Anor [2024] QCA 11 -
Kazal v Thunder Studios Inc (California) [2023] FCAFC 174 (03 November 2023) (Wigney, Wheelahan and Abraham JJ)

243. The English Court of Appeal's decision in *Burstein* sanctions the admission of evidence of directly relevant background facts in mitigation so that the assessment of damages does not occur "in blinkers". Prior to *Burstein* , there were established and limited circumstances in which evidence could be adduced in defamation proceedings as going solely to mitigation of damage. The limited circumstances were referred to by Gleeson JA in *Fairfax Digital Australia and New Zealand Pty Ltd v Kazal* [2018] NSWCA 77; 97 NSWLR 547 at [176]-[180] , which was cited with approval by the Full Court in *Australian Broadcasting Corporation v Wing* [2019] FCAFC 125; 271 FCR 632 at [94] (Besanko, Bromwich and Wheelahan JJ). In relation to facts concerning reputation, the question was governed by authorities such as *Scott v Sampson* (1882) 8 QBD 491, *Hobbs v Tinling (CT) & Co Ltd* [1929] 2 KB 1, *Plato Films v Speidel* [1961] AC 1090, *Dingle v Associated Newspapers Ltd* [1964] AC 371, and *Prager v Times Newspapers* [1988] 1 WLR 77. One aspect of these rules was that, generally, a party could not adduce evidence to justify an imputation in the absence of a plea of truth. Another was that evidence of specific incidents of misconduct, as opposed to evidence of general reputation, was usually inadmissible. In relation to facts that were in evidence on some other basis, such as in support of a defence that fails, it had long been the case that a court was entitled to take such evidence into account in assessing damages: see, *Chalmers v Shackell* (1834) 6 Car & P 475; 172 ER 1326; *Hicks v Gregory* (1904) 6 WALR 100 at 104 (Stone CJ). In relation to the circumstances of publication, the circumstances could be relevant to the presence or absence of malice, which might inform the assessment of damages: see, *Uren v John Fairfax Ltd* [1966] HCA 40; 117 CLR 118 at 151 (Windeyer J) , citing *Forsdike v Stone* (1868) LR 3 CP 607 (Willes J). The absence of malice as being relevant to mitigation of damage may arise if the publication was provoked by a publication about the defendant before the defamatory publication: *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1071 (Lord Hailsham). But there may be a difference for this purpose between provocation and deliberate retaliation. Now, under s 36 of the *Defamation Act 2005 (NSW)* and corresponding legislation, a court is to disregard the malice or other state of mind of the defendant at the time of publication of the matter, or at any other time, "except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff".

John XXIII College v SMA [2022] ACTCA 32 -
John XXIII College v SMA [2022] ACTCA 32 -
John XXIII College v SMA [2022] ACTCA 32 -
Rayney v The State of Western Australia [No 4] [2022] WASCA 44 (12 April 2022) (Buss P; Murphy JA; Corboy J)

Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40 ; (1966) 117 CLR 118

Rayney v The State of Western Australia [No 4] [2022] WASCA 44 -
Fairfax Media Publications Pty Ltd v Voller [2021] HCA 27 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Amaca Pty Ltd v Werfel [2020] SASCFC 125 -
Lewis v Australian Capital Territory [2020] HCA 26 (05 August 2020) (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ)

112. By contrast, aggravated damages are "compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like" [150] . They are "a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing" [151] .

via

[151] *Ibbett* (2006) 229 CLR 638 at 646 [31] . See also *Uren* (1966) 117 CLR 118 at 149.

Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Nationwide News Pty Ltd v Rush [2020] FCAFC 115 (02 July 2020) (White, Gleeson and Wheelahan JJ)

380. The Judge found that the appellants had engaged in aggravating conduct. His Honour did not award Mr Rush a separate sum as aggravated damages, but took account of the appellants' aggravating conduct in assessing damages for non-economic loss. This was the conventional approach. At common law, a separate award of damages on account of aggravating conduct of a publisher is not usually made, because it is not a discrete head of damage: *The Herald & Weekly Times Ltd v Popovic* [2003] VSCA 161; 9 VR 1 at [385] (Gillard AJA). That is because in a defamation case, a separate award on account of aggravating conduct would usually be difficult to assess, as the amount of an award of damages for non-economic loss "is the product of a mixture of inextricable considerations": *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118 (***Uren***) at 150 (Windeyer J); *Carson v John Fairfax & Sons Ltd* [1993] HCA 31; 178 CLR 44 (***Carson***) at 72 (Brennan J); *Lower Murray Urban and Rural Water Corp v Di Masi* [2014] VSCA 104; 43 VR 348 at [116] (Warren CJ, Tate and Beach JJA). Those inextricable considerations may include the conduct or malice of the publisher to the extent that it affected the harm sustained by the person defamed: *Defamation Act,* s 36 . The terms of s 35 of the *Defamation Act* do not change that position so as to require that aggravated damages be separately awarded: *Bauer Media* at [217]-[229] (Tate, Beach and Ashley JJA).

Nationwide News Pty Ltd v Rush [2020] FCAFC 115 (02 July 2020) (White, Gleeson and Wheelahan JJ)

472. The assessment by a judge of damages for non-economic loss in a defamation proceeding is an intuitive process where, subject to the statutory constraints in s 34 to s 36 of the Act, damages are at large. Because the assessment of damages is the subject of what Windeyer J referred to in *Uren* at 150 as "the product of a mixture of inextricable considerations", the question of their assessment does not admit of one correct answer. The correctness standard of appellate review described by Gageler J in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 at [41]-[49] applies to any findings of fact and to the application of legal principles in arriving at the assessment, but not to the assessment itself. In the absence of specific error, a claim on appeal that an award of damages for non-economic loss was manifestly excessive invokes the last of the bases for appellate review in *H ouse v The King* at 504-505 (Dixon, Evatt and McTiernan JJ). It is not enough, therefore, "that the judges composing the appellate court consider that, if they had been in the position of the Judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion": *House v The King* at 504-505 . The "contention that damages are manifestly excessive alleges that the result at which the Judge arrived is evidently wrong and that, although the nature of the error made may not be discoverable, there must have been a failure to properly exercise the discretion in fixing the amount to be awarded": *Rogers* at [62] (Hayne J). For that reason, what must be shown is *manifest* excess, and not just excess: *Rogers* at [64] (Hayne J).

Nationwide News Pty Ltd v Rush [2020] FCAFC 115 (02 July 2020) (White, Gleeson and Wheelahan JJ)

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430. Aggravated damages may be awarded by way of compensation for injury resulting from the circumstances and manner of a publisher's wrongdoing, such as conduct which manifests malice: *Uren* at 130 (Taylor J) and at 149 (Windeyer J); *Carson* at 71 (Brennan J); *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638 at [31] (the Court). Where malice is in issue, s 36 of the *Defamation Act* provides that the Court is to disregard the malice or state of mind of the defendant except to the extent that the malice or other state of mind affects the harm sustained by the plaintiff. The harm caused to a person by the conduct of the publisher, and the circumstances and manner of publication may be inferred: *Andrews* at [74] (Glass JA). As we have stated, in the present appeal there is no challenge to the Judge's findings in support of the conclusion that the manner in which the appellants published the defamatory matters aggravated the harm to Mr Rush.

Nationwide News Pty Ltd v Rush [2020] FCAFC 115 -
KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden [2020] NSWCA 28 (03 March 2020) (Basten, Payne and White JJA)

Association of Quality Child Care Centres of NSW v Manefield [2012] NSWCA 123; *Korean Times v Un Dok Pak* [2011] NSWCA 365; *Triggell v Pheeney* (1951) 82 CLR 497; [1951] HCA 23; *Uren v John Fairfax & Sons Ltd* (1966) 117 CLR 118; [1966] HCA 40 ; *Clark v Ainsworth* (1996) 40 NSWLR 463; *Randwick Labor Club v Amalgamated Television Services* [2000] NSWSC 906; *Polias v Ryall* [2014] NSWSC 1692; *Cantwell v Sinclair* [2011] NSWSC 1244 applied.

KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden [2020] NSWCA 28 -
State of South Australia v Holder [2019] SASCFC 135 (31 October 2019) (Kourakis CJ; Kelly and Stanley JJ)

25. Broadly, an award of exemplary damages will be justified where there is conscious wrongdoing in contumelious disregard of another's rights, [6] however an award of exemplary damages is not confined to contumelious conduct. [7] The defendant's conduct must be of such a character that it merits punishment, so that it must have been knowingly wanton, fraudulent, malicious, violent, cruel, insolent, high-handed or an abuse of power. [8] The conduct must be such that an award of compensatory damages does not sufficiently express the court's disapproval or (in cases where the defendant stood to gain more than the plaintiff lost) demonstrate that wrongful conduct should not be to the advantage of the wrongdoer. [9]

via

[8] See *State of New South Wales v Delly* (2007) 70 NSWLR 125, 143 [88] ; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 122 (McTiernan J); *Fontin v Katapodis* (1962) 108 CLR 177, 187.

State of South Australia v Holder [2019] SASCFC 135 -
Fairfax Media Publications Pty Ltd v Gayle; The Age Company Pty Ltd v Gayle; The Federal Capital Press of Australia Pty Ltd v Gayle [2019] NSWCA 172 (16 July 2019) (Bell P, Gleeson and Leeming JJA)

161. These grounds amount to a challenge to an essentially impressionistic evaluation of damages compensating for the defamatory publication. Those damages extend to the "consolation for the personal distress and hurt caused ... by the publication, reparation for the harm done to [personal reputation] and vindication": *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60 ; [1993] HCA 31. The process is "essentially a matter of impression and not addition": *Broome v Cassell & Co* [1972] AC 1027 at 1072. The award is the product of a mixture of inextricable considerations: *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150 ; [1966] HCA 40 .

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Northern Territory v Griffiths [2019] HCA 7 (13 March 2019) (KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ)

272. Neither of these two dimensions is dependent upon the particular subjective distress or mental suffering arising from the disruption to a person's life that follows the compulsory, rather than voluntary, nature of the deprivation of their rights. That is the province of an award of solatium. Awards described as "solatium" [325] have also been made in different fields in law, including the field of personal injury such as for "distress and suffering caused by the death" of a relative [326] , and in the field of defamation for the degree of "indignity and humiliation" caused by the defamation [327] .

via

[325] *Public Trustee v Zoanetti* (1945) 70 CLR 266 at 272-273, 276, 285-286, 290-291; [1945] HCA 26; *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150151 ; [1966] HCA 40 ; *Kaufmann v Van Rymenant* (1975) 49 ALJR 227 at 230; 6 ALR 153 at 160 ; *Jacobs v Varley* (1976) 50 ALJR 519 at 523, 526; 9 ALR 219 at 227, 233-234 ; *Astley v Austrust Ltd* (1999) 197 CLR 1 at 19 [40]; [1999] HCA 6. Compare *De Sales v Ingrilli* (2002) 212 CLR 338 at 382-383 [126]; [2002] HCA 52.

