High Court of Australia

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

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UREN v. JOHN FAIRFAX & SONS PTY. LTD. [1966] HCA 40; (1966) 117 CLR 118

Damages - Tort

High Court of Australia

McTiernan(1), Taylor(2), Menzies(3), Windeyer(4) and Owen(5) JJ.

CATCHWORDS

Damages - Defamation - Exemplary damages - When exemplary damages may be awarded.
Tort - Exemplary damages - When exemplary damages may be awarded.

HEARING

Sydney, 1965, November 29, 30; 1966, June 2. 2:6:1966

APPEAL from the Supreme Court of New South Wales.

DECISION

1966, June 2.

The following written judgments were delivered:-

McTIERNAN J. The Full Court of the Supreme Court of New South Wales has defamation under the Defamation Act, No. 39, 1958, of that State. There are two counts in the declaration. Each count is for a separate publication of the defamatory words of which the plaintiff complains. One publication was in the first edition of the Sun-Herald; the other in the second edition. The date of the issue of the newspaper was 10th February 1963. The defendant is printer and publisher of the newspaper. The plaintiff is a member of the Federal Parliament and has held his seat by large majorities. He was first elected in 1958. His party is the Australian Labor Party. (at p121)

2. The words on which the plaintiff sued the defendant were the first half of a report from a political correspondent at Canberra. This report was published in the first edition of the newspaper in question under headlines which read: "LABOR LINK WITH RED SPY - CANBERRA CHARGE", and in the second edition under headlines: "SPY DUPED LABOR MPs". I will not quote all of the part of the report which is the subject matter of the action. It will be sufficient for present purposes to quote the first and second paragraphs:

> "Allegations are expected to be made in Parliament that
>
> two Labor MPs were duped by the Russian spy, Ivan Skripov.
>
> It will be claimed that Skripov inspired them to ask searching

questions in Parliament unsuspectingly, on secret defence

establishments in Australia." (The italics are mine.) (at p121)

3. In a subsequent paragraph it is said that:

"Political observers say several Government back-bench

members will make the allegations against the Labor MPs

when Parliament begins its next sitting on March 28." (at p121)

4. The writer of the article was, apparently, Elwyn Spratt - the headlines ascribe it to him. He was not called as a witness, the defendant did not call any witnesses. (at p121)

5. The pleas of the defendant raised the issue whether the words "two Labor MPs" could be understood to point to the plaintiff and another person. The defendant conceded at the trial that the words could be understood to do so. (at p121)

6. The defendant at the beginning of the trial abandoned all pleas it filed in denial of liability. They included pleas of "qualified protection" under s. 17 (h) of the Defamation Act. It did so to make room for an apology, which counsel then sought leave from the Court to make on behalf of the defendant. Leave was granted and the apology was made at once. The only issue which was left for the jury to try was the quantum of damages. (at p121)

7. The plaintiff claimed both aggravated and exemplary damages. The defendant's plea to the jury was to mitigate damages on the grounds that the management stopped publication of the libel in the third edition, the only other edition of the newspaper in question, and the defendant apologized for the publications of the libel which occurred in the first and second editions. (at p122)

8. The trial judge gave a full and fair summing up. He told the jury that there were circumstances which made the case one for an award of exemplary damages and it would be within their discretion to make such an award. (at p122)

9. The jury assessed damages in respect of the publication of the defamatory matter under the headlines: "LABOR LINK WITH RED SPY" at 8,000 pounds, and in respect of its publication under the headlines: "SPY DUPED LABOR MPs" at 5,000 pounds. (at p122)

10. The State Full Court considered that the direction regarding exemplary damages was wrong and the damages excessive: and for those reasons directed a new trial limited to the issue of damages. (at p122)

11. The substantial question is whether an award of exemplary damages was appropriate. The law of exemplary damages as it was before it was altered by the decision of the House of Lords in Rookes v. Barnard

[1964] UKHL 1; (1964) AC 1129 is compendiously stated in Mayne & McGregor on Damages, 12th ed. (1961), p. 196: "Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages. They can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights." "Such damages" the learned authors said at p. 197 "are recognized to be recoverable in appropriate cases of defamation." (at p122)

12. I think that nothing is disclosed by the evidence in the present case that could bring it within Lord Devlin's second category - the first category has no possible relevance. But I think the circumstances of the case are proper to found a claim for exemplary damages, if we do not change the law on damages by holding that a case is not appropriate for an award of exemplary damages unless the judge hearing it is satisfied that it can be brought within Lord Devlin's second category. (at p122)

13. A decision of the House of Lords is not as a matter of law binding on this Court. But the Court may prefer to follow a decision of the House of Lords rather than one of its own, even if a conflicting decision. It is a matter of discretion whether the Court should do so or not. I think that we should not in this case decide that an award of exemplary damages is not appropriate merely because the case cannot be brought within Lord Devlin's second category. In my view there is evidence which could reasonably satisfy a jury that the publication of both libels was wanton conduct and was made in contumelious disregard of the plaintiff's right to his good name. I am not prepared to follow the House of Lords because I think the code of law on exemplary damages, which their Lordships have laid down for the United Kingdom, should not by a judgment of this Court in this case be made law in Australia. (at p123)

14. Lord Devlin, before specifying the two categories of case, said: "I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards" (of exemplary damages) "and that there is powerful, though not compelling, authority for allowing them a wider range" (1964) AC, at p 1226 . I would adopt the statement quoted above from Mayne & McGregor on Damages as a summary of the decisions of this Court as to the circumstances giving rise to a claim for exemplary damages. It was not argued before us that any of those decisions are manifestly wrong in principle. The only reason urged for rejecting them is that they allow more scope for exemplary damages than this decision of the House of Lords does. (at p123)

15. In Australia, the power to make laws with respect to such a matter belongs under the Constitution to the several States except in the case of a Territory. The Defamation Acts of the States were not examined in argument. Wallace J. in his judgment made observations which show that he considered that there may be some incongruity between Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 in so far as it applies to damages for defamation and some provisions of the Defamation Act of New South Wales. It is a responsibility of the Parliament of each State to decide whether any departure should be made from the present principles limiting the remedy of punitive damages. I think it would be injudicious for this Court to limit by a decision in this case the scope of exemplary damages as established by the decisions of this Court. They are, in truth, supported by the "powerful" authority to which Lord Devlin refers. (at p123)

16. A jury could find that each publication of the defamatory matter was marked with cynical indifference to the fact that Elwyn Spratt's report was a gross imputation on the plaintiff. The defendant put forward no defence of justification. Its only answer to the action was to put the plaintiff to prove that he was one of the members to whom the article referred and to claim a statutory privilege which, if proved by evidence to be available, would have freed the defendant from liability. The claim to that privilege was abandoned at the trial. The defendant behaved well by withdrawing the article. But the conduct complained of was the publication of it in the first edition and again in the second edition. The withdrawal could be construed as evidencing a strong doubt in

the defendant that the publication of the article was legally excusable rather than something done out of consideration for the plaintiff. (at p124)

17. The article was the premier feature of the front page of each edition in which it appeared. Other features were inserted in that page which aggravated the insult done to the plaintiff by the publication of the article. The article is stated to be Number 1 feature: a second article beginning on the front page was expressed to be Number 2 feature. This article was a story of the detection of the Russian spy, Ivan Skripov. The third feature was a photograph of a man. It was entitled: "The Russian Spy, Mr. Ivan Skripov." (at p124)

18. A jury could find that the defendant considered that the publication of Elwyn Spratt's report with a headline "LABOR LINK WITH RED SPY" would contribute towards making the issue of the newspaper of 10th February 1963 a financial success, in other words, that it was published for pecuniary gain. The plaintiff gave evidence that on Saturday evening the front page of the Sun-Herald was shown on television and the headline "LABOR LINK WITH RED SPY" was displayed: the plaintiff said that the television station's announcer broadcast an exhortation in these words: "Read in tomorrow's Sun-Herald how Russian spy Skripov inspired two Federal Members of Parliament to ask carefully worded questions in Federal Parliament." This circumstance nearly brings the case within Lord Devlin's second category, but it does not satisfy the words: "Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity" (1964) AC, at p 1227 . (The italics are mine.) There is no evidence that the defendant made such a calculation. (at p124)

19. With great respect, the test for bringing libel within the second category imposes an undue burden on a plaintiff and that seems to me, besides the general considerations I have mentioned, to be a reason for not rejecting the decisions of this Court and proceeding to give adherence to the doctrine on exemplary damages in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 . (at p124)

20. It is said in Gatley on Libel and Slander, 5th ed. (1960), p. 573: "So where the defendant purposely abstained from inquiring into the facts or from availing himself of means of information which lay at hand when the slightest inquiry would have shown that the imputation was groundless, or where he deliberately stopped short in his inquiries in order not to ascertain the truth, a jury may rightly infer malice. A refusal to listen to an explanation by the plaintiff may be an error of judgment, but is not in itself evidence of malice. It might be otherwise if the defamatory charge was made, not on the evidence of his own senses, but on the information of another, and a slight extrinsic inquiry would have shown that the charge was unfounded." (at p125)

21. There is evidence - it was given by the plaintiff - that he knew Elwyn Spratt and he knew the plaintiff; they met at Canberra and had talked with one another from time to time: Elwyn Spratt knew where the plaintiff lived in Sydney and had telephoned to him from time to time; he made no inquiry from the plaintiff about the subject matter of the report in question. (at p125)

22. In my view the statements that Skripov "inspired" the plaintiff to ask "searching questions" in Parliament "unsuspectingly" are extravagant and, by themselves, afford evidence of malice. The failure to make inquiry tends to strengthen the proof of malice afforded by the words themselves. The plaintiff swore that he was not inspired, approached or asked by Skripov to ask questions in Parliament. This evidence was not challenged by the defendant. It is said in Mayne & McGregor on Damages, 12th ed. (1961), p. 760: "In one sense defamation is the tort par excellence for the awarding of exemplary damages because of the frequency of the defendant's wanton conduct in the form of malice. Thus it may be argued that the many cases already considered in which evidence has been introduced to prove malice in order to increase the damages reflect the acceptance of exemplary damages in defamation. And the awarding of damages as a punishment as distinct from compensation stands out clearly in Rook v. Fairrie" (1941) 1 KB 507 . In my opinion the matters

disclosed by the evidence provided a sound basis for the direction to the jury that it was within their discretion to award exemplary damages. (at p125)

