1967/19

In The Privy Council

No. 4 of 1967

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

Between

AUSTRALIAN CONSOLIDATED PRESS LIMITED - - Appellant (Defendant)

and

THOMAS UREN - - - - - - - - - - - - - Respondent (Plaintiff)

CASE OF THE APPELLANT

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and

THOMAS UREN - - - - - - - - - - - - - Respondent (Plaintiff)

CASE FOR THE APPELLANT

1. This Appeal arises from proceedings in the Supreme Court of New South Wales in which the Respondent as Plaintiff sought and recovered from the Appellant exemplary damages for defamation.

2. The defamatory matter is set out and the evidence at the trial is reviewed in the reasons for judgment delivered by Herron, C.J. on the Defendant's Appeal to the Full Court of the Supreme Court of New South Wales: pages 67 to 70 of the Record. The four articles in which the defamatory matter appeared were in evidence as Exhibits "A", "B", "E" and "D": pages 192 to 195 of the Record.

Pages 23-27.

3. The circumstances out of which this Appeal arises appear in the Petition of Appeal herein which forms the Schedule to this Case.

4. The outstanding question in dispute is as to the principles of law which should govern damages in the general new trial of the action which has been ordered by the High Court of Australia.

5. This question turns on whether the principles governing awards of exemplary damages were correctly enunciated by the House of Lords in **Rookes v. Barnard** (1964) A.C. 1129.

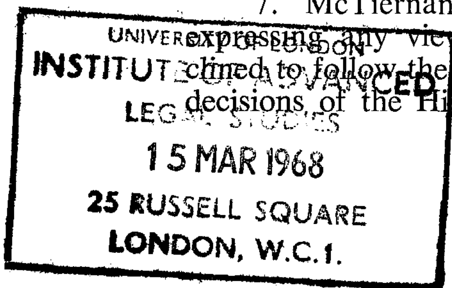
6. In Australia there has been, in the instant case, a division of judicial opinion on this question. In both the Full Court and the High Court, their Honours' Reasons were given in the Judgments published in the case of **Uren v. John Fairfax & Sons Pty. Ltd.** (described in the Petition of Appeal herein as the **Fairfax Case**) and adopted in those published in the instant case.

In the Full Court, Herron, C.J. and Walsh, J. were of the opinion that **Rookes v. Barnard** does correctly enunciate the principles governing awards of exemplary damages, but their decision was disapproved by a majority of the High Court (Taylor, Menzies, Windeyer and Owen, JJ.), which decided that the limitation of the application of the principles to the categories specified in **Rookes v. Barnard** is not justified either upon principle or upon authority.

References

Herron, C.J.	66 S.R. 223 at 230-248	Adopted	R.73.
Walsh, J.	66 S.R. 223 at 251-259	,,	R.96.
Taylor, J.	R. 161-170	,,	R.129.
Menzies, J.	R. 171-177	,,	R.131.
Windeyer, J.	R. 178-183 Adopted and expanded R.137-138 and 145.		
Owen, J.	R. 184-188	Adopted	R.151.

7. McTiernan, J., who presided in the High Court, without expressing any view on the correctness of **Rookes v. Barnard,** declined to follow the House of Lords in preference to earlier conflicting decisions of the High Court. In the Full Court, Wallace, J. (as he



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then was) also refused to follow the decision of the House of Lords not only because it was in conflict with the earlier decisions of the High Court but because of his Honour's opinion that the law stated therein was not applicable in New South Wales.

References

McTiernan, J. R.155-156 Adopted R.127.
Wallace, J. 66 S.R. 223 at 264-271 Adopted R.112.

8. It is the Appellant's contention that the considered enunciation in **Rookes v. Barnard** of the principles governing awards of exemplary 10 damages is manifestly correct for the reasons given by Lord Devlin and expressly adopted by the other Lords of Appeal present.

9. The Appellant adopts, by way of submissions, the reasons given by Herron, C.J. and Walsh, J. for following and applying that decision.

66 S.R. 223 at 230-248 and 251-259 adopted R. 73 and 96.

10. The Appellant submits that the majority of the High Court was in error in holding that **Rookes v. Barnard** was wrongly decided and that the considerations leading to its rejection are not well founded.

11. It is proposed to present the argument in support of this contention by directing submissions to the specific matters which 20 appear to form the basis for that rejection.

12. It is respectfully submitted that Taylor, J. was in error:—

Elaborated Paragraph 16.