Northern Territory v Griffiths [2019] HCA 7 -
State of New South Wales v Cuthbertson [2018] NSWCA 320 (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 at 129–130 ; [1966] HCA 40 (Taylor J) ; see also Gray v Motor Accident Commission (1998) 196 CLR 1; [1998] HCA 70 at [100] (Kirby J).

State of New South Wales v Cuthbertson [2018] NSWCA 320 (17 December 2018) (Beazley P, McColl, Basten, Meagher and Payne JJA)

118. Aggravated damages are “given by way of compensation for injury to the plaintiff, though frequently intangible, resulting from the circumstances and manner of the defendant’s wrongdoing.” [4] They “bring the damages up to the upper end of the available range.” [5]

via

4. Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 at 129 – 130 per Taylor J; [1966] HCA 40 ; see also Gray v Motor Accident Commission (1998) 196 CLR 1; [1998] HCA 70 (Gray) at [100] per Kirby J.

State of New South Wales v Cuthbertson [2018] NSWCA 320 -
State of New South Wales v Cuthbertson [2018] NSWCA 320 -
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Fede v Gray by his tutor New South Wales Trustee and Guardian [2018] NSWCA 316 -
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The State of Western Australia v Cunningham [No 3] [2018] WASCA 207 -
The State of Western Australia v Cunningham [No 3] [2018] WASCA 207 -
Bauer Media Pty Ltd v Wilson (No 2) [2018] VSCA 154 -
Bauer Media Pty Ltd v Wilson (No 2) [2018] VSCA 154 -
Amaca Pty Ltd v Latz [2017] SASCFC 145 -
Amaca Pty Ltd v Latz [2017] SASCFC 145 -
Lesses v Maras (No 2) [2017] SASCFC 137 -

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Jensen v Legal Services Commissioner [2017] QCA 189 (01 September 2017) (Sofronoff P and Gotterson JA and Atkinson J)

Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118; [1966] HCA 40 , cited

Jensen v Legal Services Commissioner [2017] QCA 189 -
State of New South Wales v Bouffler [2017] NSWCA 185 (27 July 2017) (Beazley ACJ, Ward and Gleeson JJA)

286. Exemplary damages are different, although as Taylor J observed in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, at 130 , " *the same set of circumstances might well justify either an award of exemplary or aggravated damages*". Exemplary damages are not compensatory. Rather, they are essentially punitive in nature: see *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448. In *Uren v John Fairfax & Sons*, Windeyer J explained, at 154:

> "... there must ... be evidence of some positive misconduct to justify a verdict for exemplary damages. There must be evidence on which the jury could find that there, was, at least, a 'conscious wrong-doing in contumelious disregard of another's rights'."

State of New South Wales v Bouffler [2017] NSWCA 185 (27 July 2017) (Beazley ACJ, Ward and Gleeson JJA)

Exemplary damages are different, although as Taylor J observed in Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 at 130 ; [1966] HCA 40 , "the same set of circumstances might well justify either an award of exemplary or aggravated damages". Exemplary damages are not compensatory. Rather, they are essentially punitive in nature: see XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448; [1985] HCA 12. In Uren v John Fairfax & Sons, Windeyer J explained, at 154:

"... there must ... be evidence of some positive misconduct to justify a verdict for exemplary damages. There must be evidence on which the jury could find that there was, at least, a 'conscious wrongdoing in contumelious disregard of another's rights'."

State of New South Wales v Bouffler [2017] NSWCA 185 -
Hunter v Hanson [2017] NSWCA 164 -
Hunter v Hanson [2017] NSWCA 164 -
Feldman v GNM Australia Ltd [2017] NSWCA 107 (25 May 2017) (Beazley P, McColl and Macfarlan JJA)

119. As Lord Radcliffe said in *Dingle v Associated Newspapers Limited* ,[4] a libel action is fundamentally an action to vindicate a person's reputation "on some point as to which he has been falsely defamed, and the damages awarded have to be regarded as the demonstrative mark of that vindication." [5] The plaintiff must "be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge." [6] This is said to be particularly the case where "the defendant has not apologised and withdrawn the defamatory allegations." [7] Part of the role of vindication, as is apparent, is to be able to demonstrate to third parties that the defamer has borne the brunt of the award of damages as the price of the defamatory publication.

via

5. See also Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 (at 150); [1966] HCA 40 per Windeyer J .

Feldman v GNM Australia Ltd [2017] NSWCA 107 (25 May 2017) (Beazley P, McColl and Macfarlan JJA)

119. As Lord Radcliffe said in *Dingle v Associated Newspapers Limited* , [4] a libel action is fundamentally an action to vindicate a person's reputation "on some point as to which he has been falsely defamed, and the damages awarded have to be regarded as the demonstrative mark of that vindication." [5] The plaintiff must "be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge." [6] This is said to be particularly the case where "the defendant has not apologised and withdrawn the defamatory allegations." [7] Part of the role of vindication, as is apparent, is to be able to demonstrate to third parties that the defamer has borne the brunt of the award of damages as the price of the defamatory publication.

via

5. See also Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 (at 150); [1966] HCA 40 per Windeyer J.

Feldman v GNM Australia Ltd [2017] NSWCA 107 -
Gore v Australian Securities and Investments Commission [2017] FCAFC 13 -
Cheng v Farjudi [2016] NSWCA 316 (21 November 2016) (Beazley P, Ward JA and Harrison J)
BHP Billiton Ltd v Parker (2012) 113 SASR 206 ; [2012] SASCFC 73 Brockway v Pando (2000) 22 WAR 405 ; [2000] WASCA 192 Browne v Dunn (1893) 6 R 67 (HL) Carter v Walker (2010) 32 VR 1 ; [2010] VSCA 340 Channel Seven Sydney Pty Ltd v Mahommed (2010) 278 ALR 232 ; [2010] NSWCA 335 Cotogno v Lamb (No 3) (1986) 5 NSWLR 559 Cramer v Geraldton Building Co (2004) 29 WAR 410 ; [2004] WASCA 289 Daniels v Thompson [1998] 3 NZLR 22 ; [1998] NZCA 3 De Reus v Gray (2003) 9 VR 432 ; [2003] VSCA 84 Farjudi v Cheng [2015] NSWDC 297 Fernando v Commonwealth of Australia (2014) 231 FCR 251 ; [2014] FCAFC 181 Giller v Procopets (2008) 24 VR 1 ; [2008] VSCA 236 Gray v Motor Accident Commission (1998) 196 CLR 1 ; [1998] HCA 70 Herald & Weekly Times Ltd, The v Popovic (2003) 9 VR 1 ; [2003] VSCA 161 House v The King (1936) 55 CLR 499 ; [1936] HCA 40 Lamb v Cotogno (1987) 164 CLR 1 ; [1987] HCA 47 McFadzean v Construction, Forestry, Mining & Energy Union (2007) 20 VR 250 ; [2007] VSCA 289 Niven v SS [2006] NSWCA 338 Noye v Robbins [2010] WASCA 83 R v Mauger [2012] NSWCCA 51 Rookes v Barnard [1964] AC 1129 S v The Queen [2004] WASCA 113 State of New South Wales v McMaster (2015) 91 NSWLR 666 ; [2015] NSWCA 228 State of Victoria v Horvath (2002) 6 VR 326 ; [2002] VSCA 177 Tilden v Gregg [2015] NSWCA 164 Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 ; [1966] HCA 40 Vaysman v Deckers Outdoor Corporation Inc (2014) 222 FCR 387 ; [2014] FCAFC 60 W v W [1999] 2 NZLR 1 Whitbread v Rail Corporation NSW [2011] NSWCA 130 Whitfeld v De Lauret and Company Ltd (1920) 29 CLR 71 ; [1920] HCA 75 Wilson v Horne (1999) 8 Tas R 363 ; [1999] TASSC 33 XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448 ; [1985] HCA 12

Cheng v Farjudi [2016] NSWCA 316 -
Cheng v Farjudi [2016] NSWCA 316 -
Toben v Nationwide News Pty Ltd [2016] NSWCA 296 (04 November 2016) (Meagher, Ward and Payne JJA)

48. At the outset, I note that it seemed to be accepted by both sides that the purposes for which a plaintiff properly brings a defamation action are generally said to be: first, the vindication of his or her reputation; second, to receive compensation for the damaged reputation; and, third, to provide consolation for hurt and distress caused by the publication (*Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118; [1966] HCA 40 at 150 ; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44; [1993] HCA 31; *Packer v Meagher* [1984] 3 NSWLR 486 at 492). Dr Toben thus accepts that what the primary judge said at [44] of her reasons as to the purpose of defamation proceedings is correct. However, Dr Toben maintains that, in addition, a plaintiff in defamation proceedings has an entitlement to express his or her own views about the subject matter complained of.

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Brisciani v Piscioneri (No 4) [2016] ACTCA 32 -
Paciocco v Australia and New Zealand Banking Group Ltd [2016] HCA 28 (27 July 2016) (French CJ, Kiefel, Gageler, Keane and Nettle JJ)

7. In *Cavendish Square Holding BV v Makdessi* [15] , Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC (with whom Lord Carnwath JSC agreed) held that the rule against penalties was confined to cases arising out of contractual breach. Their disagreement with the scope of the law as stated in *Andrews* was emphatic, describing the decision as "a radical departure from the previous understanding of the law" [16] . Their Lordships' language echoed that of Menzies J in this Court half a century earlier in *Uren v John Fairfax & Sons Pty Ltd* [17] when he declared the limitation on recovery of exemplary damages prescribed by Lord Devlin in *R ookes v Barnard* [18] to be "a radical departure from what has been regarded as established law." It is not necessary for present purposes to engage with that characterisation of *Andrews* [19] . Gageler J expresses the view that it was incorrect and based upon a misunderstanding of the scope of what was actually decided in *Andrews* [20]. In any event, emphatic disagreement between our jurisdictions in relation to the common law and equitable doctrines, while infrequent, is not novel. The countries of the common law world have a shared heritage which they owe to the unwritten law of the United Kingdom. That shared heritage offers the undoubted advantage, but does not import the necessity, of development proceeding on similar lines [21] .

via

[17] (1966) 117 CLR 118 at 145 ; [1966] HCA 40 . See also at 160 per Owen J.

Paciocco v Australia and New Zealand Banking Group Ltd [2016] HCA 28 -
Paciocco v Australia and New Zealand Banking Group Ltd [2016] HCA 28 -
Machado & Anor v Underwood & Anor [2016] SASCFC 65 (03 June 2016) (Kourakis CJ; Gray and Nicholson JJ)

272. In *Uren v John Fairfax & Sons Pty Ltd* , Windeyer J expressed the function of compensatory damages in defamation as follows: [85]

> ... A man's reputation, his good name, the estimation in which he is held in the opinion of others, is not a possession of his as a chattel is. Damage to it cannot be measured as harm to a tangible thing is measured. Apart from special damages strictly so called and damages for a loss of clients or customers, money and reputation are not commensurables. It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation is here a solatium rather than a monetary recompense for harm measurable in money. ...