23. The head of damage was injury to the plaintiff's reputation, and in addition, the injury to his feelings had to be taken into account. These are not matters of pecuniary damage. Lord Atkin said in Ley v. Hamilton (1935) 153 LT 384 : "It is precisely because the 'real' damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach: it is impossible to weigh at all closely the compensation which will recompense a man or a woman for the insult offered or the pain of a false accusation. No doubt in newspaper libels juries take into account the vast circulations which are justly claimed in present times" (1935) 153 LT, at p 386 . That case was decided in 1935. (at p126)

24. The summing up in the present case shows that the trial judge directed the jury to assess separately the amount of damages they would award the plaintiff under each count. Admittedly the Sun-Herald has a large circulation. The first and second editions came out at different times: and the jury could reasonably assume that both editions of the newspaper have large circulations. "The amount of damages is 'peculiarly the province of the jury', who in assessing them will naturally be governed by all the circumstances of the particular case." (Gatley on Libel and Slander, 5th ed. (1960), p. 625.) The character and circumstances of the parties, their position and standing, could properly lead to the aggravation of the damages. The plaintiff was a member of the Federal Parliament. It is a grievous wrong to a member to raise and circulate widely about him a question whether he is a "dupe" of a spy prying into defence secrets, or is a "link" between the spy and the member's party in the Parliament. The retraction of the libel was a circumstance which the jury could take into account: also the apology published in the next issue of the Sun-Herald. But in the meantime the plaintiff commenced the action. It was a matter entirely for the jury whether the apology was too meagre to assuage the plaintiff's injured feelings and whether the apology might have been dictated as expedient because of the issue of the writ. When the plaintiff's action against Australian Consolidated Press Limited for damages for the libels, two of which were similar to the libels in the present case, had ended the defendant in this case offered an apology to the plaintiff and to pay his costs of the present action to date. The trial nevertheless took place and as it has been said the defendant abandoned all its pleas on denial of liability and apologized "in open court" to the plaintiff. Again the value of such action as amends for the wrong done to the plaintiff was peculiarly within the province of the jury. There was cross-examination of the plaintiff in relation to the other action designed to obtain for the defendant a whittling down of damages under s. 24 of the Defamation Act. The State Full Court held that the direction of the trial judge as to the matter elicited by that part of the plaintiff's cross-examination was correct. The defendant, as has been said, adduced no evidence by examination in chief. Its strategy was to get admissions from the plaintiff by cross-examination to prove a case for the mitigation of damages. In this way he obtained evidence of the non-publication of the libel (further than the second edition) by asking the plaintiff questions leading him to say that he read that edition and the libel was not in it. The fact that an apology was published in the Sun-Herald of 17th February was proved in the same way. The words of the apology were read out to the plaintiff and he was asked whether he read it and whether it was in those words. The plaintiff said that as far as he could remember it was. Proof of the contents of the letter offering to apologize and to pay the plaintiff's costs to date was made in the same way. This part of the defendant's conduct in Court at the trial of the action was a circumstance which the jury could take into consideration in the assessment of damages. The jury could take an unfavourable view of it because there could be no cross-examination from the plaintiff's side. (at p127)

25. The damages awarded by the jury in respect of each publication are heavy. It was a matter for them to say to what extent, if at all, damages ought to be mitigated by any circumstance or consideration put forward by the defendant. Its plea to the jury was that in all the circumstances justice did not call for a heavy award of damages. (at p127)

26. It seems from the award of damages that the jury took the view that the publication of the libel in the first edition and again in the second was in each case wanton conduct and had the colour of a contumelious disregard of his reputation both as a man and a member of Parliament. The jury could only express their disapproval or "detestation" (a word used by Pratt C.J. in Wilkes v. Wood [1763] EngR 103; (1763) Lofft 1 (98 ER 489)) by awarding exemplary damages. That is the purpose of exemplary damages. I think taking all the circumstances of the case into consideration and the summing up, that the jury were moved to punish the defendant in that way. (at p127)

27. The judgment of Pearson L.J. in McCarey v. Associated Newspapers Ltd. (1964) 3 All ER 947 said: "However, there still remains the question of the excessive damages, as to which the proper question to be considered is this: Could a reasonable jury, correctly applying the true measure of damages in libel, arrive at this figure of $9,000? Manifestly it is a very high figure. Is it so high that this Court can interfere in accordance with established principles?" (1964) 3 All ER, at p 954 I refer to a passage from each of two of the cases mentioned in the judgment found at p. 956 of the report. First "The constitution has thought, and I think there is great advantage in it, that the damages to be paid by a person who says false things about his neighbour are best decided by a jury representing the public, who may state the view of the public as to the action of the man who makes false statements about his neighbour": per Scrutton L.J. (1934) 50 TLR 581, at p 584 After quoting that passage, Pearson L.J. said: "In my view, that passage also involves the proposition that it is right for a jury to include in their assessment of damages an element of punishment for the defendants as distinct from compensation for the plaintiff" (1964) 3 All ER, at p 956 The second passage is a sentence from the judgment of Holroyd Pearce L.J. in Lewis v. Daily Telegraph Ltd. (in the Court of Appeal) (2). The sentence is: "The fact that the jury may give exemplary damages for libel must always make it very difficult for the defendants to show that the award is out of all proportion." Diplock L.J. said: "If this were one of those cases where punitive and aggravated damages were appropriate, I would not have thought it right to interfere with the award of the jury; but it is not a case of that kind" (1964) 3 All ER, at p 959 . In my view, the present case is such a case. (at p128)

28. I would not interfere with the jury's assessment of damages under either count. The verdict of the jury for $13,000 damages should, in my opinion, be restored. The appeal should in my opinion be allowed. (at p128)

TAYLOR J. This is an appeal from an order of the Supreme Court of New South Wales directing the new trial of an action in which the plaintiff sought to recover damages for defamation. There were two counts in the declaration and at the first trial the jury returned a verdict for $5,000 on the first count and for $8,000 on the second count. The order for a new trial made by the Full Court on the ground that the damages were excessive is limited to the issue of damages and, as I see it, the vital question is whether this was a case in which the jury was at liberty to award a sum by way of exemplary damages. (at p128)

2. The substance of the defamatory matter and the circumstances attending its publication in successive editions of the respondent's newspaper are adequately referred to in the reasons given by the members of the Full Court. It is, therefore, unnecessary to refer in detail to these matters; it is sufficient to say that the alleged libels were substantial and that, properly instructed, substantial verdicts at the hands of the jury might reasonably have been expected. But the learned trial judge directed the jury that the case was one in which, upon the facts, they were at liberty to award exemplary damages and to my mind this was erroneous. The direction was given some months after the decision of the House of Lords in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 and shortly after the report of that case was available in this country but his Honour declined to charge the jury in accordance with that decision. Upon the appeal two members of the Full Court (Walsh and Wallace JJ.) - and also, I think, Herron C.J. - were of the opinion that the case was not one in which the jury was at liberty to award exemplary damages either upon the principles enunciated by Lord Devlin in Rookes v. Barnard (1), or according to the law as it stood before that decision. I agree entirely with that view but since the conclusion follows that the order for a new trial should stand it is necessary for us to determine whether

Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 ought to be followed in this country. In the Supreme Court two of its members thought, though not without reservations, that they should follow that decision whilst the third member was of the opinion that the Court should not do so because of what was said by this Court in Parker v. The Queen [1963] HCA 14; (1963) 111 CLR 610 and because the law as stated in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 is not applicable to the New South Wales legislation "which appreciably differs from the English Defamation Act, 1952". I do not, however, see any distinction between the English legislation and that in force in this State which would make the observations in that case inapplicable in New South Wales. (at p129)

3. Prior to Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 the law relating to exemplary damages both in England and in this country was that damages of that character might be awarded if it appeared that, in the commission of the wrong complained of, the conduct of the defendant had been high-handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights. Various expressions had been employed to describe such conduct and the law, though, of necessity invested with a degree of flexibility, was sufficiently certain. The cases in which this principle has been acted upon are numerous and it is sufficient for the present to say that it has been acted upon in this Court on a number of occasions. It is, perhaps, desirable to point out that there had been a degree of confusion between "aggravated" and "exemplary" damages and sufficient attention has not, in the past, been given to the distinction between these two concepts. The former are, of course, given by way of compensation for injury to the plaintiff, though frequently intagible, resulting from the circumstances and manner of the defendant's wrongdoing. On the other hand, exemplary damages are awarded, as Lord Devlin says in Rookes v. Barnard (1964) AC, at p 1221 , to "punish and deter" the wrong-doer though, in many cases, the same set of circumstances might well justify either an award of exemplary or aggravated damages. (at p130)