(i) in proceeding on the unsafe premise that prior to **Rookes v. Barnard** the law as to exemplary damages in England and Australia was sufficiently certain;

(ii) in treating **Whitfield v. De Lauret & Co. Ltd.** (1920) 29 C.L.R. 71 as formulating any principle;

(iii) in the assumption that, in arriving at the decision in **Rookes v. Barnard,** no account was taken of the development of the law in Australia;

30 (iv) in not fully perceiving the anomaly with which the House of Lords was concerned;

(v) in misconceiving the scope of the first category of cases intended to be formulated;

(vi) in misapprehending the basis for the formulation of the second category of cases;

(vii) in misunderstanding Lord Devlin's examination of the early authorities; and

(viii) in relying upon citations from the 3rd edition of Sedgwick on Damages (1858) in derogation of the reasoning in **Rookes v.** 40 **Barnard.**

Elaborated Paragraph 17.

13. It is respectfully submitted that Menzies, J. was in error:—

(i) in invoking, sub silentio, the dubious maxim "Communis Error Facit Jus"; and

(ii) in assuming that the House of Lords had not considered the law as it stood in Australia and in the United States of America.

Elaborated Paragraph 18.

14. It is respectfully submitted that Windeyer, J. was in error:—

(i) in treating the explanation for admitting the second category into the civil law as being the exposition of its scope; and

(ii) in not fully perceiving the distinction between aggravated compensatory damages and exemplary damages. 10

Elaborated Paragraph 19.

15. It is respectfully submitted that Owen, J. was in error:—

(i) in invoking, sub silentio, the dubious maxim "Communis Error Facit Jus";

(ii) in misconceiving the scope of the first category of cases intended to be formulated;

(iii) in not perceiving the precise meaning that the phrase "unconstitutional action" conveys;

(iv) in misunderstanding the basis for the exclusion of private corporations and individuals from the first category; 20

(v) in giving any weight to apprehended difficulties in the application of the second category to particular sets of circumstances;

(vi) in viewing the task of vindicating the common law from misrepresentation as being one for the Legislature rather than for the Courts; and

(vii) in attributing to trial judges and appellate courts in every case a considerable measure of control over the right of a jury to award exemplary damages.

16. In elaboration of paragraph 12, it is respectfully contended that Taylor, J. was in error for the following reasons:— 30

R. 161 (42)-162 (1).

(i) His Honour proceeded on the unsafe premise that, prior to **Rookes v. Barnard**, the law as to exemplary damages in England and in Australia was "sufficiently certain", notwithstanding a recognition that:

R. 162 (4-7).

(1) there had been a degree of confusion between "aggravated" and "exemplary" damages; and

R. 163 (31-33).

(2) "there was, perhaps, some room for a more precise definition of the circumstances in which exemplary damages might be awarded". 40

Submissions

(a) In spite of the existence of powerful though not compelling authorities in England, the law as to exemplary damages was far from certain both there and in Australia.

(b) Lord Devlin demonstrated that the older cases in England contained no statement of principle and refused to treat the language that Appellate Judges have used to justify their non-intervention with liberal awards as positive formulations of types of cases in which exemplary damages can be awarded: (1964) A.C. at 1229.

(c) Herron, C.J., in a review of the cases in the High Court, pointed out that although that Court had dealt with the subject of exemplary damages on numerous occasions it was, with perhaps two exceptions, concerned not to define the exact nature of exemplary damages in tort, but rather with the application of a principle of punishment which was assumed to apply to the facts of the individual case: 66 S.R. 223 at 236.

Herron, C.J. concluded:

(1) that the High Court, while propounding the circumstances in which such damages were properly awarded, had not purported to lay down the law for Australia after careful consideration of what the law was in relation to exemplary damages: 66 S.R. at 248; and

(2) that the High Court had always assumed and, as far as his Honour's researches went, there had not been, in any reported case, any challenge to the proposition that, where evidence is present, no limitation exists upon a jury's right to award exemplary damages: 66 S.R. at 247-8.

(ii) In treating **Whitfield v. De Lauret & Co. Ltd.** (1920) 29 C.L.R. 71 as formulating any principle. R. 169 (7)-170 (3).

Submissions

(a) That appeal arose out of an action in tort brought by the Respondent company against a nominal defendant on behalf of the N.S.W. Government for damages for maliciously inducing others to commit a breach of contracts made with the plaintiff for the sale and carriage of wheat.

At the trial, statements were admitted into evidence showing the profits that the plaintiff would have made from the contracts in question had they been carried out and showing expenses occasioned by the breach. The direction by the trial judge to the jury bound them to adopt those calculations as the proper basis of assessment, and the aggregate of the two statements was the amount of the jury's verdict.

The Full Court of the N.S.W. Supreme Court (20 S.R. 669) ordered a new trial, one of the grounds being that the trial judge had not left the jury free to treat damages as being "at large", a view which the Full Court appeared to have based on a passage in the judgment of Lord Esher, M.R. in **Exchange Telegraph Company v. Gregory & Co.** (1896) 1 Q.B. 147 at 153.