These remarks were adopted by Toohey J, writing for the majority in *Coyne v Citizen Finance Ltd* . [86] In the same case, Mason CJ and Deane J summarised the law concerning an award of damages in defamation proceedings in the following terms: [87]

> In a case where there is no question of punitive or exemplary damages or of the inflation of damages to the minimum amount necessary for purposes of vindication, defamation damages are confined to what can fairly be regarded as compensation for injury sustained. As Diplock L.J. pointed out in *McCarey v Associated Newspapers Ltd.* [No. 2], the injury sustained by the defamed person may be "classified under two heads: (1) the consequences of the attitude adopted towards him by other persons as a result of the diminution of the esteem in which they hold him because of the defamatory statement; and (2) the grief or annoyance caused by the defamatory statement to the plaintiff himself". The injury sustained by the plaintiff may, in some circumstances, be aggravated by subsequent conduct: see *Triggell*. Such aggravation does not, however, alter the compensatory character of the damages which may properly be awarded in such a case. Some injury to reputation — as distinct from specific pecuniary loss — is presumed to flow from the

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publication of the defamatory material. The extent of that presumed injury to reputation, if it is not rebutted, will depend on the circumstances of the case. If specific pecuniary loss (or other special damage) is alleged, it should be specifically claimed. Any such specific pecuniary loss must be affirmatively proved by a plaintiff in the ordinary way, that is to say, on the balance of probabilities.

[Footnotes omitted.]

via

[85] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 150.

Machado & Anor v Underwood & Anor [2016] SASCFC 65 -
Machado & Anor v Underwood & Anor [2016] SASCFC 65 -
Sahade v Bischoff [2015] NSWCA 418 (23 December 2015) (Basten and Gleeson JJA, Beech-Jones J)

184. The principles concerning the award of aggravated and exemplary damages were summarised by Sackville AJA in *State of New South Wales v Zreika* [2012] NSWCA 37 at [60] -[64] . It is unnecessary to repeat what was said there. In short, aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the defendant's wrongdoing. Exemplary damages are awarded to punish or deter the wrongdoer: *New South Wales v Ibbett* at [31] and [33] , citing with approval Taylor J in *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118 at 129-130 .

MacDougal v Mitchell [2015] NSWCA 389 (09 December 2015) (Meagher JA, Bergin CJ in Eq and Tobias AJA)

17. With respect to the applicant's claim for aggravated and/or exemplary damages articulated by him, the primary judge's reasons for disallowing such damages is contained in the following four paragraphs of his reasons:

> "61. Exemplary damages and punitive damages are damages over and above that necessary to compensate the Plaintiff and are awarded to punish defendants and provide rehabilitation and to act as both specific and general deterrents and demonstrate a court's disapproval of such conduct. They are rarely awarded and only where there is conduct and where there is 'high handed, insolent, vindictive or malicious conduct' amounting to a 'conscious wrongdoing or contumelious disregard of another's rights' (*Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR at 129 per Taylor J).
>
> 62. In the context of the assaults before me and the intoxicated state of the Second Defendant I do not think the assaults meet the test set out by the High Court in *Uren* (s upra) and I make no award for exemplary damages.
>
> 63. Aggravated damages are awarded to compensate a Plaintiff for increased mental suffering due to the manner in which a defendant behaved in committing the wrong or there other (Uren supra per Windeyer J at 149).
>
> 64. They are essentially compensatory in nature. In my view, my award to the Plaintiff for general damages is sufficient compensation and I disallow the claim for aggravated damages."

MacDougal v Mitchell [2015] NSWCA 389 -
MacDougal v Mitchell [2015] NSWCA 389 -
MacDougal v Mitchell [2015] NSWCA 389 -

Jackson v Abram [2015] SASCFC 175 (04 December 2015) (Peek, Stanley and Lovell JJ)

100. The judge identified the legal principles applicable to an award of exemplary or punitive damages as follows: [54]

> There are cases in which the court will award exemplary or punitive damages. The purpose of such damages is to punish and deter the defendant and other potential tortfeasors. In *Uren v John Fairfax & Sons Pty Ltd* [55] Owen J said at 158 that the Court may award damages:
>
> > ...over and above those required to compensate the plaintiff for the injury suffered by him if it forms the opinion... that the defendants conduct in committing the wrong was so reprehensible as to require that he should not only compensate the plaintiff for what he has suffered but should be punished for what he has done in order to discourage him and others from acting in such a fashion.
>
> The power to make an award of exemplary damages was also acknowledged in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 where Brennan J said at 471 that an award of exemplary damages:
>
> > Is intended to punish the defendant for conduct showing a conscious and contumelious regard for the plaintiff's rights and to deter him from committing like conduct again.
>
> Such damages are available in an action based on negligence but the plaintiff must establish that "the defendant can be seen to have acted consciously in contumelious disregard of the rights of the plaintiff." *Gray v Motor Accident Commission* (1998) 196 CLR 1.
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[55] (1966) 117 CLR 118 .

Fairfax Media Publications Pty Ltd v Pedavoli [2015] NSWCA 237 -
State of New South Wales v McMaster [2015] NSWCA 228 -
Tilden v Gregg [2015] NSWCA 164 (16 June 2015) (McColl, Macfarlan and Meagher JJA)

57. The appellant sought aggravated and exemplary damages. The relevant principles are sufficiently summarised by Sackville AJA in *State of New South Wales v Zreika* [2012] NSWCA 37 at [60] – [61] :

> ... Aggravated damages are given by way of compensation for injury to the plaintiff which, although frequently intangible, results from the circumstances and manner of the defendant's wrongdoing, while exemplary damages are awarded to punish and deter the wrongdoer: *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; 117 CLR 118, at 129-130 , per Taylor J , cited with approval in *New South Wales v Ibbett* [2006] HCA 57; 229 CLR 638, at 646-647 [31], [33] . Aggravated damages are assessed from the point of view of the plaintiff, but an award of exemplary damages is based on the conduct of the defendant: *NSW v Ibbett*, at [34]; *Gray v Motor Accident Commission* [1998] HCA 70; 196 CLR 1, at 7 [15], per Gleeson CJ, McHugh, Gummow and Hayne JJ. However, the same set of circumstances may justify an award of either aggravated or exemplary damages, or both: *NSW v Ibbett*, at 647 [33]. [34].
>
> Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future and to reflect "*detestation*" for the action: *Lamb v Cotogno* [1987] HCA 47; 164 CLR 1, at 8. Exemplary damages are awarded rarely and not every finding of fault warrants an award: *Lamb v Cotogno* , at 6 [12] . Nonetheless, such damages can be awarded in a wide variety of circumstances. Generally speaking, what is required for an award is "*conscious wrongdoing in contumelious disregard of another's rights*": *Gray v MAC*, at 7 [14].

Angeleska (known as Slaveska) v State of Victoria [2015] VSCA 140 (10 June 2015) (Warren CJ, Tate JA and Ginnane AJA)

115. Applying those principles to this case, it follows that Mrs Slaveska's claims in respect of Incidents 5 to 10, 12 and 13 were brought out of time *to the extent* that they claim damages that relate to personal injury. Nevertheless, while personal injury damages appear to be a significant part of the relief Mrs Slaveska seeks, it cannot be said that she has not claimed any other relief. Among other matters, Mrs Slaveska has alleged the deprivation of her liberty, violation of property rights, and conduct causing her to apprehend imminent harmful contact. In relation to all her claims, she has sought '[d]amages, including compensatory, aggravated and exemplary damages'.[105] Any nominal damages to which Mrs Slaveska may be entitled ought not to be regarded as 'related to personal injury'. [106] N or should any exemplary damages, given their punishment and deterrent function. [107] Ho wever, aggravated damages should be regarded as 'related to personal injury' to the extent that they compensate for personal injury [108] as opposed to the infringement of rights. [109]

via

[107] See *New South Wales v Ibbett* (2006) 229 CLR 638, 647 [33] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ), citing *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 .

Angeleska (known as Slaveska) v State of Victoria [2015] VSCA 140 -
Barrow v Bolt [2015] VSCA 107 (21 May 2015) (Ashley, Kaye and McLeish JJA)

52. Ultimately, the determination of the question will involve some consideration of the fundamental basis of a claim for damages for defamation. A cause of action in defamation is based on the publication of matter about a person, that would injure the reputation of that

person in the eyes of ordinary members of the community. However, the harm, that is recompensed by an award of damages, extends beyond compensation for the damaged reputation. In a frequently cited passage, Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* [35] stated:

> It seems to me that, properly speaking, a man defamed does not get compensation *for* his damaged reputation. He gets damages *because* he was injured in his reputation, that is because he was publicly defamed. For this reason, compensation by damages operates in two ways — as a vindication of the plaintiff to the public and as consolation to him for a wrong done. Compensation here is a solatium rather than a monetary recompense for harm measurable in money. [36]

via

[35] (1966) 117 CLR 118 , 150.

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Gacic v John Fairfax Publications Pty Ltd [2015] NSWCA 99 (16 April 2015) (McColl, Macfarlan and Barrett JJA)

91. It was in the context of that finding that the primary judge came to consider the issue of exemplary damages. The primary judge set out the legal principles concerning awards of exemplary damages in the following manner:

> "[282] In *Uren v John Fairfax & Sons Pty Ltd* [1965] – [1966] 117 CLR 118 at 149 , Windeyer J stated:
>
> > '... first, it is necessary to notice that, whatever be the position in torts other than defamation, the distinction between aggravated and exemplary damages is not easy to make in defamation, either historically or analytically; and in practice it is hard to preserve. The formal distinction is, I take it, that aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done:

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> exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment – moral retribution or deterrence.'
>
> [283] In *Uren* , Windeyer J at p 153 also stated that the decision in *Rookes v Barnard* [19 64] AC 1129 emphasised that exemplary damages must always be based on something more substantial than a jury's mere disapproval of the conduct of a defendant. His Honour further observed:
>
> > '... the decision makes clear too, if it was ever in any doubt, that all matters that may aggravate compensatory damages do not of themselves justify the addition or inclusion of the further purely punitive element ... The wrong must be one of a kind for which exemplary damages might be given; and the facts of the particular case must be such that exemplary damages could properly be given ... There must ... be evidence of some positive misconduct to justify a verdict for exemplary damages. There must be evidence on which the jury could find that there was, at least, a 'conscious wrongdoing in contumelious disregard of another's rights'. I select that particular phrase out of many, because it has been used more than once in this Court ...'
>
> [284] In *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 6, the High Court (Gleeson CJ, McHugh, Gummow and Hayne JJ) observed that:
>
> > 'Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their reward. Something more must be found. Although they are awarded rarely, they have been awarded in very different kinds of cases: ranging from abuse of governmental power ... through defamation cases of the kind considered in *Uren* , to assault cases ...'
>
> [285] Accordingly, it is now well established that the award of exemplary damages is an exceptional remedy in cases of conscious wrongdoing in contumelious disregard of a plaintiff's rights."