4. It seems to me that it was the purpose for which exemplary damages had theretofore been awarded that led Lord Devlin in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 to review the previous law. Having observed that the object of damages is usually to compensate and that the object of exemplary damages is to punish and deter he observed: "It may well be thought that this confuses the civil and criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages is peculiar to English law. There is not any decision of this House approving an award of exemplary damages and your Lordships therefore have to consider whether it is open to the House to remove an anomaly from the law of England" (1964) AC, at p 1221 . A review of a number of authorities convinced his Lordship that the House "could not, without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognize the exemplary principle" (1964) AC, at p 1226 and "that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal" (1964) AC, at p 1226 . Two categories, not including cases where exemplary damages are expressly authorized by statute, were specified by Lord Devlin, and they appear in a passage which I take from his speech: "The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category - I say this with particular reference to the facts of this case - to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for 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. It is true that there is something repugnant about a big man bullying a small man and, very likely, the bullying will be a source of huliliation that makes the case one for aggravated damages, but it is not, in my opinion, punishable by damages. Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit

for himself which may well exceed the compensation payable to the plaintiff. I have quoted the dictum of Erle C.J. in Bell v. Midland Railway Co. [1861] EngR 486; (1861) 10 CB (NS) 287 (142 ER 462) , Maule J. in Williams v. Currie [1845] EngR 942; (1845) 1 CB 841, at p 848 (135 ER 774, at p 776) suggests the same thing; and so does Martin B. in an obiter dictum in Crouch v. Great Northern Railway Co. [1856] EngR 7; (1856) 11 Ex 742, at p 759 (156 ER 1031, at p 1038) . It is a factor also that is taken into account in damages for libel; one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrong-doing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object - perhaps some property which he covets - which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay" (1964) AC, at pp 1226, 1227 . (at p131)

5. I agree that there was, perhaps, some room for a more precise definition of the circumstances in which exemplary damages might be awarded. But with great respect, I do not feel as Lord Devlin did, that such a far-reaching reform as he proposed, and in which the other Lords of Appeal engaged in the case agreed, was justified by asserting that punishment was a matter for the criminal law. No doubt the criminal law prescribes penalties for wrongs which are also crimes but it prescribes no penalty for wrongs which are not at one and the same time crimes, and in both types of cases the courts of this country, and I venture to suggest the courts of England, had admitted the principle of exemplary damages as, in effect, 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. This principle did not admit of the award of exemplary damages against a defendant "simply because he is the more powerful"; it permits such an award, not because of the character of the defendant, but because of the character of his conduct. But the anomaly, if indeed there was one, was by no means removed by the observations in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 . In specifying two categories of cases in which exemplary damages might be awarded his Lordship's observations admit that in the type of cases specified exemplary damages in the true sense may be awarded and the only result which is achieved is the narrowing of the classes of cases in which it is appropriate to permit an award of such damages. It is with the categories as expressed that I find the greatest difficulty. The first category is limited to wrongful acts committed by "servants of the government" and exemplary damages may be awarded where such acts are "oppressive, arbitrary or unconstitutional". But who, for the purpose of this category, is to be regarded as a servant of the government? That the expression is not used with the limitations which would be imposed by a strictly technical understanding of it seems reasonably clear (cf. Attorney-General for New South Wales v. Perpetual Trustee Co. (Ltd.) [1955] HCA 9; (1955) AC 457; (1955) 92 CLR 113). But how far does the expression extend? Does it mean persons invested by the government with authority to exercise particular rights, powers and functions? If so, does it extend to persons who, in these days of governmental participation in forms of trade and commerce, are employed by a corporation created by Parliament for the purpose of carrying on some particular activity not readily recognizable as a strictly governmental function? I mention as examples in this country The Commonwealth Banking Corporation constituted by Act No. 5 of 1959, The Australian Coastal Shipping Commission constituted by Act No. 4 of 1956 for the purpose of establishing and maintaining and operating a shipping service for the carriage of passengers goods and mails, and The Australian National Airlines Commission constituted by Act No. 31 of 1945 for the purpose of providing for the transport by air of passengers and goods. Such functions might, of course, be performed directly by servants of the government and I am unable to see that there is any material difference whether they are so performed or whether they are performed by the servants of a corporation constituted by Parliament. If the servants of such a corporation are, as I understand the intention to be, to be regarded as "servants of the government" and, therefore, within the range of exemplary damages for wrongs committed by them "oppressively or

arbitrarily", it is difficult to see why servants of corporations not constituted by an Act of Parliament but carrying on, for instance, the business of banking, aerial transport, shipping or insurance in precisely the same manner as government corporations should not occupy a like position. Indeed, I can see no basis upon which any such distinction can be made. (at p133)

6. It seems that the basis of the first category was a group of three cases decided between 1763 and 1766 - Wilkes v. Wood [1763] EngR 103; (1763) Lofft 1 (98 ER 489) ; Huckle v. Money [1799] EngR 225; (1763) 2 Wils KB 205 (95 ER 768) ; and Benson v. Frederick [1766] EngR 135; (1766) 3 Burr 1845 (97 ER 1130) . In each of these cases the defendant was "a servant of the government" and in each case it was held that an award of exemplary damages was justified. In the first of these cases Lord Chief Justice Pratt stated the principle in the following words: "Notwithstanding what Mr. Solicitor-General has said, 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" (1763) Lofft, at pp 18, 19 (98 ER, at pp 498, 499) . It will be observed that his Lordship was not purporting to state any new principle. Nor was he stating one the application of which depended upon the official position of the defendant; the principle was stated in general terms as one which had application to a tortious act committed by any person. In the second case the Lord Chief Justice, before dealing with the special facts of the case, again stated in general terms the considerations which should be taken into account in assessing damages for tort though without expressly referring to the term "exemplary damages". He said: "the law has not laid down what shall be the measure of damages in actions of tort; the measure is vague and uncertain, depending upon a vast variety of causes, facts, and circumstances; torts or injuries which may be done by one man to another are infinite; in cases of criminal conversation, battery, imprisonment, slander, malicious prosecutions, etc. the state, degree, quality, trade or profession of the party injured, as well as of the person who did the injury, must be, and generally are, considered by a jury in giving damages" (1763) 2 Wils KB, at p 206 [1799] EngR 225; (95 ER 768) . Again in the third case no point was made that the application of the principle was dependent upon the fact that the defendant occupied an official position; the members of the Court merely agreed that the defendant "had manifestly acted arbitrarily, unjustifiably and unreasonably" and, by inference, maliciously, and that this justified the verdict. Lord Devlin observes that some considerable time elapsed after these cases had been decided "before the principle eo nomine was extended in other directions" and that "six cases, decided in the course of the next century", had been cited to their Lordships. But Tullidge v. Wade [1769] EngR 22; (1769) 3 Wils KB 18 (95 ER 909) , the first of these six cases, was decided in 1769 - a mere three years after Benson v. Frederick [1766] EngR 135; (1766) 3 Burr 1845 (97 ER 1130) . It was an action per quod by a father based upon the seduction of his daughter and the complaint was that the jury's award was excessive. But the Court refused to disturb the verdict and in giving judgment Lord Chief Justice Wilmot said: "Actions of this sort are brought for example's sake; and although the plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages . . . if much greater damages had been given, we should not have been dissatisfied therewith; the plaintiff having received this insult in his own house; where he had civilly received the defendant, and permitted him to make his addresses to his daughter" (1769) 3 Wils KB, at p 19 [1769] EngR 22; (95 ER 909) . Admittedly, this was not a very precise statement of principle but clearly enough his Lordship was not purporting to introduce any new principle; he was, it seems to me, merely acting upon an established principle which, as far as I can see, was completely in accordance with the three cases previously mentioned. I do not refer to the later English cases which his Lordship mentions other than Bell v. Midland Railway Co. [1861] EngR 486; (1861) 10 CB (NS) 287 (142 ER 462) which he explains as an example of the award of exemplary damages where the wrongdoer was seeking to make a profit out of his wrongdoing. It is true that Erle C.J. said: "looking at the conduct of the company, who set up a wharf of their own, and, careless whether they were doing right or wrong, prevented all access to the plaintiff's wharf, for the

purpose of extinguishing his trade and advancing their own profit, it is impossible to say the plaintiff was not entitled to ample compensation" (1861) 10 CB(NS), at p 304 (142 ER, at p 469) and that Willes J. said: "The defendants have committed a grievous wrong with a high hand and in plain violation of an Act of Parliament; and persisted in it for the purpose of destroying the plaintiff's business and securing gain to themselves" (1861) 10 CB(NS), at p 307 (142 ER, at p 470) . But he prefaced this observation by remarking that "if ever there was a case in which the jury were warranted in awarding damages of an exemplary character, this is that case" (1861) 10 CB (NS), at p 307 (142 ER, at p 470) . Byles J. stated the principle in more general terms when he said: "I agree also with my brother Willes, that, where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into their consideration, and giving retributory damages" (1861) 10 CB (NS), at p 308 (142 ER, at p 471) . I do not find in the judgments any suggestion that as against a private individual exemplary damages may be awarded only where the wrongdoer is seeking to make a profit out of his wrongdoing; the observations of the Chief Justice and Willes J. appear to me to be directed to the facts of the particular case and to amount to no more than statements that proof of those facts was sufficient to justify an award of exemplary damages. (at p135)

7. I should not leave the first category without remarking upon the difficulty which is occasioned by the use of the word "unconstitutional". This word has a more particular meaning in a federal system and I cannot imagine that a person exercising, in the greatest good faith, a power which an ultra vires statute purports to confer upon him could ever be thought to be within the range of exemplary damages. But the word is not, I think, used in this sense; it carries with it in its context, I think, the notion of a flagrant and deliberate violation of some fundamental principle of the Constitution. (at p135)