The question on the issue of damages which fell for decision in the High Court was whether the evidence given at the first trial would justify a direction at the new trial 10 that the damages were "at large". That question was unanimously answered in the negative.

(b) Knox, C.J. was of the opinion that, if the expression "damages at large" was intended to include exemplary damages, he could find nothing in the evidence justifying a direction in those terms.

R. 169 (10-14).

Knox, C.J. does, it is true, recognize the existence of an exemplary principle in the passage from his Judgment cited by Taylor, J. It is reasonable, however, to suppose that the learned Chief Justice was merely adopting, with- 20 out acknowledgment, the view being put forward in the then current edition of Salmond on Torts (5th Edition [1920], page 129): the introductory sentence being a paraphrase of Salmond's view and the two that follow being in ipsissimis verbis. In neither that nor any other edition in which the same statement is made does that learned author cite any authority to support his proposition.

R. 169 (18-43).

(c) The passage from the judgment of Isaacs, J. cited by Taylor, J. occurred in the course of a statement by his 30 Honour of some broad principles, it being, in his Honour's view, both unnecessary and at that stage inadvisable to enter into any detailed consideration of the rules governing the measure of damages in a case such as the one before the Court (29 C.L.R. at 80).

Isaacs, J. was, however, principally concerned to make the point that, apart from special circumstances, there was nothing in the nature of the tort itself to warrant the recovery of "damages at large" (ibid, 79-80). His Honour considered the expression "damages at large" to be so 40 comprehensive that it could include not only compensatory damages meted out by means of the "broad axe" but "exemplary damages" as well (ibid, 81).

In deciding that "damages at large" included a class of damages of imprecise definition, his Honour, choosing from many descriptions, selected "exemplary damages" and then went on to indicate an intention to include in

that class damages which had also variously been described by judges of distinction as "penal", "punitive", "vindictive" and "retributory".

It is to be observed that the passage from the judgment of Isaacs, J. cited by Taylor, J: R. 169 (18-43).

(1) refers to only one earlier decision of the High Court, **Willoughby Municipal Council v. Halstead** (1916) 22 C.L.R. 352, a case in which that Court was evenly divided, and is, therefore, not an effective precedent: **Tasmania v. Victoria** (1935) 52 C.L.R. 157 at 173 and 183-185;

(2) refers to an obiter dictum of Story, J. delivering the Judgment of the Supreme Court of the United States in the **Amiable Nancy** (1818) 3 Wheaton 546; and

(3) is otherwise a collection of English authorities none of which purports to lay down any principle.

(d) The third member of the Court, Rich, J., made no reference to the exemplary principle at all, but contented himself by saying that it would not necessarily be right for the judge presiding at the new trial to tell the jury that damages were "at large": the propriety or otherwise of such a direction depending, in his Honour's view, upon the state of the evidence at the end of the new trial. (29 C.L.R. at 83-84)

(e) Thus it can be seen that there is nothing in any of the three Judgments to suggest that there was any challenge to the existence of an exemplary principle or that the question for decision itself called for any review of the law with a view to ascertaining the true principles governing an award of exemplary damages.

(iii) The observation that ". . . the measure of research disclosed by the observations in **Rookes v. Barnard** takes no account of the development of the law in Australia . . ." overlooks that the decision of the High Court in **Whitfield v. De Lauret & Co. Ltd.** (supra) would almost certainly have been taken into account. R. 169 (3-7).

Submission

In his Principles of the Law of Damages (1962), Professor Street, in the course of tracing the history of exemplary damages, claims (at page 29) that "very often courts have given a lump sum by way of damages without making clear whether they were awarding compensatory aggravated damages or exemplary damages."

To support that statement in the text, the learned author refers in a footnote to the decision of the High Court in **Whitfield v. De Lauret & Co. Ltd.** and, in particular, to the judgment of Isaacs, J. at 80-82.

Professor Street's history of exemplary damages was not only cited by Counsel for the Respondents ([1964] A.C. at 1163) in "the very penetrating discussion about the nature of exemplary damages to which their Lordships listened" (ibid. 1220), but Lord Devlin, in his speech, accepts it as a brief and clear statement of the subject (ibid. 1221). 10

(iv) His Honour did not fully perceive the anomaly with which the House of Lords was concerned.

Submission

R. 170 (9).
R. 163 (47).

His Honour's doubts as to the existence of any anomaly are reflected in two references to it as "the suggested anomaly" and "the anomaly, if indeed there was one".

R. 164 (5-40).
R. 168 (30-38).

(v) His Honour, by treating as "servants of the government" the employees of a corporation, constituted by Parliament for the purpose of engaging in some form of trade or commerce, misconceived the scope of the category of cases intended to 20 be formulated by **Rookes v. Barnard** as the first of two in which an award of exemplary damages could serve a useful purpose.