Gacic v John Fairfax Publications Pty Ltd [2015] NSWCA 99 (16 April 2015) (McColl, Macfarlan and Barrett JJA)

233. The principles relevant to exemplary damages are not in dispute. Such damages punish the defendant by way of "a penalty for a wrong committed in such circumstances or in such manner as to warrant the court's signal disapproval of the defendant's conduct". These are words used in *Uren v John Fairfax & Sons Pty Ltd* [199] by Taylor J who approved statements that exemplary damages are awarded only for "conscious wrongdoing in contumelious disregard of another's rights" or for "reprehensible conduct and as a deterrent". The first of these formulations is that of Knox CJ in *Whitfield v De Lauret & Co Ltd* [200] and was said by members of the High Court in *Gray v Motor Accident Commission* [201] to describe "at least the greater part of the relevant field".

Gacic v John Fairfax Publications Pty Ltd [2015] NSWCA 99 (16 April 2015) (McColl, Macfarlan and Barrett JJA)

99. My mind has wavered as to whether the circumstances warrant an award of exemplary damages. My original thought was that they should not. However, I have been persuaded by Barrett JA's pellucid analysis of the issue to the contrary view. It is not to point, on reflection, that the appellants may have the right to take further action to restrain the first respondent from continuing to publish the review (and, of course, the defamatory imputations) on its website. Rather, the first respondent's conduct in keeping the review on its website after the

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Court of Appeal judgment and the failure of its special leave application confirmed it had published an indefensibly defamatory review of and concerning the appellants manifested the "conscious wrongdoing in contumelious disregard" of their rights of which Windeyer J wrote in *Uren v John Fairfax & Sons Pty Ltd* . [88] That conduct can properly be characterised as more than "mere fault".

Gacic v John Fairfax Publications Pty Ltd [2015] NSWCA 99 (16 April 2015) (McColl, Macfarlan and Barrett JJA)

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> > '... the decision makes clear too, if it was ever in any doubt, that all matters that may aggravate compensatory damages do not of themselves justify the addition or inclusion of the further purely punitive element ... The wrong must be one of a kind for which exemplary damages might be given; and the facts of the particular case must be such that exemplary damages could properly be given ... There must ... be evidence of some positive misconduct to justify a verdict for exemplary damages. There must be evidence on which the jury could find that there was, at least, a 'conscious wrongdoing in contumelious disregard of another's rights'. I select that particular phrase out of many, because it has been used more than once in this Court ...'
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Fernando v Commonwealth [2014] FCAFC 181 (22 December 2014) (Besanko, Barker and Robertson JJ)
Uren v John Fairfax & Sons Pty Limited (1966) 117 CLR 118
Wall v Cooper

Fernando v Commonwealth [2014] FCAFC 181 -
State of New South Wales v Abed [2014] NSWCA 419 -
Vergara v Ewin [2014] FCAFC 100 -
Vergara v Ewin [2014] FCAFC 100 -
Vaysman v Deckers Outdoor Corporation Inc [2014] FCAFC 60 (22 May 2014) (Dowsett, Siopis and Besanko JJ)

26. However, in *Gray* , at [15] the majority, also referring to *Uren* said:

> In considering whether to award exemplary damages, the first, if not the principal, focus of the inquiry is upon the wrongdoer, not upon the party who was wronged. (The reaction of the party who is wronged to high-handed or deliberate conduct may well be a reason for awarding aggravated damages in further compensation for the wrong done. But it is not ordinarily relevant to whether exemplary damages should be allowed.) The party wronged is entitled to whatever compensatory damages the law allows (including, if appropriate, aggravated damages). By hypothesis then, the party wronged will receive just compensation for the wrong that is suffered. If exemplary damages are awarded, they will be paid in addition to compensatory damages and, in that sense, will be a windfall in the hands of the party who was wronged. Nevertheless, they are awarded at the suit of that party and, although awarded to punish the wrongdoer and deter others from like conduct, they are not exacted by the State or paid to it.

Vaysman v Deckers Outdoor Corporation Inc [2014] FCAFC 60 -
Cerutti v Crestside Pty Ltd [2014] QCA 33 (28 February 2014) (Margaret McMurdo P and Gotterson JA and Applegarth J)
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118; [1966] HCA 40 , cited

Cerutti v Crestside Pty Ltd [2014] QCA 33 -
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Casley v Australian Broadcasting Corporation [2013] VSCA 182 -
Day v The Ocean Beach Hotel Shellharbour Pty Ltd [2013] NSWCA 250 -
Roberts v Prendergast [2013] QCA 47 (15 March 2013) (Chief Justice, Fraser and Gotterson JJA,)

39. These contentions are flawed at two levels. At one level, in focusing upon proved actual injury to reputation, they overlook the principle affirmed by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* [17] that a person who is defamed "does not get compensation *for* his damaged reputation". The person "gets damages *because* (they were) injured in their reputation, that is simply because (they were) publicly defamed."

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via

[17] (1966) 117 CLR 118 at p 148 , cited by Lord Hailsham LC in *Broome* at 1071.

Roberts v Prendergast [2013] QCA 47 -
WAQ v Di Pino [2012] QCA 283 -
WAQ v Di Pino [2012] QCA 283 -
WAQ v Di Pino [2012] QCA 283 -
Dean v Phung [2004] NSWCA 223 -
Dean v Phung [2004] NSWCA 223 -
BHP Billiton Ltd v Parker [2012] SASCFC 73 (18 June 2012) (Doyle CJ; Gray and White JJ)

205. At common law, exemplary damages may be awarded as part of the damages for a tort involving a reprehensible disregard of the plaintiff's interests, often expressed in the phrase "a contumelious disregard of the plaintiff's rights". [23] Their purpose is to punish and deter the wrongdoer. Thus in *Uren v John Fairfax & Sons Pty Ltd,* [24] Owen J said:

> [A] jury may award damages over and above those required to compensate the plaintiff for the injury suffered by him if it forms the opinion, on evidence justifying that conclusion, that the defendant's conduct in committing the wrong was so reprehensible as to require not only that he should compensate the plaintiff for what he has suffered but should be punished for what he has done in order to discourage him and others from acting in such a fashion. [25]

In the same case, Windeyer J said that "exemplary damages ... are intended to punish the defendant, and presumably to serve one or more of the objects of punishment – moral retribution or deterrence". [26]

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via

[23] *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 (Knox CJ); *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 129 , 138 (Taylor J); *Gray v Motor Accident Commission* [1998] HCA 70 at [14]; (1998) 196 CLR 1 at 7.

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BHP Billiton Ltd v Parker [2012] SASCFC 73 -
BHP Billiton Ltd v Parker [2012] SASCFC 73 -
BHP Billiton Ltd v Parker [2012] SASCFC 73 -
BHP Billiton Ltd v Parker [2012] SASCFC 73 -
State of New South Wales v Zreika [2012] NSWCA 37 -
Facton Ltd v Rifai Fashions Pty Ltd [2012] FCAFC 9 (20 February 2012) (Lander, Gilmour & Gordon JJ)
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118 cited

Facton Ltd v Rifai Fashions Pty Ltd [2012] FCAFC 9 (20 February 2012) (Lander, Gilmour & Gordon JJ)

34. The distinction between aggravated damages and exemplary damages was identified by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149 :

> The formal distinction is, I take it, that aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment – moral retribution or deterrence.

Darcy v State of New South Wales [2011] NSWCA 413 -
Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 (24 May 2011) (Giles, McColl and Whealy JJA)

68. As Whealy JA has explained (at [235]) aggravated damages may be reduced if the plaintiff's own behaviour may have brought the attack on himself. This proposition is drawn from *Fonti n v Katapodis* and appears to depend on understanding the references in that case to exemplary damages included aggravated damages. That is because it was only in *Rookes v Barnard* that the distinction between aggravated and exemplary damages was explained and accepted in *Uren v John Fairfax & Sons Pty Ltd* : see Halsbury's, *Laws of Australia* , LexisNexis at [135-605].

Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
Whitbread v Rail Corporation New South Wales [2011] NSWCA 130 -
Siemer v Stiassny [2011] NZCA 106 (30 March 2011)

37. The second ground in *Flint v Lovell* , that of an "entirely erroneous estimate", poses greater difficulty in defamation cases. That is because the purpose of compensatory damages in defamation is primarily to remedy damage to reputation but also to recompense hurt feelings. As Windeyer J said in *Uren v John Fairfax & Sons Pty Ltd*: [31]

> It seems to me that, properly speaking, a man defamed does not get compensation for his damaged reputation. He gets damages because he was injured in his reputation ... For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as consolation to him for a wrong done.

via

[31] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 (HCA) at 150. Lord Hailsham in *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL) approved of that statement of principle at 1070-1071 .

Carter v Walker [2010] VSCA 340 -
Carter v Walker [2010] VSCA 340 -
Channel Seven Sydney Pty Ltd v Mahommed [2010] NSWCA 335 (07 December 2010) (Spigelman CJ at 1; Beazley JA at 2; McColl JA at 11; McClellan CJ at CL at 282; Bergin CJ in Eq at 283)

Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40; (1966) 117 CLR 118
Waterhouse v Broadcasting Station 2UE Pty Ltd

Channel Seven Sydney Pty Ltd v Mahommed [2010] NSWCA 335 (07 December 2010) (Spigelman CJ at 1; Beazley JA at 2; McColl JA at 11; McClellan CJ at CL at 282; Bergin CJ in Eq at 283)

> 150 A person who is defamed does not get compensation for his or her damaged reputation, but receives damages because s/he was injured in his or her reputation, that is simply because s/he was publicly defamed. For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as consolation to him or her for a wrong done: *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118 (at 150) per Windeyer J.

Channel Seven Sydney Pty Ltd v Mahommed [2010] NSWCA 335 -
Alishah v Gunns Ltd [2010] TASFC 6 (01 December 2010) (Evans, Blow and Tennent JJ)

> 10. The concept of penalty privilege was recognised prior to 1736, *Smith v Read* (1736) 1 Atk 527; 26 ER 332, and awards of damages of the nature of exemplary damages, which punish the wrongdoer, have been recognised since at least 1763: *Wilkes v Wood* (1763) Lofft 1; *Huckle v Money* (1763) 2 Wils KB 205; *Rookes v Barnard* [1964] AC 1129 at 1221 – 1222, and *Uren* (supra) at 152.

Alishah v Gunns Ltd [2010] TASFC 6 -
Alishah v Gunns Ltd [2010] TASFC 6 -
New South Wales v Radford [2010] NSWCA 276 (28 October 2010) (Beazley and Macfarlan JJA, Sackville AJA)
Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40; 117 CLR 118
Watson v Marshall

New South Wales v Radford [2010] NSWCA 276 -
Noye v Robbins [2010] WASCA 83 -
Noye v Robbins [2010] WASCA 83 -
Couch v Attorney-General (No 2) [2010] NZSC 27 (24 March 2010)

> [1] In 2002 the Privy Council in *Bottrill v A* held: [1]
>
> > [U]nder the common law of New Zealand the Court's jurisdiction to award exemplary damages in cases of negligence is not rigidly confined to cases where the defendant intended to cause the harm or was consciously reckless as to the risks involved.
>
> In the present appeal the Supreme Court overrules that decision and reinstates the view of the Court of Appeal in *Bottrill* . [2] I dissent from the conclusion. It reintroduces a "cause of action" condition for exemplary damages despite earlier rejection in New Zealand, Australia, and Canada of similar attempts in the United Kingdom at such restrictions as unprincipled and arbitrary. It requires construction of a "species of negligence" [3] in which intention or conscious recklessness is an element, in order to exclude a remedy of otherwise general application once liability in tort is established. The restriction is justified on the basis that exemplary damages are "anomalous". Such assessment rests in part on the erroneous but persistent view that making an example of the defendant is not a proper function of the law of torts. That view has been accurately characterised as question-begging. [4] It is unhistorical [5] and was rejected in New Zealand by all members of the Court of Appeal in *Taylor v Beere.* [6] There, by rejecting confinement of exemplary damages to categories, the Court of Appeal affirmed that they are awarded under a principle of general application.

via

[5] As described by Taylor J and Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 136–139 and 152–153 .