8. The difficulties occasioned by the statement in the second category, particularly in the case of defamation by a newspaper are, I think, obvious and are illustrated by the case of McCarey v. Associated Newspapers Ltd. (No. 2) (1965) 2 QB 86 ; Broadway Approvals Ltd. v. Odhams Press Ltd. (No. 2) (1965) 1 WLR 807 and Manson v. Associated Newspapers Ltd. (1965) 1 WLR 1038 . This category is based upon the observations in Bell v. Midland Railway Co. [1861] EngR 486; (1861) 10 CB (NS) 287 (142 ER 462) to which I have already referred, and to some extent upon the observations of Maule J. in Williams v. Currie [1845] EngR 942; (1845) 1 CB 841, at p 848 [1845] EngR 942; (135 ER 774, at p 776) and those of Martin B. in Crouch v. Great Northern Railway Co. [1856] EngR 7; (1856) 11 Ex 742, at p 759 [1856] EngR 7; (156 ER 1031, at p 1038) . I have already said all that I wish to say about the first-mentioned case. The second case, which was an action for trespass by a tenant against his landlord does not, in my respectful view, provide any support for the proposition that the existence of a profit-making motive in a wrongdoer is the only circumstance entitling the jury to award exemplary damages. Indeed, in that case, Coltman C.J. expressly acted upon the principle laid down by De Grey C.J. in Sharpe v. Brice [1746] EngR 468; (1774) 2 Black W 942 (96 ER 557) in which the defendant, a customs officer, was successfully sued for trespass and the verdict having been attacked as excessive, a new trial was, it appears, refused because of the circumstances in which the trespass had been committed. Reference may also be made to the case of Leith v. Pope [1799] EngR 222; (1779) 2 Black W 1327 (95 ER 777) - which is noted at the foot of the report of Sharpe v. Brice [1746] EngR 468; (1774) 2 Black W 942 (96 ER 557) - where a verdict for 10,000 pounds for malicious prosecution was upheld because of the outrageous conduct of the defendant. Nor, I should add, do I find anything in the observations of Martin B. in Crouch v. Great Northern Railway Co. [1856] EngR 7; (1856) 11 Ex 742, at p 759 (156 ER 1031, at p 1038) to justify the formulation of the second category. (at p136)

9. There have been not infrequent discussions concerning the propriety of the civil law providing for damages of a penal character but, so far as I know, no writer and no authority has ever claimed that an award of exemplary damages should be restricted to the categories suggested. On this point I content myself with the quotation of two passages in the third edition of Sedgwick on the Measure of Damages. Writing in 1858, the learned author says (s. 38): "Thus far we have been speaking of the great class of cases where no question of

fraud, malice, gross negligence, or oppression intervenes. Where either of these elements mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms punitory, vindictive, or exemplary damages; in other words, blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender. This rule, as we shall see hereafter more at large, seems settled in England, and in the general jurisprudence of this country." Thereafter, in Ch. 18 he reviews a number of English and American authorities, some of the former being additional to those cited by Lord Devlin, and cites the following passage from the judgment of Grier J. delivering the opinion of the Supreme Court of the United States in Day v. Woodworth (1851) 13 How 363 (14 Law Ed 181) : "It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, etc., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory. In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation cf the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money'. This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case" (1851) 13 How, at p 371 (14 Law Ed, at p 185) . (at p137)

10. To my mind - and I say this with the greatest respect - the attempt, expressly made in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 "to remove an anomaly from the law" did not achieve this result. Nor, in my view, was such an attempt justified by the assertion that it was not the function of the civil law to permit the award of damages by way of penalty. Indeed, the statement of the categories in which exemplary damages may be awarded concedes that, in some cases, at least, it is the function of the civil law to permit an award of damages by way of punishment. The first of these is, as we have seen, limited to the "oppressive or arbitrary" invasion of another's rights by a person who answers the description of a servant of a government. I am unable to see any grounds, either in principle or upon authority, justifying the formulation of this limited category. This observation has, I think, special force when it is seen that in many cases much the same functions are performed in precisely the same manner and in the exercise of much the same authority by both "servants of the government" and other persons. There is, I think, even more force in the observation when it is observed that the second category admits the principle of exemplary damages against defendants generally. This category relates to acts done by any person but it is confined to acts done by a defendant who "with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk". "It is necessary" it is said "for the law to show that it cannot be broken with impunity." I am quite unable to see why the law should look with less favour on wrongs committed with a profit-making motive than upon wrongs committed with the utmost degree of malice or vindictively, arrogantly or high-handedly with a contumelious disregard for the plaintiff's rights. (at p138)

11. However this may be, the measure of research disclosed by the observations in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 takes no account of the development of the law in this country where frequently this Court has recognized that an award of exemplary damages may be made in a much wider category of cases than that case postulates. In Whitfield v. De Lauret & Co. Ltd. [1920] HCA 75; (1920) 29 CLR 71 Knox C.J. said:

"Damages may be either compensatory or exemplary. Compensatory damages are awarded as compensation for and are measured by the material loss suffered by the plaintiffs. Exemplary damages are given only in cases of conscious wrongdoing in contumelious disregard of another's rights" (1920) 29 CLR, at p 77 . In the same case Isaacs J. dealt with the matter at some length. Having mentioned that, in general, damages are compensatory in character, his Honour went on to say (1920) 29 CLR, at p 81 : "Further . . . there is still a well recognized feature, which with one exception is, in the opinion of one learned writer, confined to damages for torts (see Mayne on Damages, 9th ed., at p. 41). I refer to what are called 'exemplary damages'. From a very early period exemplary damages have been considered by very eminent Judges to be punitive for reprehensible conduct and as a deterrent. That was the opinion of Gibbs C.J. and Heath J. in Merest v. Harvey [1814] EngR 330; (1814) 5 Taunt 442 [1814] EngR 330; (128 ER 761) in 1814, and of Story J. in the Amiable Nancy [1818] USSC 32; (1818) 3 Wheat 546, at p 558 (4 US (SC) 287, at p 291) (noted in 4 Law Ed. 796). in 1818. In Emblen v. Myers (1860) 6 H & N 54, at p 58 [1860] EngR 914; (158 ER 23, at p 25) in 1860 Pollock C.B. used the expression 'vindictive damages'; in 1861 Byles J., in Bell v. Midland Railway Co. [1861] EngR 486; (1861) 10 CB (NS) 287, at p 308 [1861] EngR 486; (142 ER 462, at p 471) , termed them 'retributory damages'; in 1889 Kay J., in Dreyfus v. Peruvian Guano Co. (1889) 42 Ch D 66, at p 77 , called them 'vindictive'; in 1891 Lord Hobhouse, for the Privy Council in McArthur & Co. v. Cornwall (1892) AC 75, at p 88 , called them 'penal'; in The Mediana (1900) AC 113, at p 118 Lord Halsbury L.C. called them 'punitive damages'; in 1908, in Anderson v. Calvert (1908) 24 TLR 399, at pp 400, 401 , Lord Cozens Hardy and Lord Wrenbury (then in the Court of Appeal), used the word 'punitive'; in 1913, in Smith v. Streatfeild (1913) 3 KB 764, at p 769 , Banks J. called them 'vindictive' damages. See also Willoughby Municipal Council v. Halstead [1916] HCA 80; (1916) 22 CLR 352 ." This principle has been clearly recognized by this Court in the subsequent cases of The Herald and Weekly Times Ltd. v. McGregor [1928] HCA 36; (1928) 41 CLR 254 ; Triggell v. Pheeney [1951] HCA 23; (1951) 82 CLR 497 ; Williams v. Hursey [1959] HCA 51; (1959) 103 CLR 30 ; and Fontin v. Katapodis [1962] HCA 63; (1962) 108 CLR 177 and I think we should adhere to it. It is a broad principle which I think has been acted upon for a century and upwards, it has been part of the law of this country for many years, the limitation of the application of the principle to the categories specified in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 is not, in my view, justified either upon principle or upon authority, and the adoption of those categories would not remove the suggested anomaly, but on the contrary, introduce others. In these circumstances, I am firmly of the opinion that the observations in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 do not express the law of this country and that they should not be followed. (at p139)

MENZIES J. In my opinion, despite the arguments addressed to us about other matters, the fate of this appeal depends upon a determination whether or not the direction which the learned trial judge gave about exemplary damages was correct. I choose the adjective "exemplary" in preference to synonyms because it is that adjective which has been adopted by Parliament: see, for instance, Law Reform (Miscellaneous Provisions) Act, 1934 (U.K.), s. 1 (2) (a), and the New South Wales Act of 1944 similarly entitled, s. 2 (2) (a). The direction was that the jury would be justified in awarding the plaintiff exemplary or aggravated damages "in addition to the compensatory component of damages". His Honour said: "You were invited by the plaintiff to award to him exemplary damages. The way it was put to you by Mr. Evatt was that you ought to show to the defendant company that the publication of this sort of libel does not pay. I think those were the words he used. I would suggest that you do not lightly - I do not think any jury would lightly rush in, if I may use that expression, and award exemplary damages; but, nevertheless, if upon a mature consideration of the situation, it appeared to you, for example, that a serious libel was published without being checked, and it was published with the intent of increasing sales and therefore increasing circulation and profits and with a reckless disregard of the plaintiff's right to have his reputation preserved unsullied, then you would be entitled to award exemplary damages - exemplary damages meaning merely damages that are awarded by way of example and discouragement." This direction the Full Court held to be in error. It therefore set aside the verdict of the jury and ordered a new trial limited to damages. (at p140)