Submissions

(a) It is clear from what Lord Devlin said ([1964] A.C. at 1223) before formulating the category (ibid, 1226) that the contemplated purpose to be served was the restraint of "arbitrary and outrageous use of **executive** power".

(b) It is also clear from the context in which the first category is formulated that it is intended to be confined to those 30 "servants of the government" who, by reason of their duty of service to the Government, are also the servants of the people.

R. 164 (21-40).

(c) The employees of the statutory bodies, instanced by his Honour as participating in forms of trade and commerce, owe their "duty of service" to the corporations that employ them and are not "servants of the people". They are not even members of the Commonwealth Public Service: Public Service Act 1922-1960.

(d) In the United Kingdom, the former employer of the 40 Appellant in **Rookes v. Barnard,** B.O.A.C., which was constituted by the Air Corporations Act, 1949, provides a close parallel to the Australian National Airlines Commission in its function of providing air transport services and carrying out all other forms of aerial work.

The staff of B.O.A.C. in England can not be regarded as "servants of the government" any more than the employees of the statutory bodies instanced by his Honour.

(vi) His Honour misapprehended the basis for the formulation of the second category.

Submission

His Honour finds no support in the judgments in either **Bell v. Midland Railway Co.** (1861) or **Williams v. Currie** (1845) for the proposition that exemplary damages may be awarded **only** where the wrong-doer is seeking to make a profit out of his wrong-doing. R. 166 (1)-167 (13).

Nor could his Honour find in the observations of Martin, B. in **Crouch v. The Great Northern Railway Co.** (1856) anything to justify the formulation of the second category. R. 167 (13-15).

His Honour's observations on these three cases suggest a misconception of the reliance placed upon them by Lord Devlin.

Lord Devlin nowhere states that any one of these cases supports the proposition that exemplary damages may be awarded **only** where the wrong-doer is seeking to make a profit out of his wrong-doing.

His Lordship's search for recognition "eo nomine" of the exemplary principle disclosed three dicta: those of Maule, J. in **Williams v. Currie** (1845), of Martin, B. in **Crouch v. The Great Northern Railway Co.** (1856) and of Erle, C.J. in **Bell v. Midland Railway Co.** (1861).

All Lord Devlin says at 1226-1227 is that the two earlier dicta **suggest** the same thing as emerged clearly in the dicta in **Bell v. Midland Railway Co.:** that exemplary damages are warranted in a case where the defendant's conduct had been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

This was the only category of case, apart from arbitrary excess of power, where the character of the wrong could not properly be reflected in an award of aggravated compensatory damages.

(vii) A misunderstanding of Lord Devlin's examination of the early authorities appears in the two sentences "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** (3 Wils. K.B. 18), the first of these six cases, was decided in 1769 — a mere three years after **Benson v. Frederick**". R. 165 (29-35).

Submission

R. 165 (33-35).

His Honour, in observing that **Tullidge v. Wade** (1769) was decided a mere three years after **Benson v. Frederick** (1766), has misunderstood the meaning clearly conveyed by Lord Devlin's words "six cases decided in the course of the next century" (ibid, 1223).

That phrase conveys not that the first of those cases **(Tullidge v. Wade)** was decided in the course of the 19th century but that all six cases were decided in the course of a period of nearly one hundred years that elapsed 10 between 1766, the year of the decision in **Benson v. Frederick** and 1860, the year **Emblen v. Myers** was decided.

Lord Devlin also made it plain that in none of those six cases "was there any clear ruling" and that in the last of them, **Emblen v. Myers,** "the verdict was upheld without recourse to the principle".

In examining many large awards, Lord Devlin found it difficult to say whether the idea of compensation or the idea of punishment had prevailed because the conduct 20 of the defendants had been of such a malevolent, spiteful or humiliating kind that it could properly have been taken into account in assessing the appropriate **compensation.**

But, on the other hand, the survey of cases revealed that there were some where the awards could not be explained as compensatory.

That discovery led Lord Devlin to a further scrutiny to see how far and in what sort of cases the exemplary principle had been recognised. 30

The three cases of **Wilkes v. Wood, Huckle v. Money** and **Benson v. Frederick** were all cases where there had been an arbitrary and outrageous use of executive power.

R. 165 (29-35).

The first case regarded by Lord Devlin as extending the principle "eo nomine" in directions other than towards the restraint of arbitrary and outrageous use of executive power was not, as his Honour appears to have read the speech, **Tullidge v. Wade** but **Bell v. Midland Railway Co.** where "a clear dictum" was perceived.