Couch v Attorney-General (No 2) [2010] NZSC 27 (24 March 2010)

[1] In 2002 the Privy Council in *Bottrill v A* held: [1]

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In the present appeal the Supreme Court overrules that decision and reinstates the view of the Court of Appeal in *Bottrill* . [2] I dissent from the conclusion. It reintroduces a "cause of action" condition for exemplary damages despite earlier rejection in New Zealand, Australia, and Canada of similar attempts in the United Kingdom at such restrictions as unprincipled and arbitrary. It requires construction of a "species of negligence" [3] in which intention or conscious recklessness is an element, in order to exclude a remedy of otherwise general application once liability in tort is established. The restriction is justified on the basis that exemplary damages are "anomalous". Such assessment rests in part on the erroneous but persistent view that making an example of the defendant is not a proper function of the law of torts. That view has been accurately characterised as question-begging. [4] It is unhistorical [5] an d was rejected in New Zealand by all members of the Court of Appeal in *Taylor v Beere.* [6] There, by rejecting confinement of exemplary damages to categories, the Court of Appeal affirmed that they are awarded under a principle of general application.

via

[4] By Lord Wilberforce in *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL) at 1114 ; and Cooke P in *Re Chase* [1989] 1 NZLR 325 (CA) at 332–333 . See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 130–131 per Taylor J and at 149–150 per Windeyer J . And see Nicholas McBride "Punitive Damages" in Peter Birks (ed) *Wrongs and Remedies in the TwentyFirst Century* (New York, 1996) 175, who says at 195 that it is "a conclusion masquerading as an argument".

Couch v Attorney-General (No 2) [2010] NZSC 27 (24 March 2010)

[54] The position in Australia is not as Lord Nicholls thought it to be. The central passage in the joint judgment in the decision of the High Court of Australia in *Gray v Motor Accident Commission* makes that quite clear: [157]

> No question arises here of an intentional wrong being committed by inadvertence. For present purposes it is enough to note two things. First, *exempl ary damages could not properly be awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant*. Ordinarily, then, questions of exemplary damages will not arise in most negligence cases be they motor accident or other kinds of case. But there can be cases, framed in negligence, in which the defendant can be shown to have acted *consciously* in contumelious disregard of the rights of the plaintiff or persons in the position of the plaintiff. (emphasis added)

An earlier passage[158] cited by Lord Nicholls, in which it is said that conscious wrongdoing in contumelious disregard of another's rights describes "at least the greater part" of the relevant field, was actually directed at the whole field of exemplary damages. It was not directed towards the narrower question of claims made in negligence and must be read in light of the central passage quoted above, which was. If that requires any confirmation, it is to be found in a subsequent judgment of the High Court, joined by one of the plurality Judges in *Gray* , Gummow J, in *New South Wales v Ibbett* . [159] There the Court recollected that it had previously said that there may be cases, framed in negligence, in which the defendant could be shown to have acted consciously in contumelious disregard of the rights of the plaintiff or

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persons in the position of the plaintiff. The significance comes from a footnote [160] which cites the passage from *Gray* quoted above and contrasts it with *Bottrill* (PC) and with the Canadian case of *Whiten v Pilot Insurance Co* . [161] By making the latter contrast in the judgment in *Ibbett* the High Court can only be taken to be indicating that the Supreme Court of Canada had not fully appreciated the intended effect of the passage from *Gray* , that is that "exemplary damages [cannot] properly be awarded in a case of alleged negligence in which there was no conscious wrongdoing by the defendant".

via

[157] *Gray v Motor Accident Commission* [1998] HCA 70, (1998) 196 CLR 1 at 9. This passage is entirely consistent with the approach earlier taken in *Lamb v Cotogno* (1987) 164 CLR 1 at 9 where the judgment of the Court cited with approval Brennan J's statement in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 15 CLR 448 at 471 that "an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again". Further back, the same requirement, drawn from the first edition of JW Salmond *The Law of Torts* (Stevens & Haynes, London, 1907) at 102 had been endorsed by Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 154.

Couch v Attorney-General (No 2) [2010] NZSC 27 -
Couch v Attorney-General (No 2) [2010] NZSC 27 -
Couch v Attorney-General (No 2) [2010] NZSC 27 -
Couch v Attorney-General (No 2) [2010] NZSC 27 -
Trad v Harbour Radio Pty Ltd [2010] NSWCA 41 (18 March 2010) (Tobias JA)

42 However, as the defendant accepted, injury to hurt feelings comprises only one of the elements that go to make up the totality of a plaintiff's compensatory damages when his reputation is traduced by a serious defamation. Thus, he is also entitled to damages for the social disadvantages that result, or may be thought likely to result, from the wrong that has been done to him. The law has long recognised that the vindication of the plaintiff is an essential part of the remedy in a defamation action. As was observed by Lord Hailsham LC in *Broome v Cassell & Co Ltd (No 1)* [1972] AC 1027 at 1071, the damages awarded must be sufficient "*to convince a bystander of the baselessness of the charge*". The plaintiff is entitled to be compensated for his damaged reputation and he is injured in that reputation simply because he has been publicly defamed: *Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40;* (1966) 117 CLR 118 at 150 ; see also *John Fairfax & Sons Pty Ltd v Kelly* (1987) 8 NSWLR 131 at 143 per McHugh JA.

New South Wales v Corby [2010] NSWCA 27 -
New South Wales v Corby [2010] NSWCA 27 -
Bracks v Smyth-Kirk [2009] NSWCA 401 -
Bracks v Smyth-Kirk [2009] NSWCA 401 -
Buckley v The Herald & Weekly Times Pty Ltd [2009] VSCA 118 -
Radio 2UE Sydney Pty Ltd v Chesterton [2009] HCA 16 -
Radio 2UE Sydney Pty Ltd v Chesterton [2009] HCA 16 -
Radio 2UE Sydney Pty Ltd v Chesterton [2009] HCA 16 -
Aktas v Westpac Banking Corporation Ltd [2009] NSWCA 9 -
Aktas v Westpac Banking Corporation Ltd [2009] NSWCA 9 -
Lindholdt v Hyer [2008] NSWCA 264 (24 October 2008) (Giles JA ; McColl JA; Basten JA)
Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40 ; (1966) 117 CLR 118
Warren v Coombes

Lindholdt v Hyer [2008] NSWCA 264 -
Coull v Nationwide News Pty Ltd [2008] NTCA 10 -
Ali v Nationwide News Pty Ltd [2008] NSWCA 183 (08 August 2008) (Tobias JA ; McColl JA ; Basten JA)

73 A person who is defamed receives damages because he or she has been injured in his or her reputation; that is, because he or she was publicly defamed. Damages in a defamation action vindicate the plaintiff to the public, and are consolation for a wrong done: *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118 at 150 per Windeyer J .

Ali v Nationwide News Pty Ltd [2008] NSWCA 183 (08 August 2008) (Tobias JA ; McColl JA ; Basten JA)
Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40 ; (1966) 117 CLR 118
Waterhouse v Broadcasting Station 2GB Pty Ltd

Radio 2UE Sydney Pty Ltd v Chesterton [2008] NSWCA 66 (17 April 2008) (Spigelman CJ at 1; Hodgson JA at 16; McColl JA at 31)

76 A person who is defamed gets damages because he or she was injured in his or her reputation, that is because he or she was publicly defamed. Damages in a defamation action vindicate the plaintiff to the public, and are consolation for a wrong done: *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118 (at 150) per Windeyer J.

Radio 2UE Sydney Pty Ltd v Chesterton [2008] NSWCA 66 -
State of New South Wales v Delly [2007] NSWCA 303 (06 November 2007) (Ipp JA 1; Tobias JA ; Basten JA)

113. The circumstances of aggravation relied upon were those identified as the effect on the Respondent of knowing that one of her daughters had witnessed her arrest, the failure of the police to comply with Part 10A of the *Crimes Act* 1900 (NSW) and advise her of her rights whilst under arrest, and the continuation of the custody for one hour after Superintendent Little had decided not to charge her: see [54]-[57] above. In *State of New South Wales v Riley* (20 03) 57 NSWLR 496 at [131] Hodgson JA suggested that one way of determining compensation in circumstances of aggravation is for the Court to aim "towards the upper limit of the wide range of damages which might conceivably be justified". However, it is not always clear how this approach will work in practice. For example, there will be varying degrees of aggravation; if one is to aim towards the upper end of the range for any significant circumstance of aggravation, what should one do with the most serious forms of aggravation? Further, one may ask why the 'upper end of the range' for a tort without elements of aggravation necessarily sets the limit for cases of serious aggravation. To speak of "the wide range of damages which might conceivably be justified", suggests a degree of flexibility in setting the range which in turn suggests that his Honour was giving general guidance, rather than formulating a principle. That conclusion is also supported by his Honour's reference to wrongdoing of a kind "that goes beyond ordinary human fallibility". That language appears in a passage which, correctly, focuses on the question of hurt to feelings caused by such wrongdoing and not the moral culpability of the tortfeasor: *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 151 (Windeyer J) . The culpability of the wrongdoer may have been seen as a way of assessing the seriousness of the hurt to feelings.

State of New South Wales v Delly [2007] NSWCA 303 (06 November 2007) (Ipp JA 1; Tobias JA ; Basten JA)
Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118
XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd

State of New South Wales v Delly [2007] NSWCA 303 -
New South Wales v Ibbett [2006] HCA 57 (12 December 2006) (Gleeson CJ; Gummow, Kirby, Heydon and Crennan JJ)

33. In *Uren v John Fairfax & Sons Pty Ltd* [14] , Taylor J, after observing that aggravated damages fix upon the circumstances and manner of the wrongdoing of the defendant, contrasted the function of exemplary damages as punishment and deterrent of the wrongdoer. His Honour added that [15] :

> "in many cases, the same set of circumstances might well justify either an award of exemplary or aggravated damages".

Subsequently, in *Lamb v Cotogno* [16] , in the joint reasons of five members of the Court, the conceptual distinction was drawn between the compensatory nature of aggravated damages and the punitive and deterrent nature of exemplary damages. Their Honours added that in some cases it might be difficult to differentiate between aggravated damages and exemplary damages. Gleeson CJ, McHugh, Gummow and Hayne JJ spoke in like terms in *Gray v Motor Accident Commission* [17] .

via

[14] (1966) 117 CLR 118 .