2. The libels for which the plaintiff had sued were published in two editions of the Sun-Herald of 10th February 1963. The imputation made was a grave one which impugned the plaintiff's fitness to be a member of Parliament. It was that he, being a member of Parliament, had some link with a Russian spy and had been duped by that spy to ask searching questions in Parliament to extract from the Prime Minister and the Minister for Defence information about secret defence establishments in Australia. In the next issue of the defendant's paper - that is, that of 17th February 1963 - under the heading "Apology", the following statement was published by the defendant: "In the early editions of the Sun-Herald last Sunday a report was published under the heading 'Labor Link with Red Spy'. It stated that some Government members were expected to allege in the Federal Parliament that there had been association between some Labor members and the Russian spy Ivan Skripov and that he had duped them. The report was withdrawn as soon as it came to the notice of a senior executive of the publishing company. The Sun-Herald regrets that the report implied that some Labor members had an improper association with Skripov. It apologizes for publication of the report." It seems to me that the implication here attributed to the earlier publication, viz. that of an improper association between the plaintiff and Ivan Skripov, could be regarded as an aggravation of what had been published previously, for the charge of an improper association with a spy might be thought to go beyond the charge of being the foolish dupe of a spy. This latter charge, it is to be observed, was not withdrawn. Having regard to the terms of this apology, it is not surprising that under cross-examination the plaintiff said that, in his view, this second publication was not a sincere apology. However, more was to follow. On 11th March 1964 the defendant's solicitors wrote to the plaintiff's solicitors a letter saying, inter alia: "As you are aware, the article of which your client complains did not refer to him by name and as soon as its publication was noticed by a senior executive of our client company steps were taken to have it withdrawn from our client's newspaper and from further publication. At the first available opportunity and without request from your client an apology was published; in the belief that your client would not want us to identify him, the apology made no specific reference to him, a course which did not meet with your client's disapproval. In the course of the recent proceedings by your client against Australian Consolidated Press Limited, the article published by our client was referred to and tendered in evidence. It was stated in open court by counsel for your client that it referred to your client and, indeed, it was claimed that the article published in the Sunday Telegraph had been lifted from our client's newspaper. All these matters have received publicity in the morning and evening Press, so that there may be now no doubts in the minds of the reading public that he was one of the persons referred to in the article complained of. Realizing that your client's particular concern is his reputation, our client is now prepared to reiterate its apology to your client by name in open court and also to pay all your client's costs to date. Will you please let us know what are your client's instructions in this matter." This means that, in satisfaction for a serious libel for which it had been sued for heavy damages, the defendant was offering "to reiterate its apology to your client by name in open court and also to pay all your client's costs to date" and no more. This letter was dated the same day as that on which the jury which had tried an action by the plaintiff against Australian Consolidated Press Limited had returned a verdict in favour of the plaintiff for 15,000 pounds in respect of a libel similar to that published by the defendant. This offer could be regarded not as a genuine attempt on the part of the defendant to right a grave wrong which it had done to the plaintiff, but merely as an attempt to escape from the consequences of its wrongdoing. Finally, at the hearing and before the plaintiff's counsel could open his case to the jury, the defendant's counsel offered an apology in open court to be published in its newspaper. The apology was for having inserted the article, together with an expression of regret for any inconvenience or annoyance it may have caused the plaintiff. The offer to pay full costs to date was repeated. Again the jury might think that the expression of regret for "any inconvenience or annoyance" that the defendant may have caused the plaintiff was, in the circumstances, something less than a penitent defendant would have offered. (at p141)

3. In the foregoing circumstances, it was hardly surprising that, at the end of a trial lasting six days - notwithstanding that damages only were in issue - in which the plaintiff was cross-examined to indicate that he

was entitled to no more than a withdrawal of the libellous imputation, the jury should bring in verdicts of 5,000 pounds in respect of the first count which related to the edition in which the article was published under the heading "Spy Duped Labor MPs", and 8,000 pounds in respect of the second count relating to the publication of the same article under the heading "Labor Link with Red Spy". (at p142)

4. One of the defendant's grounds of appeal to the Full Court was that, independently of any misdirection, the damages were excessive, and this contention did there receive some support, for Herron C.J. said " . . . in my opinion the verdict might well be regarded as excessive upon general principles". At the hearing before us, I was left in some doubt about the defendant's attitude to this matter in the event of this Court disagreeing with the Full Court and upholding the direction that exemplary damages could be awarded. A reading of the transcript has not removed that doubt. However, if it was open to the jury to have awarded exemplary damages, I would certainly not regard the verdict as excessive. An infamous personal attack, which the jury could think was nothing but a concoction, was featured upon the front page of the defendant's paper under banner headlines and advertised on television for no purpose other than to induce people to buy the paper. To this matter I must return later. (at p142)

5. Before coming to what I regard as the real point of the case, there is a matter to be mentioned merely to be put on one side. Mr. Woodward, for the defendant, laid great stress upon the apologies made or tendered and, as I followed him, he did so not merely as matters to be taken into account in mitigation of damages - a point already discussed and one entirely for the jury - but as, in some way or other, negating malice or ill will on the part of the defendant towards the plaintiff. As I indicated during the argument, I fail to grasp the significance of the apologies to any matter in issue upon this appeal. Whether or not they establish, or even tend to establish, the absence of malice or ill will was a matter for the jury, and it is not surprising that the jury remained unimpressed. (at p142)

6. I turn now to the question whether the direction that exemplary damages could in the circumstances be awarded was, as the Full Court decided, a misdirection. (at p142)

7. With respect to the different opinion of Wallace J., I think the direction was correct unless the law in Australia is what the House of Lords in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 stated the law of England to be. Independently of that case, I think exemplary damages could have been awarded on the simple ground that it was open to the jury to find that the defendant recklessly and arrogantly attacked the plaintiff's reputation for the purpose of publishing a sensational story to attract the custom of newspaper readers. That conduct, if so found, was malicious, wilful and reprehensible. It was a "contumelious disregard" of the rights of the plaintiff to his reputation. See Whitfeld v. De Lauret & Co. Ltd. [1920] HCA 75; (1920) 29 CLR 71, at p 77 . (at p143)

8. The next question is whether the law in Australia is as stated by the House of Lords in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 . The question of damages in that case arose upon a cross appeal by the defendant to the action and the decision of the House that there should be a retrial because the jury had been wrongly directed that punitive damages could be awarded to the plaintiff was based upon the opinion of Lord Devlin, with which the other members of the House agreed. (at p143)

9. Lord Devlin, having stated that exemplary damages are anomalous, considered whether "it is open to the House to remove an anomaly from the law of England" (1964) AC, at p 1221 . Having considered earlier authority going back to Wilkes v. Wood [1763] EngR 103; (1763) Lofft 1 (98 ER 489) , his Lordship said: "These authorities clearly justify the use of the exemplary principle; and for my part I should not wish, even if I felt at liberty to do so, to diminish its use in this type of case where it serves a valuable purpose in restraining the arbitrary and outrageous use of executive power" (1964) AC, at p 1223 . His Lordship then considered cases, other than those concerned with the arbitrary and outrageous use of executive power, in which exemplary damages had been awarded. At the conclusion of this survey, his Lordship said: "These authorities convince

me of two things. First, that your Lordships could not, without a complete disregard of precedent, and indeed of statute, now arrive at a determination that refused altogether to recognize the exemplary principle. Secondly, that there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made. I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not, therefore, conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance they may be said to afford" (1964) AC, at pp 1225, 1226 . (at p144)

10. Thus, the first category of cases in which punitive damages could be awarded his Lordship described as cases of "oppressive, arbitrary or unconstitutional action by the servants of the government" (1964) AC, at p 1226 . Cases in the second category are those "in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff" (1964) AC, at p 1226 . In elaboration, his Lordship said: "It is a factor also that is taken into account in damages for libel; one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity. This category is not confined to moneymaking in the strict sense. It extends to cases in which the defendant is seeking to gain at the expense of the plaintiff some object - perhaps some property which he covets - which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay" (1964) AC, at p 1227 . (at p144)

11. His Lordship's judgment continued with a statement of three considerations to be borne in mind when awards of exemplary damages are being considered. These are: (1964) AC, at pp 1225, 1226 "the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour"; (1964) AC, at p 1226 "the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the Wilkes Case, can also be used against liberty"; and (1964) AC, at p 1227 "the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant" (1964) AC, at pp 1227, 1228 . On the basis of this reasoning and after observing that some of the cases where an award of exemplary damages had been upheld could be explained as cases of aggravated compensatory damages, his Lordship reached the conclusion that it was necessary to overrule Loudon v. Ryder (1953) 2 QB 202 and express dissent from much of the reasoning in Owen and Smith (trading as Nuagin Car Service) v. Reo Motors (Britain) Ltd. (1934) 151 LT 274 and Williams v. Settle (1960) 1 WLR 1072 . His Lordship then stated: "This conclusion will, I hope, remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject. Otherwise, it will not, I think, make much difference to the substance of the law or rob the law of the strength which it ought to have. Aggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages. In so far as they do not, assaults and malicious injuries to property can generally be punished as crimes, whereas the objectionable conduct in the categories in which I have accepted the need for exemplary damages are not, generally speaking, within the criminal law and could not, even if the criminal law was to be amplified, conveniently be defined as crimes. I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law" (1964) AC, at p 1230 . (at p145)

12. The question for us now is whether, in a case where the award of exemplary damages has not been authorized by statute and is not concerned with unlawful executive action, exemplary damages can be awarded only if "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff" (1964) AC, at p 1226 . (at p145)

13. The first thing to be said is that in Australia, as in England prior to Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 , such a limitation upon the power to award exemplary damages had not been perceived, with the consequence that to accept the limitation now adopted by the House of Lords would involve a radical departure from what has been regarded as established law. It is not merely that in the authorities there is nothing to support the limitation adopted by the House of Lords but the law has from time to time been stated in different terms. See Whitfeld v. De Lauret & Co. Ltd. [1920] HCA 75; (1920) 29 CLR 71 ; The Herald and Weekly Times Ltd. v. McGregor [1928] HCA 36; (1928) 41 CLR 254 ; Triggell v. Pheeney [1951] HCA 23; (1951) 82 CLR 497 ; and Fontin v. Katapodis [1962] HCA 63; (1962) 108 CLR 177 . It is, perhaps, of more importance that it has always been taken for granted that damages beyond restitutio in integrum can be awarded to punish a defendant for reprehensible misconduct in cases falling outside the limits of the decision of the House of Lords in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 . Thus, for instance, in cases of trespass "high-handed procedure or insolent behaviour" (1900) AC, at p 118 , to use the language of the Earl of Halsbury L.C. in The Mediana (1900) AC 113 , has been regarded as warranting the award of exemplary damages. In Fontin v. Katapodis [1962] HCA 63; [1962] HCA 63; (1962) 108 CLR 177 , Owen J., with the concurrence of the Chief Justice, expressed this common understanding in Australia when he said in an assault case: "In a proper case the damages recoverable are not limited to compensation for the loss sustained but may include exemplary or punitive damages as, for example, where the defendant has acted in a high-handed fashion or with malice" (1962) 108 CLR, at p 187 . Again, in libel cases what Farwell L.J. said in Jones v. E. Hulton & Co. (1909) 2 KB 444 represents the general understanding of the law in Australia, viz. "Such newspapers as publish libellous statements do so because they find that it pays: many of their readers prefer to read and believe the worst of everybody, and the newspaper proprietors cannot complain if juries remember this in assessing damages" (1909) 2 KB, at p 483 . Thus, to use McTiernan J's phrase in Smith's Newspapers Limited v. Becker [1932] HCA 39; (1932) 47 CLR 279, at p 315 , "the deserts of" the defendant in a libel action are not to be left out of account in assessing damages. Furthermore, breach of contract of marriage has always been treated as warranting exemplary damages in an appropriate case on the basis stated by Bowen L.J. in Finlay v. Chirney (1888) 20 QBD 494 where his Lordship said: "The question we have to decide today relates to a class of action which, though in its form and substance contractual, differs from other forms of actions ex contractu in permitting damages to be given as for a wrong. This double aspect of an action for breach of promise creates the perplexity in the present instance. On which side of the line is to fall an action which is based on the hypothesis of a broken contract, yet is attended with some of the special consequences of a personal wrong, and in which 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? (1888) 20 QBD, at p 504 " Must it now be said that Bowen L.J. was in error? (at p146)