The considerable lapse of time which was stated to 40 have elapsed before that principle was extended "eo nomine" was clearly intended to refer to the lapse of time between **Benson v. Frederick** (1766) and **Bell v. Midland Railway Co.** (1861).

R. 167-168.

R. 167 (18-20).

(viii) His Honour cites two passages from the 3rd Edit. of Sedgwick (1858) to support the statement that "no writer and no authority has ever claimed that an award of exemplary damages should be restricted to the categories suggested."

Submission

Whatever else may be derived from the particular quotations, the latter contains an acknowledgment by Grier, J., that the propriety of the principle he claimed to be well-established had been questioned by some writers and, elsewhere in the text, Sedgwick clearly acknowledges a contemporary school of juridical thought contending for the principle of absolute compensation.

10 The first Appendix to the 3rd Edit. of Sedgwick (pages 653-664) is a reprint of what Sedgwick describes (at 665) as an able and elaborate article by Professor Greenleaf "re-asserting and defending the position . . . that damages even in actions of tort must always be strictly limited to compensation . . ."

The author also claims that the exemplary principle has no place in either Roman or Scottish law.

His Honour also observes that some of the English authorities reviewed by Sedgwick in Chap. 18 of the 1858 Edition are "additional to those cited by Lord Devlin". R. 167 (35-37).

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Submission

There are, it is true, in Chap. 18, fourteen English authorities referred to which are not cited by Lord Devlin but none of these decisions, and his Honour does not seek to demonstrate otherwise, bears in any significant way on the problem which was before the House of Lords.

17. In elaboration of paragraph 13, it is respectfully contended that Menzies, J., was in error for the following reasons:—

(i) His Honour's refusal to accept a limitation not previously perceived because it would involve a radical departure from 30 "what had been regarded as established law" i.e. what the law "has for so long been taken to be" appears to be an invocation, sub silentio, of the dubious maxim "Communis Error Facit Jus". R. 176 (1-6). R. 177 (17-19).

Submissions

(a) It is true that where an erroneous conception of the law, especially of real property, has been made, for a length of time, the basis upon which rights have been regulated and arrangements as to property made, the maxim, Communis Error Facit Jus, may be applied: **Davidson v. Sinclair:** 40 (1878) 3 App. Cas. 765; but the reluctance to correct misconceptions of that nature stems from a fear of interference with rights based upon them.

(b) Where, however, no question of rights in property arises, the maxim should not be applied "to set up a misconception of the law in destruction of the law". See **The King v. Eriswell** (1790) 3 T.R. 707 at 725.

To borrow from the speech of Lord Reid in **British Transport Commission v. Gourlay** (1956) A.C. 185 at 211-212, this is not the type of case in which vested interests may have accrued or in which people may have ordered their affairs relying on the validity of existing practice. 10

An extract from the speech of Lord Denman in **O'Connell v. Reg.** (1844) 11 Cl. & Fin. 155 at 372-373 further illustrates the dubiety of the maxim: "And I am tempted to take this opportunity of observing, that a large portion of that legal opinion which has passed current for law, falls within the description of 'law taken for granted'. If a statistical table of legal propositions should be drawn out, and the first column headed 'Law by Statute,' and the second 'Law by Decision'; a third column, under the heading of 'Law taken for granted', would comprise as much 20 matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and re-statement of a doctrine — the mere repetition of the cantilena of lawyers, cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."

R. 177 (13-16).

(ii) The observation that, "Naturally enough, the law as it stood in Australia and in the United States of America — see Re- 30 statement of the Law of Torts, paragraph 908, Punitive Damages — seems not to have been considered" overlooks two considerations.

Submissions

(a) For the reasons given in paragraph 16 (iii) of this Case, the decision of the High Court in **Whitfield v. De Lauret & Co. Ltd.** would almost certainly have been considered.

(b) Their Lordships would also have considered the law as it stood in the United States of America in so far as it was revealed: 40

(1) by that section of Sedgwick on Damages 9th Edit. (1913) quoted by McCardie, J., in **Butterworth v. Butterworth** (1920) P. 126; and

(2) in the relevant portions of the American Restatement of the Law of Torts Volume 4 (1939) (one being para. 908);

as both authorities were cited by Counsel for the Respondents during argument in **Rookes v. Barnard** the former, in chief, at 1160 and the latter, in reply, at 1163.

It is probable also that consideration would have been given to the lengthy analysis by Foster, J., of the Supreme Judicial Court of New Hampshire in **Fay v. Parker** (1873) 53 N.H. 342, cited by Professor Street in Principles of the Law of Damages (1962) (at page 30) as illustrating his proposition that "it is difficult to find an English case where an award of exemplary damages could not equally well have been justified as aggravated damages". In the course of that analysis, each one of the six cases decided between 1769 and 1860 that are examined by Lord Devlin (at 1223) are discussed and Professor Street's proposition strongly supported.