New South Wales v Ibbett [2006] HCA 57 (12 December 2006) (Gleeson CJ; Gummow, Kirby, Heydon and Crennan JJ)

39. Windeyer J later doubted whether the origin of the idea conveyed by the term "exemplary damages" was as recent as *Huckle* [24] . However that may be, what is well established is that an award of exemplary damages may serve "a valuable purpose in restraining the arbitrary and outrageous use of executive power" and "oppressive, arbitrary or unconstitutional action by the servants of the government". The words are those of Lord Devlin, no supporter of the general use of this remedy [25] . His Lordship added that [26] :

> "the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service".

via

[24] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 152153 ; see also *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 5 [8] .

New South Wales v Ibbett [2006] HCA 57 -
New South Wales v Ibbett [2006] HCA 57 -
New South Wales v Ibbett [2006] HCA 57 -
John Fairfax Publications Pty Ltd v Zunter [2006] NSWCA 227 -
John Fairfax Publications Pty Ltd v Zunter [2006] NSWCA 227 -
John Fairfax Publications Pty Ltd v Zunter [2006] NSWCA 227 -
Neilson v City of Swan [2006] WASCA 94 (31 May 2006) (Wheeler JA, Pullin JA , Buss JA)

Uren v John Fairfax & Sons Pty Limited (1966) 117 CLR 118

Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -
State of New South Wales v Ibbett [2005] NSWCA 445 (13 December 2005) (Spigelman CJ, Ipp and Basten JJA)

42 Further, as Fullagar J pointed out in *Midalco Pty Ltd v Rabenalt* [1989] VR 461 at 476-477, the joint judgment's references to "intention or recklessness" must be understood in the context of the case.

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The joint judgment referred with approval to *Fontin v Katapodis* (1962) 108 CLR 177 where Owen J, with whom Dixon CJ agreed, said at 187 that exemplary damages may be awarded "where the defendant has acted in a high handed fashion or with malice". Similarly in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 120 , Taylor J referred to the relevant test as conduct that had been "high handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights". Conduct which is "high handed" is not necessarily knowingly wrongful.

State of New South Wales v Ibbett [2005] NSWCA 445 -
New South Wales v Bryant [2005] NSWCA 393 -
New South Wales v Bryant [2005] NSWCA 393 -
John Fairfax Publications Pty Ltd v O'Shane (No 2) [2005] NSWCA 291 (31 August 2005)

22. The majority of the High Court in **Carson v John Fairfax & Sons Limited** (1993) 178 CLR 44 at 60-1 said:

"Specific economic loss and exemplary or punitive damages aside, there are three purposes to be served by damages awarded for defamation. The three purposes no doubt overlap considerably in reality and ensure that 'the amount of a verdict is the product of a mixture of inextricable considerations'. The three purposes are consolation for the personal distress and hurt caused to the appellant by the publication, reparation for the harm done to the appellant's personal and (if relevant) business reputation and vindication of the appellant's reputation (see **Uren v John Fairfax & Sons Pty Ltd** (1966) 117 CLR at 150). The first two purposes are frequently considered together and constitute consolation for the wrong done to the appellant. Vindication looks to the attitude of others to the appellant: the sum awarded must be at least the minimum necessary to signal to the public the vindication of the appellant's reputation. (See **Carson** (1991) 24 NSWLR at pp 296-299)."

Seabrook v Allianz Australia Insurance Limited [2005] QCA 58 -
Seabrook v Allianz Australia Insurance Limited [2005] QCA 58 -
Bashford v Information Australia (Newsletters) Pty Ltd [2004] HCA 5 (11 February 2004) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

123. What we now call the common law of defamation (with its division between libel and slander [138]) has not developed in a structured and ordered way; it is, as Gatley has noted, "firmly rooted in its historical origins, and [has not been] open to the development and rationalisation that is acceptable elsewhere in the common law" [139] . Pleas of publication on privileged occasions were a comparatively late development [140].

via

[139] *Gatley on Libel and Slander*, 9th ed (1998) at [1.11]. See *Uren v John Fairfax & Sons Pty Ltd* (196 6) 117 CLR 118 at 149-150 .

Herald & Weekly Times Ltd v Popovic [2003] VSCA 161 -
Herald & Weekly Times Ltd v Popovic [2003] VSCA 161 -
State of New South Wales v Riley [2003] NSWCA 208 (01 August 2003) (Sheller and Hodgson JJA, Nicholas J)

121 Then, he dealt with exemplary damages, as follows:

> *Both aggravated and exemplary damages are at large. There is therefore, even in cases where such damages are appropriate, very little guidance on the quantum. I have nonetheless been assisted by two recent decisions of the Court of Appeal, Adams v Kennedy (200 0) 49 NSWLR 78 and Lee v Kennedy (unreported) [2000] NSWCA*

> *153 . The first in particular bears some significant similarities to this case. Like this case Adams v Kennedy concerned an unlawful arrest during which the plaintiff was handcuffed behind his back while he was on the ground. However, one of his arms was wrenched in the process causing a massive rupture of the rotator cuff tendon. That injury was far more serious than any injury attributable to intentional acts on the part of the police officers in this case. There were also other respects in which the conduct of police officers in Adams v Kennedy were more reprehensible. For example, the police first arrived at the plaintiff's premises in that case uninvited in contrast to the response in this case to openly provocative behaviour on the part of the plaintiff.*
>
> *While an overall comparison of the facts in Adams v Kennedy with those before me would suggest that any award of exemplary damages if appropriate in this case should be less than the sum awarded in Adams v Kennedy, there are a number of reasons why exemplary damages should still be awarded. First of all there is the fact that, as in Adams v Kennedy, the arrest was made in breach of the procedures laid down to prevent arbitrary arrest. In this case Senior Constables Wallace and Heinjus exceeded the orders given by their Field Commander which were restricted to interception and search. Secondly, the plaintiff was subjected to application of physical force entirely out of proportion to the limited threat, if any, presented by him immediately preceding his arrest. Thirdly, although in this regard care has to be taken not to duplicate aggravated damages, the forceful detention of the plaintiff persisted in the face of the falling away of any grounds to justify such detention. The conduct of the police officers in those circumstances was highhanded and displayed a "contumelious disregard of the plaintiff's rights" (Uren v John Fairfax and Sons Pty Ltd (1966) 117 CLR 118). The plaintiff is entitled to a substantial sum byway of exemplary damages which I assess at $40,000.*

Amalgamated Television Services Pty Ltd v Marsden (No 2) [2003] NSWCA 186 (09 July 2003) (Beazley, Giles and Santow JJA)

Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118

Amalgamated Television Services Pty Ltd v Marsden (No 2) [2003] NSWCA 186 -
De Reus v Gray [2003] VSCA 84 -
De Reus v Gray [2003] VSCA 84 -
De Reus v Gray [2003] VSCA 84 -
State of New South Wales v Mastronardi [2003] NSWCA 72 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 (07 February 2003) (Spigelman CJ Mason P Heydon JA)

These usages correspond with the traditional language of the courts in discussing exemplary damages: for example, *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149 per Windeyer J ("exemplary damages ... are intended to punish the defendant, and presumably to serve one or more of the objects of punishment – moral retribution or deterrence"); *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [15] (exemplary damages are "awarded to punish the wrongdoer and deter others from like conduct" per Gleeson CJ, McHugh, Gummow and Hayne JJ). In *Rookes v Barnard* [1964] AC 1129 at 1266 Lord Devlin said the award of exemplary damages admitted "into the civil law a principle which ought logically to belong to the criminal". In *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1086 Lord Reid said:

Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 (07 February 2003) (Spigelman CJ Mason P Heydon JA)

Ltd (1966) 117 CLR 118 at 149 per Windeyer J ("exemplary damages ... are

Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -

Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Harris v Digital Pulse Pty Ltd [2003] NSWCA 10 -
Amalgamated Television Services Pty Ltd v Marsden [2002] NSWCA 419 -
Amalgamated Television Services Pty Ltd v Marsden [2002] NSWCA 419 -
Amalgamated Television Services Pty Ltd v Marsden [2002] NSWCA 419 -
Chen v Karandonis [2002] NSWCA 412 (18 December 2002) (Beazley, Heydon and Hodgson JJA)

84 Exemplary damages are available where a party engages in *"conscious wrongdoing in contumelious disregard of another's rights"*: see *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77 per Knox CJ. As is pointed out in Luntz's Assessment of Damages for Personal Injury and Death, 4th Ed, this phrase has become a term of art. Luntz, at para 1.7.4 expands upon this, describing the conduct necessary to ground an award of exemplary damages as being *"of such a character that it merits punishment, so that it must have been knowingly wanton, fraudulent, malicious, violent, cruel, insolent, high-handed or an abuse of power"*. He points out that:

> "all these descriptors have been used: see *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 122 per McTiernan J (approving a statement of the pre- *Rookes v Barnard* law in *Mayne & McGregor on Damages* , 12th Ed, Sweet & Maxwell, London, 1961, p 196), 143 and 147 per Menzies J, 153 per Windeyer J (warning that 'exemplary damages must always be based upon something more substantial than a jury's mere disapproval of the conduct of the defendant'), 161 per Owen J. See also *Fontin v Katapodis* (1962) 108 CLR 177 at 187 (where defendant has acted in high-handed fashion or with malice); *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 212 per Windeyer J (restricted to more flagrant instances of conscious wrongdoing)."

Roberts v Bass [2002] HCA 57 -
State of Victoria v Horvath [2002] VSCA 177 (07 November 2002) (Winneke, P., Chernov and Vincent, Jj. A)

60. Again we think that there is merit in these contentions. His Honour's reasons for decision up to the point where he came to assess damages appear to us to be an exercise of logic and clarity, pointing to a police exercise which was ill motivated and clumsily conceived and executed. However the assessment of damages - and particularly exemplary damages – against Christensen seems to us to have been governed, not so much by principles which ought to be employed in assessing such damages, but rather as a means through which the plaintiffs could be assured of recovering compensation from the State via the provisions of s. 123 of the Act . Exemplary damages are rarely awarded but, when they are, they are awarded to punish conscious wrongdoing in contumelious disregard of another's rights [22] . "Contu melious" is not a word which enjoys wide currency in modern society but, when used in the context in which the law uses it, is calculated to describe conduct which is disgraceful, humiliating or contemptuous of the rights of others. Although the law of this country recognizes a wider range of circumstances in which exemplary damages can be awarded than is recognized in England [23] , they will rarely be awarded in actions for negligence, and are not appropriate to cases of negligent acts or omissions unaccompanied by conscious wrongdoing [24] . It is, of course, in the nature of a police officer's duty that he or she is constantly in contact with members of the community. As we have previously noted, the officer will frequently be placed in a situation where he or she has to make "on the spot decisions" which will have ramifications for citizens who are affected by that decision. The decision might be such that more time and calmer reflection will, with hindsight, suggest it was wrong or even unreasonable, and give rise to a claim in damages for negligence [25] . However, if the conduct of the police officer is done "reasonably in the course of the officer's duty", and is done in "good faith", it seems to us that such conduct must be the antithesis of conduct which should be punished by an award of exemplary damages; namely conscious wrongdoing in contumelious disregard of the rights of those affected by it. That is why

counsel for the State attacked his Honour's findings in relation to Christensen as "contradictory in terms" and as findings "of convenience" made very much with the consequences of s. 123 of the Act in mind. Mr. Wheelahan, who represented Mr. Christensen on this appeal, made "common cause" with counsel for the State on this issue.

via

[23] *Uren v. John Fairfax & Sons Pty. Ltd.* (1966) 117 C.L.R. 118 .