14. My examination of the English and Australian authorities has not shown that before Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 the common law in relation to exemplary damages was as the House of Lords has now stated it to be. Indeed, the opinion of Lord Devlin recognizes that what is there stated to be the law is not what was previously understood to be the law and his Lordship's examination began with an inquiry whether the House could "remove an anomaly from the law of England" (1964) AC, at p 1221 . What the House did was not to remove an anomaly but, for reasons of policy, to limit what was regarded as an anomaly to cases "in which an award of exemplary damages can serve a useful purpose . . ." (1964) AC, at p 1226 . Conceding that a line must be drawn somewhere, what the House of Lords has done is to draw a different line from that drawn previously by lower courts in England. Naturally enough, the law as it stood in Australia and in

the United States of America - see Restatement of the Law of Torts, par. 908, Punitive Damages - seems not to have been considered. (at p147)

15. Upon full consideration, I do not think that the decision of the House of Lords 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 C.J., "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 (see Finlay v. Chirney (1888) 20 QBD, at p 504). In Australia, no one could say that, if the vigorous assertion and application of this rule were to curb the malice and arrogance of some defamatory publications, it would not serve a useful purpose in vindicating the strength of that part of the law which protects people's reputations, and would afford that protection without encroaching in any way upon the liberty of the Press. A vigilant concern with freedom of speech is in no way inconsistent with the recognition that malicious and callous disregard for a man's reputation deserves discouragement: cf. New York Times Co. v. Sullivan (1964) 11 Law Ed 2d 686, Headnote 20 . (at p147)

16. In this case the direction of the learned trial judge was, in effect, that "the deserts of" the defendant should not be left out of account and that the "spirit and intention" of the defendant are matters for consideration in assessing damages, to use the language of Tindal C.J. in Pearson v. Lemaitre [1843] EngR 666; (1843) 5 Man & G 700 (134 ER 742) . In the circumstances I consider that the defendant's spirit and intention could be regarded as warranting exemplary damages and that, in the result, the defendant got no more than, what the jury could properly think, were its deserts. (at p147)

17. I would therefore allow the appeal and restore the jury's verdicts of 5,000 pounds and 8,000 pounds damages. (at p148)

WINDEYER J. The trial of this action at nisi prius took place not long after that of an action the plaintiff had brought against another defendant, Australian Consolidated Press Limited, for various publications in its newspapers, one of which was substantially the same as that in question in the present case. In each case the jury found for the plaintiff. Each defendant moved in the Full Court of the Supreme Court for a new trial. In each case one ground taken was that the damages awarded were excessive. And in each case one question argued was whether the jury had been misdirected by being told that they were at liberty to give exemplary damages. In this case the only issue fought at the trial was the quantum of damages, liability not being disputed. (at p148)

2. The argument about damages became largely centred upon what was said in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 . In the judgments in the Supreme Court the matter is discussed as raising a deep question of the doctrine of precedent and the authority in Australia of decisions of the House of Lords. I do not think it is necessary to sound these depths in this case. I recently stated, in Skelton v. Collins [1966] HCA 14; (1966) 115 CLR 94 , my belief on this. I shall not repeat what I said there. Some of the reasons given in earlier times for awarding exemplary damages for insulting words, such as the need to discourage duelling, have disappeared today. But law has often used its old weapons instead of forging new ones. If some passages in what was said in the House of Lords in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 are to be understood in an absolute way, part of what had long been taken to be the common law has been overthrown in England. The House of Lords can of course overturn for England what had been thought to be established doctrine by declaring it to have been mistaken. But it indicates no disrespect for the high authority of their Lordships' House, no breaking of the ties light as air, if we, having a duty to abide by the law that we have inherited and having in mind the way it has been declared here, feel unable to join in this. (at p148)

3. Nevertheless, for myself, I accept what I take to be the broad principle that is stated in that part of Lord Devlin's judgment that relates to the law of defamation. That does not mean that I accept the narrow

application of it that counsel for the newspaper companies urged upon us. If that were the effect of what the House of Lords has said I would only say, with respect, that we ought not to follow it. It would be to restrict the general principle, that exemplary damages may be given to make it clear that tort does not pay, to particular instances which Lord Devlin illustratively described. It is general conceptions that count in the development of the common law, and I respectfully adopt what his Lordship said of this in another case: "The general conception can be used to produce other categories in the same way. An existing category grows as instances of its application multiply until the time comes when the cell divides": Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1963] UKHL 4; (1964) AC 465, at p 525 . An attempt to subsume incongruous instances and anomalies under one rule may make obvious the need to redefine the rule and thus to limit a category. That is what has been done, it seems, for England in relation to exemplary damages: but not, as I understand it, so drastically as the argument supposed. I shall return to this later. 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: 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. (at p149)

4. The difficulty of the matter lies in uncertainty of the basis on which damages for defamation are given; and in a still deeper uncertainty as to the fundamental principle of liability in the law of torts, compensation and fault competing for first place. The muddle the matter is in appears from an informative article "Problems of Assessing Damages for Defamation", by Mr. Samuels in the Law Quarterly Review (1963) 79 Law Quarterly Review 63 . The law of defamation and of damages for defamation has a complicated history: see the articles by Sir William Holdsworth in the Law Quarterly Review (1924) 40 Law Quarterly Review 302, 397; (1925) 41 Law Quarterly Review 13 . References to some aspects, presently relevant, appear in the sketch "Exemplary Damages for Defamation", by L. F. S. Robinson (1929) 3 Australian Law Journal pp 250, 292 . Compensation is the dominant remedy if not the purpose of the law of torts today. But fault still has a place in many forms of wrongdoing. And the roots of tort and crime in the law of England are greatly intermingled. Some things that today are seen as anomalies have roots that go deep, too deep for them to be easily uprooted. (at p150)

5. Defamation is a criminal offence and also a civil wrong. We heard in the course of the argument some complaint of a victim of a criminal act having an option to pursue his civil remedy and in this to seek punitive damages instead of seeking to set the criminal law in motion. But the law allows this, and not only for defamation; and perhaps wisely so. One lesson of eighteenth century events may be that libels, especially those arising out of private feuds and partisan political controversy, ought not, except in very gross cases, to be made the subject of criminal prosecutions. (at p150)

6. When it is said that in an action for defamation damages are given for an injury to the plaintiff's reputation, what is meant? 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. The variety of the matters which, it has been held, may be considered in assessing damages for defamation must in many cases mean that the amount of a verdict is the product of a mixture of inextricable considerations. One of these is the conduct of and the intentions of the defendant, in particular whether he was actuated by express malice. Yet in

the abstract the harm that a plaintiff suffers cannot be measured by, nor does it necessarily depend at all upon, the motive from which the defendant acted or upon his knowledge or intentions. These, however, have always been regarded as important in estimating damages. Indeed, the common-law rule that truth is a complete defence seems to reflect this. It has been rationalized by saying that the law does not protect the reputation that a man has, but only the reputation that he deserves. But is it not a mistake to suppose that there is not a deeper explanation? The law of defamation descends from more than one source. Among these were the action on the case for words whereby the king's courts took over slander from the local courts, the ancient jurisdiction of the ecclesiastical courts, and the jurisdiction of the Star Chamber. The idea of wilful wrongdoing had a place in the first. It was of the essence of the second; for a man must not bear false witness against his neighbour, he must not of malice harm his neighbour. And it strongly influenced the law of libel in the Star Chamber. The Star Chamber was concerned with libel as a criminal act, a disturbance of the peace, yet in some cases it also allowed damages to the person defamed. It is enough to say here that when the law of libel was taken into the common law, although in a general sense compensation was the remedy given, the conduct of the defendant remained always a matter that the jury might consider. Damages being at large, it became in time indisputable that a jury could in all cases consider "not only what the plaintiff should receive, but what the defendant should pay". These words came from Forsdike v. Stone (1868) LR 3 CP 607, at p 611 . That was a case of slander, but the proposition was not new. It was applicable to defamation generally and has often been repeated. (at p151)

7. Accepting that a jury may weigh the conduct of the defendant either in mitigation or aggravation of damages, how, if they think it an aggravation, can it be said that no punitive element entered into the assessment? The theory is that in such a case the damages are still only compensatory because the more insulting or reprehensible the defendant's conduct the greater the indignity that the plaintiff suffers and the more he should receive for the outrage to his feelings. That defamation may produce indignity and humiliation and that these can attract monetary compensation is no new doctrine. It goes back to the early Middle Ages, to a time before the king's courts gave any remedy for defamation: see Pollock & Maitland, 2nd ed. (1923), vol. 2, pp. 536-538. In 1928 Higgins J. remarked that it "seems to be right so long as the theory stands that 'the jingling of the guinea helps the hurt that honour feels'": The Herald and Weekly Times Ltd. v. McGregor (1928) 41 CLR, at p 272 . Insult, as well as injury to reputation, thus merits compensation. This Tennysonian explanation is convenient, but not altogether convincing. Two objections may be made. First, the satisfaction that the plaintiff gets is that the defendant has been made to pay for what he did. Guineas got from the defendant jingle more pleasantly than would those given by a sympathetic friend. Secondly, conceding that an indignity suffered must be paid for, why is the degree of the indignity that the plaintiff suffers to be measured by considering what was in the mind of the defendant, the malice or motive which moved him? It seems to me that in truth a punitive or vindictive element does lurk in many cases in which the damages were aggravated by the defendant's conduct. (at p152)