Lord Devlin also pointed out (at 1223) that, although a dictum of Church, J., in the Supreme Court of the United States of America in **Tracy v. Swartwout** (1836) 10 Peters 80, had been cited in the argument on the Rule Nisi in **Emblen v. Myers** (1860) 6 H. & N. 54, the verdict in the latter case was upheld without recourse to the exemplary principle.

The dictum of Grier, J., in **Day v. Woodworth** (1851) 14 Howard 363, cited by Taylor, J., may also have been present to their Lordships' minds as it appears as a footnote to the passage from Sedgwick quoted by McCardie, J., in **Butterworth v. Butterworth** (supra). R. 166-167.

18. In elaboration of paragraph 14, it is respectfully contended that Windeyer, J. was in error for the following reasons:—

(i) His Honour has treated the explanation for admitting the second category into the civil law as being the exposition of its scope, that is to say, His Honour appears to have confused the purpose and scope of that category. R. 178 (38-40). R. 182 (15-25).

Submission

When Lord Devlin came, at 1226, to define the first category to be admitted into the civil law, there was no occasion to explain the purpose it served because that had been earlier described, at 1223, as being in restraint of "the arbitrary and outrageous use of executive power."

When his Lordship proceeded, at 1226, to define the second category of cases, his Lordship indicated the authorities which suggest the necessity for accepting it and, after illustrating the type of conduct exhibiting a calculated profit motive, concluded by saying:

> "Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay." (1227.)

It was this last sentence, explaining the reason for admitting the category, that his Honour appears to have 10 treated as being its definition. That his Honour treated this sentence as the statement of principle appears:

R. 182 (15-16).

(1) from his Honour's impression that the Court was being asked "to subordinate the statement of principle to an illustration of that principle"; and

R. 178 (32-40).

(2) from the fact that his Honour took the broad general principle stated "in that part of Lord Devlin's judgment" to be "that exemplary damages may be given to make it clear that tort does not pay."

To take that as the statement of principle in **Rookes v.** 20 **Barnard** would be to re-assert the validity of the principle stated and applied by the Court of Appeal in **Loudon v. Ryder** (1953) 2 Q.B. 202, and expressly overruled by the House of Lords.

(ii) His Honour did not fully perceive the distinction between aggravated compensatory damages and exemplary damages.

Submission

R. 180 (28-31).

His Honour appears to treat the motives and conduct of a Defendant as being irrelevant to the Common Law concept of compensation but as being imported into it 30 when the law of libel was taken into the Common Law.

R. 180 (31-34).

His Honour asserted as indisputable the proposition that a jury could in all cases consider "not only what the plaintiff should receive but what the defendant ought to pay."

R. 180 (34-35).

Forsdike v. Stone (1868) L.R. 3 C.P. 607, the case *from which his Honour said these words came*, was one in which the Court of Common Pleas refused to set aside a nominal verdict in a slander action because the view was open to the jury on the evidence that the defendant 40 had made an innocent mistake.

In the course of the judgments in that case, Wiles, J., at 611, said:

"... in a case of slander a jury considers not only what the plaintiff should receive, but what the defendant should pay."

and Byles, J., at 612, said:

"As to the other point, the jury may reasonably have taken into account what the defendant ought to pay as well as what the plaintiffs ought to receive."

The danger of reviving the confusion between aggravated compensatory damages and exemplary damages by the use of any formula based on the decision in **Forsdike v. Stone** is demonstrated by Pearson, L.J. (as he then was), in **McCarey v. Associated Newspapers Ltd. (No. 2)** (1965) 2 Q.B. 86 in the following passage in his Lordship's judgment at 105:

"Moreover, it would not be right to allow punitive or exemplary damages to creep back into the assessment in some other guise. For instance, it might be said: 'You must consider not only what the plaintiff ought to receive, but what the defendant ought to pay'."

In any event, all that can be deduced from the earlier cases is that the conduct (and motives) of a defendant could be taken into account in assessing appropriate compensation only where a finding would be open that the conduct or motive of the defendant was of such a kind as to aggravate or mitigate the injury done to the plaintiff.

19. In elaboration of paragraph 15, it is respectfully contended that Owen, J., was in error for the following reasons:—

(i) In stating that the propositions laid down by Lord Devlin "are not in accord with the common law as it has always been understood in this country," his Honour shared the approach of Menzies, J., by appearing to invoke, sub silentio, the dubious maxim "Communis Error Facit Jus". R. 188 (12-13).

Submission

This is an erroneous approach for the reasons stated in paragraph 17 (i) of this Case.