Finesky Holdings Pty Ltd v Minister For Transport For Western Australia [2002] WASCA 206 (02 August 2002) (Wallwork, Steytler and Parker JJ)

Uren v John Fairfax & Sons Ltd (1966) 117 CLR 118

Finesky Holdings Pty Ltd v Minister For Transport For Western Australia [2002] WASCA 206 (02 August 2002) (Wallwork, Steytler and Parker JJ)

51. On the face of it, this submission flies in the face of long accepted principles governing the assessment of damages for torts. The general principle upon which compensatory damages are assessed in tortious actions is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as that in which it would have been had the tort not been committed (see, for example, ***Butler v The Egg and Egg Pulp Marketing Board*** (1966) 114 CLR 185 at 191 and ***Haines v Bendall*** (1991) 172 CLR 60 at 63), although the Court has, in appropriate cases, been prepared to award aggravated and/or exemplary damages (see ***Uren v John Fairfax & Sons Ltd*** (1966) 117 CLR 118 at 149 150).

TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 (25 March 2002) (Spigelman CJ, Mason P and Grove J)

The trial judge erred by failing to separately identify the amount awarded for exemplary damages. *Uren v John Fairfax & Sons Pty Ltd* (1965-1966) 117 CLR 118 ; *Gray v Motor Accident Commission* (1998) 196 CLR 1; *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty* Ltd (1984-1985) 155 CLR 448 ; *Lee v Kennedy* [2000] NSWCA 153; *Adams v Kennedy* (2000) 49 NSWLR 78; *Henry v Thompson* [1989] 2 Qd R 412 discussed. *Lamb v Cotogno* (1987) 164 CLR 1; *Caltex Oil (Australia) Pty Ltd v XL Petroleum (NSW) Pty Ltd* [1982] 2 NSWLR 852 referred to. *Johnstone v Stewart* [1968] SASR 142 disapproved.

TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 (25 March 2002) (Spigelman CJ, Mason P and Grove J)

Uren v John Fairfax & Sons Pty Ltd (1965-1966) 117 CLR 118
Wasson v California Standard Co

TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 (25 March 2002) (Spigelman CJ, Mason P and Grove J)

156 It is understandable why her Honour combined aggravated and exemplary damages in a single award. The distinction between the two is sometimes "hard to preserve" in practice, so that the distinction may be "dealing more in words than ideas". (Per Windeyer J in *Uren v John Fairfax & Sons Pty Ltd* (1965-1966) 117 CLR 118 at 149 , 152 , a case concerned with the special field of damages for defamation.)

TCN Channel Nine Pty Ltd v Anning [2002] NSWCA 82 -
Weir v Tomkinson [2001] WASCA 77 -
Weir v Tomkinson [2001] WASCA 77 -
Hunter Area Health Service v Marchlewski [2000] NSWCA 294 -
Hunter Area Health Service v Marchlewski [2000] NSWCA 294 -
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Hesketh v Joltham P/L [2000] QCA 44 (29 February 2000) (McMurdo P, Pincus JA and Jones J,)

17. There is of course a distinction between aggravated damages and exemplary damages; the former are to compensate a plaintiff for the harm done by a wrongful act aggravated by the manner in which it was done, whilst the latter are to punish a defendant: see *Uren v John Fairfax & Sons Pty Ltd* . [8]

Hesketh v Joltham P/L [2000] QCA 44 -
Hesketh v Joltham P/L [2000] QCA 44 -
Hesketh v Joltham P/L [2000] QCA 44 -
Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

12. Exemplary damages are awarded rarely. They recognise and punish fault, but not every finding of fault warrants their award. Something more must be found. Although they are awarded rarely, they have been awarded in very different kinds of case: ranging from abuse of governmental power exemplified by *Wilkes v Wood* and its associated cases [16] , through defamation cases of the kind considered in *Uren* , to assault cases such as *Fontin v Katapodis* [17] . And the examples could be multiplied[18].

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

122. In the landmark decision of *Uren v John Fairfax & Sons Pty Ltd* [195] , signalling an intention of this Court to depart whenever it might be thought appropriate to do so from decisions of the House of Lords, the High Court decided not to follow or apply *Rookes v Barnard* [196] :

> "Upon full consideration, I do not think that the decision of the House of Lords [in *Rookes v Barnard*] should force this Court to conclude that the law here is other than what it has for so long been taken to be, viz. that where an action is based upon a personal wrong and the defendant has acted arrogantly, mindful only of its own interests and, to use the phrase of Knox CJ, 'in contumelious disregard' of the rights of the plaintiff, 'damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner' for his outrageous conduct [197] ."

via

[196] (1966) 117 CLR 118 at 147 per Menzies J .

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

33. At the end of his submissions, counsel for the respondent sought leave [53] to reopen the decision in *Lamb v Cotogno* . That application might properly be described as belated. But even if it had been made earlier, we would have declined to reopen the decision. It is a recent judgment of the Court in which the five Justices who heard the matter gave a single set of reasons. Those are matters which may themselves be sufficient reason for refusing to reopen *Lamb v Cotogno* . But in addition to those considerations, it is as well to recall that no application was made to reopen and reconsider the logically anterior questions about the availability of exemplary damages that were decided in *Uren* and the other cases we have mentioned. The leave sought should be refused.

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

6. The distinction between aggravated and exemplary damages is often drawn. In *Uren v John Fairfax & Sons Pty Ltd* [2] , Windeyer J noted that it is a distinction that is "not easy to make in defamation, either historically or analytically and in practice it is hard to preserve" [3] . Never theless, in the present context, it is a distinction which it is as well to bear in mind, if only to attempt to ensure greater accuracy of expression. In *Uren* , Windeyer J described the difference as being:

> "that aggravated damages are given to compensate the plaintiff when the harm done to him by a wrongful act was aggravated by the manner in which the act was done: exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment moral retribution or deterrence." [4]

via

[4] (1966) 117 CLR 118 at 149.

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

16. There is an appearance of tension between using civil proceedings to compensate a party who is wronged and using the same proceedings to punish the wrongdoer. But there is a tension only if it is assumed that "... a sharp cleavage between criminal law on the one hand and the law of torts and contract on the other is a cardinal principle of our legal system"[26]. As Windeyer J points out in *Uren* , the "roots of tort and crime" are "greatly intermingled" [27] . And it is not only the roots of tort and crime that are intermingled. The increasing frequency with which civil penalty provisions are enacted [28] , the provisions made for criminal injuries compensation [29] , the provisions now made in some jurisdictions for the judge at a criminal trial to order restitution [30] or compensation to a person suffering loss or damage (including pain and suffering) as a result of an offence [31] all deny the existence of any "sharp cleavage" between the criminal and the civil law. The tension we have mentioned may therefore be more apparent than real.

via

[27] (1966) 117 CLR 118 at 149. See also *Prosser and Keeton on The Law of Torts*, 5th ed (1984) at 7-9.

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

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Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

100. The difficulty of distinguishing between aggravated damages and exemplary damages has been acknowledged by this Court [158] . To some extent compensatory, aggravated and exemplary damages overlap [159] . Thus, compensatory damages themselves may, to some degree, fulfil the purposes for which exemplary damages exist. These are ambiguous concepts[160] and, at least in part, anomalous[161]. However, it is clear that, by Australian law, compensatory damages may be enlarged to include a component for the aggravated circumstances in which a wrong to the plaintiff has occurred [162] . It is perhaps because of the lack of complete clarity of the differentiating features of aggravated damages [163] , and doubts as to what they involve, that legal practitioners often fail to claim them and persons wronged often fail to recover them. This is doubtless why it has been proposed that the "misleading phrase", aggravated damages, should be replaced by a specific component of damages for mental distress[164]. The danger of double counting in the provision of aggravated damages is an ever present one [165] . The differentiation between "aggravated damages" and "exemplary damages" became more marked following *Rookes v Barnard* [166] . I t assumes critical importance in those jurisdictions where exemplary damages, as such, have been abolished by statute.

via

[162] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 129-130 , 149 ; *Justin v Associated Newspapers Ltd* (1966) 86 WN (Pt 1) (NSW) 17 at 42, 44; *Rigby v Associated Newspapers Ltd* (1966) 68 SR (NSW) 414 at 430-432, 438-439 .

Gray v Motor Accident Commission [1998] HCA 70 (17 November 1998) (Gleeson Cj,mchugh, Gummow, Kirby, Hayne and Callinan JJ)

8. Exemplary damages have been awarded since at least the 18th century. Windeyer J [6] doubt ed "whether the famous cases concerning Wilkes and the *North Briton* should be regarded as the origin of the idea" conveyed by the expression "exemplary damages". Rather, the matter depended upon "how far
you wish to go back and how much certainty you demand in the connecting links". In *Wilkes v Wood* [7] Lord Chief Justice Pratt said [8] :

> "I have formerly delivered it as my opinion on another occasion, and I still continue of the same mind, that a jury have it in their power to give damages for more than the injury received. 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."

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via

[6] *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 152.

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Chakravarti v Advertiser Newspapers Ltd [1998] HCA 37 -
Commonwealth v Mewett [1997] HCA 29 (31 July 1997) (Brennan CJ; Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ)

[178] (1966) 117 CLR 118 at 149.

Kruger v the Commonwealth [1997] HCA 27 -
Timms v Clift [1997] QCA 61 -
Timms v Clift [1997] QCA 61 -
Carson v John Fairfax & Sons Ltd [1993] HCA 31 (16 June 1993) (Mason CJ; Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)

24. In Uren v. John Fairfax Ltd. and Sons, Windeyer J pointed out ((185) (1966) 117 CLR, at pp 151-152 .) that "in truth a punitive or vindictive element does lurk in many cases in which the damages were aggravated by the defendant's conduct". In the same case, Taylor J said ((186) ibid, at p 130.) "that the same set of circumstances might well justify either an award of exemplary or aggravated damages". This was in accord with the statement of Lord Devlin in Rookes v. Barnard ((187) (1964) AC, at p 1230 .) that aggravated damages can do most if not all the work which can be done by exemplary damages.

Carson v John Fairfax & Sons Ltd [1993] HCA 31 (16 June 1993) (Mason CJ; Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)

The appellant also provided particulars of matters relied upon in his claim for aggravated damages. While exemplary or punitive damages are unavailable in defamation actions in New South Wales ((1) s.46(3)(a).), aggravated damages may be awarded. For the moment, it suffices to say that aggravated damages, awarded to reflect conduct by the defendant which aggravates the injury and increases the harm done to the appellant, are compensatory in nature ((2) Triggell v. Pheeney (1951) 82 CLR 497, at pp 513-514 ; Uren v. John Fairfax and Sons Pty. Ltd. (1966) 117 CLR 118 , at pp 149-154 ; Coyne v. Citizen Finance Ltd. (1991) 172 CLR 211, per Mason CJ and Deane J at p 216 ; Broome v. Cassell and Co. (1972) AC 1027, per Lord Reid at pp 1085-1086 .) and available both at common law and under the Act. The appellant relied upon a number of matters including the fact that the

articles had been published without any prior attempt to make inquiries of the appellant, evidence that prior to publication Mr Slee knew that the imputations in the first article were false and the absence of any proper apology.