8. What the House of Lords has now done is, as I read what was said, to produce a more distinct terminology. Limiting the scope of terms that often were not distinguished in application makes possible an apparently firm distinction between aggravated compensatory damages and exemplary or punitive damages. How far the different labels denote concepts really different in effect may be debatable. I suspect that in seeking to preserve the distinction we shall sometimes find ourselves dealing more in words than ideas. Telling the jury in a defamation action that compensation is to be measured having regard to aggravating circumstances the result of the defendant's conduct might not result in a verdict different from that which they would return if they were told that because of that conduct they could give damages by way of example. The judgment of Knox C.J., Gavan Duffy and Starke JJ., in The Herald and Weekly Times Ltd. v. McGregor (1928) 41 CLR, at p 263 , points out that "it does not matter under what name or denomination the Judge classified the damages if he was right in instructing the jury that a particular fact was one for their consideration in assessing damages". But in that case the jury had been told that they could not give exemplary damages. It can never be right to tell

a jury that they are at liberty to award exemplary damages if the case is not one in which it would be proper for them to do so. And I do not doubt that in some cases it might be necessary for the judge to tell them expressly that, while they could take various aggravating matters into consideration in weighing the compensation the plaintiff should have, they should not add anything simply to punish the defendant or by way of example to others. (at p152)

9. Returning to Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 - It is not necessary to examine here the authorities to which Lord Devlin there referred. I would only say that I take leave to doubt whether what has been called the exemplary principle is of such recent appearance in the law as the second half of the eighteenth century, although it seems that it was then that the expression "exemplary damages" was first used. And I doubt whether the famous cases concerning Wilkes and the North Briton should be regarded as the origin of the idea. However, like any attempt to trace the lineage of an idea, much depends on how far you wish to go back and how much certainty you demand in the connecting links. Exemplary damages, so described, have been said to be given for assaults because of the insult involved. The relationship between the words "insult" and "assault" may perhaps have contributed to this, one meaning of insult being attack. For example, when Fitzherbert wrote, an action of trespass for assault and battery was quare in ipsum insultum fecit et ipsum verberavit. However that may be, it is noteworthy that in Merest v. Harvey [1814] EngR 330; (1814) 5 Taunt 442, at p 444 (128 ER 761) (one of the cases referred to by Lord Devlin) Heath J. said: "I remember a case where a jury gave 500 pounds damages for merely knocking a man's hat off; and the Court refused a new trial . . . . It goes to prevent the practice of duelling, if juries are permitted to punish insult by exemplary damages." (at p153)

10. We were asked to read Lord Devlin's statement of the second category of cases fit for exemplary damages as if it were not descriptive, but exhaustively definitive. We were asked to construe it literally and rigidly as if it were a statute. We were asked to subordinate the statement of principle to an illustration of that principle. I understand the principle expressed by his Lordship to be that the law does not allow a man to do a wrong with impunity simply because he thinks that it will be worth his while to pay damages to the person wronged. I do not think that the principle is limited, or that his Lordship really intended to limit it, to cases where the advantage that the wrongdoer hopes to gain by his wrongdoing is money or some tangible thing. The law can ensure not only that the publication of defamation must be paid for, but also that the wilful publication of indefensible defamation is not made to pay. But this does not mean that, as was suggested, we are to suppose a deliberate calculation of profit and loss in terms of money, almost a pencil and paper affair, and that only in such a case can exemplary damages be given. An equally untenable proposition was put forward on the other side. Those who publish newspapers, it was said, do so with a view to profit: the profit depends, directly or indirectly, on, among other factors, the circulation of the paper: the publication of sensational matter, obviously defamatory, calculated to increase the circulation of the paper may therefore in all cases attract exemplary damages. There is no warrant for this. (at p153)

11. What we should welcome in the decision in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 is its emphasis that exemplary damages must always be based upon something more substantial than a jury's mere disapproval of the conduct of a defendant. This of course is old doctrine. 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 a further purely punitive element. But we should not, I think, treat the decision as excluding exemplary damages from any of those forms of wrongdoing for which, in the past, the Court has said they might be given. It is however not enough, and this Court has never said that it was enough, to justify an award of exemplary damages that the tort should be of a kind for which such damages are permissible. 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. Quite apart from anything that has recently been said in the House of Lords and the Court of Appeal, there must (as Walsh J.

pointed out in this case in the Supreme Court) 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". I select that particular phrase out of many, because it has been used more than once in this Court. It appears in the first edition of Salmond on Torts, p. 102. It is not much removed in meaning from the cynical disregard of a plaintiff's rights by a calculating defendant in Lord Devlin's illustration. Whatever words be used there must be evidence to support them. Epithets without evidence will not suffice. Was there in this case evidence of conduct by the defendant which could merit punishing it by awarding a greater sum to the plaintiff? I think not. I agree, therefore, that the order of the Supreme Court for a new trial should stand. I do not mean that the libel was not a serious one. The defendant apparently recognized that it was, for it hastily withdrew it from the later editions of its paper. But it had appeared: the paper had a large circulation, and the defendant had advertised on television that a sensational story would appear in it. The mischief that was in the article as I see it I shall mention in my judgment in the other case, that of Australian Consolidated Press Ltd. v. Uren [1966] HCA 37; (1966) 117 CLR 185 . Substantial damages might be awarded by a jury; and I do not say that if the jury had been properly directed a verdict for the amount they awarded might not have been allowed to stand. It is because I think that unfortunately they were not properly directed that I consider a new trial to be necessary. (at p154)

12. As to the evidence that the defendant had already recovered damages from another newspaper proprietor in respect of the publication of the same libel: Section 24 of the Act makes this evidence admissible in mitigation of damages. Since the purpose of admitting it is to mitigate damages, it seems to me plain that the amount of damages recovered may be proved and not merely the fact that some damages had been recovered. It is however probably desirable that the judge explain to the jury that the evidence is admitted to mitigate damage by shewing the extent to which the plaintiff has already been compensated for the harm done him by the publication of the defamatory statements, and that it is not admitted for the purpose of fixing a scale of damages. Unless this be done the evidence might inflate rather than mitigate damages. (at p155)

13. As for the apology: It was not accompanied by a payment into Court or an offer of payment. It was for the jury to say what weight, if any, they would give to it in mitigation. It was for them to consider how far, if at all, it made amends. An apology can be a tricky thing in a libel action. I express no opinion at all about this one. The learned trial judge summed up the case to the jury carefully and fairly on this and other matters. Apart from his ruling about exemplary damages, no complaint is, I think, now made of what he said. (at p155)

14. I would dismiss the appeal. (at p155)

OWEN J. The plaintiff, the present appellant, brought an action of defamation against the defendant alleging that on 10th February 1963, in two successive editions of a Sunday newspaper published by it, it had libelled him. The declaration contained two counts, each setting out one of the publications of which the appellant complained. The only difference between them appears to be that in the first the headlines announced "Spy Duped Labor MPs - Canberra Charge" while the headlines in the second publication read "Labor Link with Red Spy - Canberra Charge". (at p155)

2. At the trial it was conceded that, although the plaintiff's name was not mentioned in the publications, he was one of the persons to whom they referred and that they were defamatory of him. The only contested issue was one of damages and the jury returned a verdict in the plaintiff's favour on both counts, awarding 5,000 pounds on the first count and 8,000 pounds on the second. The evidence showed that at all relevant times the plaintiff, a man of good fame and character, was a member of the Commonwealth Parliament who had served overseas with the Australian Imperial Forces during the war and had been taken prisoner by the Japanese when the island of Timor was captured by them and the libels might well be regarded by a jury as casting serious reflections on him. Their substance was that two members of Parliament who had asked questions in the House seeking information on defence matters had, in doing so, been the dupes of a man named Skripov,

a member of the Soviet Embassy staff in Australia who had, shortly before the publications appeared, been declared persona non grata by the Commonwealth Government because of his underground activities, an occurrence which had aroused much public interest and concern. It was conceded at the trial that the plaintiff had had no association with Skripov and the case was one in which the jury might well have taken the view that a substantial award of damages was called for. (at p156)

3. In his summing up, however, the learned trial judge directed the jury that they might, if they thought fit, award "exemplary damages meaning merely damages that are awarded by way of example and discouragement" in addition to whatever amount they thought proper to award by way of compensation. The defendant appealed to the Full Supreme Court (Herron C.J., Walsh and Wallace JJ.) which ordered a new trial limited to damages and against that order the plaintiff, by leave, now appeals to this Court. In the Full Supreme Court, their Honours took the view that on the evidence the case was not one in which it was open to the plaintiff to recover exemplary - and by that I mean punitive - damages; that in this respect the learned trial judge had misdirected the jury; and that there should therefore be a new trial of the issue of damages. In so deciding their Honours were called upon to consider the recent decision of the House of Lords of Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 in which Lord Devlin, with whom the other members of the House agreed, laid down a number of propositions placing limits far narrower than those which had hitherto been thought to exist upon the right of a jury to award punitive damages in certain types of action. In the argument put to the Full Court on behalf of the defendant, much reliance was placed upon that decision and it was said that it should be followed and applied even if it was found to be in conflict with decisions of this Court. This necessarily involved a consideration of what had been said by Dixon C.J. in Parker's Case [1963] HCA 14; (1963) 111 CLR 610, at pp 632, 633 , a statement with which every member of the High Court agreed. Walsh and Wallace JJ., and I think Herron C.J. also, were of opinion that whether Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 was applied or not, the case was not one in which, on the evidence as it stood, punitive damages could properly be awarded. But since the jury had been directed that they could award such damages and a new trial was therefore necessary they considered that they should deal with the arguments based upon Lord Devlin's speech. In the result a majority of the Court (Herron C.J. and Walsh J.) took the view that Rookes' Case [1964] UKHL 1; (1964) AC 1129 , which had been applied by the Court of Appeal in McCarey v. Associated Newspapers Ltd. (No. 2) (1965) 2 QB 86 and Broadway Approvals Ltd. v. Odhams Press Ltd. (No. 2) (1965) 1 WLR 805 and by Widgery J. in Manson v. Associated Newspapers Ltd. (1965) 1 WLR 1038 , should be followed notwithstanding the fact that what Lord Devlin had said conflicted with a number of decisions of this Court which proceeded upon the basis that the right to award punitive damages covered a wider field than that marked out in Rookes' Case [1964] UKHL 1; (1964) AC 1129 . The third member of the Full Court, Wallace J., was of opinion that the High Court decisions settled the law in Australia and should be followed. (at p157)