(ii) The difficulties expressed by his Honour in determining whether employees of certain statutory corporations would be regarded as "servants of the government" indicate a misconception of the scope of the first category of cases intended to be formulated by **Rookes v. Barnard.** R. 187 (9-15).

Submission

These difficulties were shared by Taylor, J., and arise from the misconception already demonstrated in paragraph 16 (v) of this Case.

R. 187 (15-25).

(iii) The difficulty foreshadowed by his Honour in evaluating the precise meaning of an "unconstitutional action" in a country which has a federal system of Government arises only if that phrase is examined apart from its context.

Submission

R. 166 (27-35).

The opinion of Taylor, J., that it should not be so examined is respectfully adopted. Taylor, J., says: "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 10 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."

R. 187 (28-38).

(iv) In pointing out that a tortfeasor is never punished **simply** because he is more powerful than the person he has wronged, 20 his Honour appears to have misunderstood the basis for the exclusion of private corporations from the first category.

Submission

Lord Devlin's statement, at 1226, was merely by way of introduction to the contrast drawn between the tortfeasor who is a powerful private individual and the tortfeasor whose power derives from being "a servant of the government", and to make the point that where there is an illegal use of that power, the former will not but the latter will be punished **simply** because he is the more powerful. 30

R. 187 (38-49).

(v) His Honour was in error in giving any weight to apprehended difficulties in the application of the second category to particular sets of circumstances.

Submission

His Honour appears to have read into the decision of the Court of Appeal in **Broadway Approvals Ltd. v. Odhams Press Ltd. (No. 2.)** (1965) 1 W.L.R. 805 some anticipation of difficulties in applying the second category to the case of publication of defamatory matter by a newspaper which ordinarily prints and publishes its news items with a view to 40 increasing the circulation and thereby increasing its profits.

It is only in the Judgment of Sellers, L.J. in that case that one finds a statement that "it may not always be easy to apply the exception for punitive damages on the basis that a defendant has profited by his own wrongdoing" (page 819).

His Lordship, however, went on to say: "I will content myself for the present by saying that if Lord Devlin had intended newspapers in publishing items of news as here to fall within a punitive penalty and not merely a compensating liability I would have expected it to be expressly so stated. Newspapers would never be immune from the risk of penalty if that is the right interpretation. They, in the ordinary course of their business, publish news for profit. It would seem that a more direct pecuniary benefit would have to be shown to make a newspaper or any other defendant liable for punitive damages".

The difficulties of proof which were thought might arise if **Billingham v. Hughes** (1949) 1 K.B. 643 were overruled did not deter the House of Lords from so doing in **British Transport Commission v. Gourley** (1956) A.C. 185.

(vi) His Honour was in error in viewing the task of vindicating the common law from misrepresentation as being one for the Legislature rather than for the Courts. R. 188 (7-11).

Submissions

(a) His Honour appears to have confused the purpose and the result of Lord Devlin's examination of the law of damages in cases of tort.

It is true that Lord Devlin approached that examination to see whether it was open to the House of Lords to remove altogether an anomaly from the law of England: (1964) A.C. at 1221. It is plain, however, that at the conclusion of that examination his Lordship arrived at the view that it was not open to the House of Lords, without a complete disregard of precedent, and indeed of statute, to arrive at a determination that refused altogether to recognise the exemplary principle: ibid, 1226.

It is therefore difficult to understand how his Honour arrived at a view that the decision in **Rookes v. Barnard** has put "unduly narrow limits on what was formerly thought to be the law in order, as Lord Devlin put it, 'to remove an anomaly from the law of England'," and that, "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." R. 186 (38-42). R. 188 (9-11).

All that his Lordship hoped had been removed from the law was "a source of confusion between aggravated and exemplary damages which had troubled the learned commentators on the subject": ibid, 1230.

(b) The only circumstances in which a superior court should relegate to the Legislature the task of removing a source of confusion from the law are:—

(1) in the interpretation of Statutes where the words used by the Legislature have a necessary meaning: see **Altrincham Electric Supply Co. v. Sale U.D.C.** (1936) 154 L.T. 379 per Lord Macmillan at 388; and

(2) in those cases, already referred to in paragraph 17 (i) of this Case, where the maxim "Communis Error Facit Jus" has a limited operation. 10

Apart from those cases and with respect to matters which do not affect existing rights, to any great degree, but tend principally to influence the future transactions of mankind, it is generally more important that the rule of law should be settled, than that it should be theoretically correct: see **Lozon v. Pryse** (1840) 4 Myl. & Cr. 600 per Lord Cottenham at 617-618.

In such cases the removal of confusion does not make new law but, by reverting to the right rule, vindicates old law from misrepresentation. 20

R. 188 (12-17).

(vii) His Honour was in error in attributing to trial judges and appellate courts in every case a considerable measure of control over the right of a jury to award exemplary damages.