Carson v John Fairfax & Sons Ltd [1993] HCA 31 (16 June 1993) (Mason CJ; Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)

17. In Uren v. John Fairfax and Sons Pty. Ltd., Windeyer J explained the purpose of an award of damages in a defamation action. His Honour said ((175) (1966) 117 CLR, at p 150 .) :

Carson v John Fairfax & Sons Ltd [1993] HCA 31 (16 June 1993) (Mason CJ; Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ)

12. Before turning to the effect of the Act, it is convenient to begin by examining the concept of aggravated damages at common law. Damages in a defamation action are "the product of a mixture of inextricable considerations" ((164) Uren v. John Fairfax and Sons Pty. Ltd. (1966) 117 CLR 118 , at p 150 ; see also Broome v. Cassell and Co. (1972) AC 1027, at p 1072.). It can also be said that they are a mixture of conflicting considerations which are the result of defamation being both a tort and a crime. One consideration is the state of mind and the conduct of the defendant which the common law has long regarded as being of great importance on the question of damages even though damage to reputation is the gist of a defamation action.

Carson v John Fairfax & Sons Ltd [1993] HCA 31 -
Carson v John Fairfax & Sons Ltd [1993] HCA 31 -
Carson v John Fairfax & Sons Ltd [1993] HCA 31 -
Williams v Spautz [1992] HCA 34 -
Coyne v Citizen Finance Ltd [1991] HCA 10 (18 April 1991) (Mason C.J., Deane, Dawson, Toohey and McHugh JJ.)

18. These judgments place great emphasis on the special role of the jury and on the difficulties facing a challenge to its verdict, particularly when an award of damages for defamation is under attack. The fact that damages are at large in defamation actions, that is, that damages are not limited to the pecuniary loss that can be proved specifically, places the jury's assessment of such damages in a position which is not invulnerable but which nevertheless an appellate court is slow to disturb. Mention of the expression "at large" may be found in Triggell v. Pheeney, at pp 510, 516, in the judgment of Lord Devlin in Rookes v. Barnard (1964) AC 1129, at p 1221, and in the judgment of Lord Diplock in Broome v. Cassell and Co., at pp 1124-1125. In Paff v. Speed (1961) 105 CLR 549, at p 559, Fullagar J. spoke of the expression as "apt to be misleading", in the context of a personal injury claim. However, it does serve to point up what was said by Windeyer J. in Uren v. John Fairfax and Sons Pty. Ltd. (1966) 117 CLR 118 , at p 151 :

XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd [1985] HCA 12 (28 February 1985) (Gibbs C. j., Mason, Murphy, Wilson and Brennan JJ)

5. But does s.5(1)(b) limit the recovery of exemplary damages under successive awards in the way in which it limits the recovery of compensatory damages? If s.5(1)(b) has that operation, the effect of assessing exemplary damages individually would be modified by the award made in the first judgment given. Section 5(1) applies "(w)here damage is suffered by any person" and par.(b) applies if "more than one action is brought in respect of that damage". Section 5(1)(b) limits "the sums recoverable under the judgments given in those actions by way of damages" to "the amount of the damages awarded by the judgment first given". Section 5(1)(b) admits of two constructions. The first would take "the sums recoverable by way of damages" as referring to the total award recoverable under the judgment, whether or not the total included exemplary damages. The second would take the phrase to refer to the sums recoverable in respect of "that damage" that is, in respect of the "damage suffered by any person". In my opinion, the second construction is to be preferred. The purpose of s.5(1)(b) is to prevent excessive recovery by a plaintiff consequential on the creation of multiple causes of action against tortfeasors. The limit imposed by s.5(1)(b) is reasonable if s.5(1)(b) is referring to compensatory damages alone, for it ensures that the "damage suffered by any person" for which all joint tortfeasors are responsible does not result in judgments which entitle a plaintiff to receive more than the damages assessed against the tortfeasor who first becomes a judgment debtor. So understood, s.5(1)(b) fixes the maximum sum in respect of which an order of contribution might be made under s.5(1)(c). But if s.5(1)(b) were taken to refer to exemplary as well

as compensatory damages, the limitation imposed on recovery would operate capriciously so that the liability of the tortfeasor against whom an award of exemplary damages is first made would provide the ceiling of exemplary damages that might be awarded against other joint tortfeasors, although the conduct of the other joint tortfeasors may have been more reprehensible than the conduct of the firstmentioned tortfeasor. Moreover, the reference in s.5(1)(c) to the liability of a tortfeasor in respect of "that damage" suggests that the damages referred to in the earlier provisions of s.5(1) and which are amenable to the making of contribution orders under s.5(1)(c) are damages in respect of "damage suffered by any person" - that is, compensatory damages. Exemplary damages are of a wholly different kind. Exemplary damages are not awarded to compensate the plaintiff but to punish and deter the wrongdoer (Uren v. John Fairfax &Sons Pty.Ltd. (1966) 117 CLR 118 , per Taylor J. at pp 129-130 , per Windeyer J . at p 149; Whitfeld v. De Lauret &Co.Ltd. (1920) 29 CLR 71, per Knox C.J. at p 77 and per Isaacs J. at p 81). It would subvert the purpose of an award of exemplary damages to make a contribution order under s.5(1)(c). The better view of the provisions of s.5(1)(b) and (c) is that they do not relate to exemplary damages and that it is open to a court, if the circumstances warrant an award of exemplary damages, to assess those damages in whatever amount is appropriate to the circumstances of the case made against a particular tortfeasor.

Australian Consolidated Press Ltd v Uren [1967] HCA 21 (24 July 1967) (Lord Morris of Borth-y-Gest, Lord Pearce, Lord Upjohn, Lord Wilberforce and Sir Alfred North.)

6. Following the order of the Full Court that there should be a new trial limited to damages, the appellant 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 its 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 (1964) AC 1129 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 (1964) AC 1129 should be followed was contained in the judgments delivered in Uren v. John Fairfax &Sons Pty. Ltd. (1966) 117 CLR 118 : that reasoning was then incorporated by reference in the judgments delivered in the present case. In the present case the appellant's 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. (at p226)

Australian Consolidated Press Ltd v Uren [1967] HCA 21 -
Australian Consolidated Press Ltd v Uren [1966] HCA 37 (02 June 1966) (McTiernan, Taylor, Menzies, Windeyer and Owen JJ)

5. In Uren v. John Fairfax &Sons Pty. Ltd. (1966) 117 CLR 118 I stated my opinion that Lord Devlin's speech in Rookes v. Barnard (1964) AC 1129 unduly limited the right of juries to award punitive damages and that, in Australia, the common law, as it had long been applied, did not lay down such narrow limits. I need not repeat what I and other members of the Bench there said. Applying, however, the broader rule which is sometimes expressed and sometimes implicit in the decisions of this Court to which reference was made in Uren v. John Fairfax &Sons Pty. Ltd. (1966) 117 CLR 118 , I agree with Wallace J. that, on the evidence in the present case, there is insufficient material to justify an award of punitive damages, certainly on the first and second counts. I have felt some doubt about the third count but, since the jury were wrongly directed that they might award punitive damages on each of the counts, it is plain that there must be a new trial and in all the circumstances that new trial should not be limited to two only of the three counts. Indeed no such limitation was suggested during the argument. (at p219)

Australian Consolidated Press Ltd v Uren [1966] HCA 37 (02 June 1966) (McTiernan, Taylor, Menzies, Windeyer and Owen JJ)

McTIERNAN J. I agree with the conclusion of the State Full Court that no miscarriage of justice resulted from the refusal of the trial judge to grant the defendant's application for the discharge of the jury or for a long adjournment of the trial. I also agree that the amount of damages awarded under the first and second counts is excessive, and that there should be a new trial of each count limited to damages. I would not interfere with the order of the State Full Court that the new trial be limited to damages. This order is based on the decision of the majority of the Court. I agree with

their reasons for confining the new trial to the issue of damages. It seems to me that the explanation of the large amounts of damages assessed under the first and second counts is that the jury understood from the summing up that they could award both compensatory and exemplary damages under each of those counts. In my view, the question whether there was proof of circumstances which would entitle the jury to award exemplary damages should be decided according to decisions of this Court. I have stated my reasons for not departing from those decisions in Uren v. John Fairfax &Sons Pty. Ltd. (1966) 117 CLR 118 . In my opinion, there is no evidence of such circumstances. I think that for these reasons the verdict on the first count and the verdict on the second count should be set aside. As I have said, I think that the issue of liability should not be tried again. (at p191)

Australian Consolidated Press Ltd v Uren [1966] HCA 37 (02 June 1966) (McTiernan, Taylor, Menzies, Windeyer and Owen JJ)

TAYLOR J. I have no doubt that the result of this appeal should be an order for the new trial of the respondent's action. I have already, in the case of Uren v. John Fairfax &Sons Pty. Ltd. (1966) 117 CLR 118 , expressed my opinion that this Court should not hold that the categories of cases in which it is proper to permit an award of exemplary damages is restricted in the manner specified by Lord Devlin in Rookes v. Barnard (1964) AC 1129 . However, applying the law of this country as I understand it to be, I agree that the respondent did not make out a case which was capable of supporting an award of exemplary damages with respect to either of the publications sued upon in the first and second counts of his declaration. I am disposed to reach the same conclusion concerning the publications of which he complains in the third and fourth counts. It may well be thought that these publications constituted much more substantial libels than those complained of in the earlier counts but there was, in my view, nothing in the substance or manner of the publications, or, in the evidence relating to the circumstances in which they were published, which brought the matter within the range of an award of exemplary damages. But whether this latter conclusion be right or not it is plain enough that is is impossible for the verdict on those counts to stand alone. Nor, in the circumstances of the case, is it possible to say that justice would be done between the parties by directing a new trial limited to damages. The principles upon which the Supreme Court should act in the exercise of its discretion under s. 160 of the Common Law Procedure Act, 1899 (N.S.W.) in granting limited new trials are discussed in Pateman v. Higgin (1957) 97 CLR 521 and it is unnecessary to restate them. Here, in addition to the misdirection of the learned trial judge, there were other substantial matters of complaint which it is reasonable to conclude may well have affected the whole course of the trial. Indeed, a review of the proceedings reveals that the trial was in many respects wholly unsatisfactory. I agree generally with the observations which Walsh J. has made on this aspect of the case and with the conclusion, to which it finally led him, that there should be a general new trial. In my view the majority of the Court in considering this question did not give due weight to these considerations. The appeal should, therefore, be allowed and the cross-appeal dismissed. (at p194)

Australian Consolidated Press Ltd v Uren [1966] HCA 37 -
Australian Consolidated Press Ltd v Uren [1966] HCA 37 -
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