4. The hearing of the appeal in this Court followed immediately upon the conclusion of the argument in an appeal in another defamation action of Australian Consolidated Press Ltd. v. Uren [1966] HCA 37; (1966) 117 CLR 185 in which the same plaintiff had recovered substantial damages for the publication of libellous statements in another Sydney newspaper. In that appeal, as in this, the decision in Rookes' Case [1964] UKHL 1; (1964) AC 1129 was debated at length and counsel for the defendant in the present case adopted the arguments of counsel for the defendant in the earlier one in support of his contention that this Court should apply that decision even if it conflicted with its earlier decisions. In both appeals counsel for the plaintiff submitted that we should not follow Rookes' Case [1964] UKHL 1; (1964) AC 1129 ; that it was inconsistent with a number of decisions in this and other Australian courts and that we should apply what, until that decision was given, was regarded, both here and in England, as being the common law governing the right to award punitive damages. (at p157)

5. It would be sufficient in the present appeal for me to say that whether Rookes' Case [1964] UKHL 1; (1964) AC 1129 be accepted and applied or not I have found no reason to differ from the conclusion reached by the Full Supreme Court that, on the evidence adduced, the case was not one in which it was open to the jury to award punitive damages and that in this respect the learned trial judge fell into error. Their Honours set out in considerable detail the material bearing upon the question and the reasons for their conclusion and I need not repeat what they said. But, since it is possible that on the new trial additional facts will emerge and arguments based upon Lord Devlin's speech may again be raised, I think I should state the views I have formed of that decision. (at p158)

6. It is not open to doubt that this and other courts in countries where the common law is in force have, time and again, recognized that there are certain types of tortious acts in which 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. "Vindictive", "penal", "punitive", "exemplary" and the like terms have been used to describe damages of this kind. In actions of defamation, for example, it has been said by this and other courts in Australia and on many occasions by the courts in England that if, in publishing defamatory matter, the defendant was actuated by malice or ill will towards the plaintiff, punitive damages may be awarded. So far as the Australian cases on defamation are concerned it is sufficient to refer to The Herald and Weekly Times Ltd. v. McGregor [1928] HCA 36; (1928) 41 CLR 254 and Triggell v. Pheeney [1951] HCA 23; (1951) 82 CLR 497 . The same principle has been recognized in the case of some other tortious acts as, for example, where a defendant is said to have maliciously induced another to commit a breach of a contract made by that other with the plaintiff. Whitfield v. De Lauret & Co. Ltd. [1920] HCA 75; (1920) 29 CLR 71 is such a case and in the judgment of Isaacs J. (1920) 29 CLR, at pp 80-82 will be found references to a number of the English authorities on the subject of punitive damages. More recent cases in England are Tolley v. J.S. Fry and Sons Ltd. (1930) 1 KB 467 ; Knuppfer v. London Express Newspapers Ltd. (1943) KB 80 ; Loudon v. Ryder (1953) 2 QB 202 ; Owen and Smith v. Reo Motors (Britain) Ltd. (1934) 151 LT 274 and Williams v. Settle (1960) 1 WLR 1072 , in all of which the same principle was recognized. Other cases in this Court to which reference may be made are Williams v. Hursey [1959] HCA 51; (1959) 103 CLR 30 where the defendants were alleged to have conspired to prevent the plaintiff from continuing in his employment, and Fontin v. Katapodis [1962] HCA 63; (1962) 108 CLR 177 , an action for trespass to the person. In England, however, the decision in Rookes v. Barnard [1964] UKHL 1; (1964) AC 1129 has put what, with all respect, appear to me to be unduly narrow limits upon what was formerly thought to be the law in order, as Lord Devlin put it, "to remove an anomaly from the law of England" (1964) AC, at p 1221 . The anomaly of which his Lordship spoke was that the purpose of awarding punitive damages was not to compensate but to punish and deter and that this confused the civil and criminal functions of the law. After examining a number of the authorities, he concluded, however, that "without a complete disregard of precedent" (1964) AC, at p 1221 it was not possible to refuse to recognize "the exemplary principle" and that there were "certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal" (1964) AC, at p 1226 . His Lordship proceeded then to state what, in his opinion, those categories were, agreeing, however, that there was "powerful, though not compelling, authority" (1964) AC, at p 1226 opposed to the limitations which he proposed. The categories were three in number. One is where there is statutory authority for the award of exemplary damages. That, of course, is plainly so and requires no discussion. The first of the other two categories, his Lordship said, consists of "oppressive, arbitrary or unconstitutional action by the servants of the government" (1964) AC, at p 1226 . Whether the employees of a statutory corporation set up, for example, to manage a country's railway system or to conduct its broadcasting and television services would be regarded as servants of the

government for the purposes of this proposition is not clear to me, nor do I understand what exactly would be covered by the word "unconstitutional". His Lordship was, no doubt, not using that word in the sense in which it is used in a country which has a federal system of government and where government officials not infrequently take action in all good faith under what appears to be the law of the land only to find later that the enactment pursuant to which they have acted is not a valid law and that they have acted illegally. It is plain that in such cases an award of punitive damages would not be permitted. I mention these matters in passing since they serve to indicate difficulties that might arise if his Lordship's words are to be accepted as being the law of this country. He went on to say that he would not extend this category to cover action by private corporations or individuals using their power to oppress persons less able to protect their interests. If a powerful corporation or individual used its or his power to effect an unlawful purpose it or he must answer for the wrong done by paying compensatory damages, but such an offender, his Lordship said, is "not to be punished simply because he is the more powerful" (1964) AC, at p 1226 . I would agree that no tortfeasor should be punished simply because he is more powerful than the person he has wronged but, with great respect, it may be pointed out that he never is punished simply for that reason. Punishment is called for only if he has caused injury by using his power "in contumelious disregard of another's rights", to use the phrase of Knox C.J. in Whitfeld's Case (1920) 29 CLR, at p 77 . (at p160)

7. The remaining category of cases in which his Lordship considered that punitive damages might be awarded is that in which "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff" (1). That this is a type of case in which punitive damages may properly be awarded, assuming of course that the plaintiff can establish the necessary fact, is undoubted. In Broadway Approvals Ltd. v. Odhams Press Ltd. (No. 2) (1965) 1 WLR 805 however, the Court of Appeal pointed to some of the difficulties in applying this statement to the case of the publication of defamatory matter by a newspaper, which ordinarily prints and publishes its news items with a view to increasing its circulation and thereby increasing its profits. Lord Devlin went on then to refer to three of the decisions of the Court of Appeal, which I have mentioned earlier: Loudon v. Ryder (1953) 2 QB 202 ; Owen and Smith v. Reo Motors (Britain) Ltd. (1934) 151 LT 274 and Williams v. Settle (1960) 1 WLR 1072 . The second and third of these decisions might, he thought, be justified in the result but not for the reasons which had been given while Loudon v. Ryder (1953) 2 QB 202 could not be sustained at all and should be overruled. (at p160)

8. With the greatest respect I am unable to agree with the reasoning which led his Lordship to impose such narrow limits upon the power of juries to award punitive damages. His purpose was, as he frankly said, to "remove" an anomaly from the law, a task which I would have thought was one for the legislature rather than for the courts. The propositions which he laid down are not in accord with the common law as it has always been understood in this country and I can see no good reason why we should now place such narrow limits upon the right of a jury to award punitive damages in appropriate cases, a right which is subject always to a considerable measure of control by trial judges and by appellate courts. The very fact that the right exists has provided in the past and will no doubt provide in the future a useful protection against the abuse of power and malicious and high-handed action by persons in disregard of the rights of others. In Skelton v. Collins [1966] HCA 14; (1966) 115 CLR 94 I endeavoured to state what, in my opinion, should be the policy which this Court should now follow where it is called upon to consider a decision of the House of Lords. I will quote one passage: "This statement" - that is the statement made by Dixon C.J. in Parker's Case [1963] HCA 14; (1963) 111 CLR 610 - "is not to be taken to have meant that judgments of the House of Lords are not to be treated by this and every court in Australia with all the respect that is rightly due to decisions of the ultimate appellate tribunal in England. But it does mean that if the High Court comes to a firm conclusion that a decision of the House of Lords is wrong it should act in accordance with its own views." (1966) 115 CLR, at p 138 ; and add that were a conflict exists between a decision of the High Court and one of the House of Lords I am of opinion that other Australian courts should follow the decision of this Court. (at p161)

9. In the present case and with all due respect to those who decided Rookes' Case [1964] UKHL 1; (1964) AC 1129 I am firmly of opinion that that case should not be followed. Since I am of opinion, however, that the learned trial judge misdirected the jury on the question of damages, I would dismiss the appeal. (at p161)

ORDER

Appeal dismissed with costs.