Submissions

(a) The measure of control which can be exercised by an appellate court is quite limited and, in the case of a trial judge, is quite minimal.

(b) The very nature of the emotional appeal to punish creates formidable difficulties of control for a trial judge. Any one of three situations may fall for consideration at the 30 conclusion of the evidence. According to the state of the evidence, he may rule that the claim is sufficiently supported, that it is insufficiently supported or that it was made without any foundation.

In the first situation, the trial judge must leave the case to the jury. In the second he has a difficult discretion to exercise. The third situation is the only one presenting no difficulty. The discretionary power to discharge the jury, on the defendant's application, should be exercised without hesitation. 40

R. 46 (20-30).

Where, as in the first situation, the case must be left to the jury, the only control which can be exercised is a resort to the type of exhortation to be dispassionate that was given in the instant case.

There is, however, no effective control of the type of advocacy which can be legitimately employed to arouse the jury's indignation.

No doubt the warning given to the jury in **Loudon v. Ryder** (quoted, (1953) 2 Q.B. 202 at 209) was present to Lord Devlin's mind when his Lordship said in **Rookes v. Barnard** at 1228: "Exhortations to be moderate may not be enough".

10 The second situation presents an imponderable difficulty.

In allowing the trial to proceed, the trial judge must satisfy himself that his warning would operate not only to control the jury but to eliminate from their minds the prejudice which would have been created by an appeal for punishment.

The words of a former Chief Justice of New South Wales are apposite to illustrate the unlikelihood of any such warning removing the effect of a very prejudicial statement. In **Croll v. McRae** (1930) 30 S.R. (N.S.W.)
20 137, at 144, Sir Philip Street, C.J. said:

> "Human nature being what it is, of what use is it to tell (the jury) to disregard such a statement. The poison, once instilled into their minds, must inevitably work, and who could possibly feel any confidence in a verdict in the plaintiff's favour arrived at after so prejudiced a statement had been made. In such a case a warning in the summing-up to disregard it is only to revive their recollection of it, and to renew its damaging potency."

30 (c) The undoubted right of appellate courts to control verdicts of juries in defamation actions is itself subject to a self-imposed and self-denying ordinance not to interfere, except in special circumstances, with measurements that are not normally capable of proof or disproof: see **Dingle v. Associated Newspapers Ltd.** (1964) A.C. 371 at 393.

This is probably due to, what Viscount Radcliffe called, "the peculiar historical sanctity" enjoyed by such verdicts (ibid.).

The point was also made by Holroyd Pearce, L.J. (as
40 he then was) that the very fact that a jury may give exemplary damages for defamation must always make it very difficult for defendants to satisfy an appellate court that an award is out of all proportion: **Lewis v. Daily Telegraph Ltd.** (1963) 1 Q.B. 340, at 381.

Although **Loudon v. Ryder** was overruled by **Rookes v. Barnard** because the Court of Appeal had wrongly applied the exemplary principle, the observations of Singleton, L.J., with whose judgment Denning and Hodson, L.JJ. (as they then were) agreed, lose none of their force or relevance in any case where the exemplary principle is rightly applied.

Singleton, L.J., who would not himself have given so large a sum as the jury, said of their verdict:

> "It was for their decision; it would not be right for this court to interfere. I hope that it will be known that, when juries are called upon to exercise a duty such as this, their verdict, is and ought to be, regarded as final": (1953) 2 Q.B. at 210. 10

That finality was accorded to the jury's verdict in the **Fairfax Case** by McTiernan and Menzies, JJ. and to the jury's verdict on the 3rd and 4th Counts in the instant case by McTiernan, J. It would also have been so accorded in the instant case by Menzies, J. if there had not been other considerations. 20

In no other reported appeal from a jury's verdict, in a case where the exemplary principle was admitted, has the High Court ever interfered.

There are, however, two reported cases in which the High Court, admitting that principle, has refused to interfere with the jury's verdict: see **David Syme v. Swinburn** (1909) 10 C.L.R. 43, and **Triggell v. Pheeney** (1951) 82 C.L.R. 497.

20. As the validity of the reasoning in **Rookes v. Barnard** is not in anyway impeached by McTiernan, J., it is not material to the Appellant's Case to examine the reasons of policy underlying his Honour's decision. 30

21. It is also submitted that, as no question arises or could arise on this appeal as to the obligation of the Supreme Court of a State to follow decisions of the High Court in preference to those of the House of Lords, only two matters in the judgment of Wallace, J. (as he then was) fall for any discussion.

It is submitted that His Honour fell into error:

(i) in treating any of the decisions of the High Court as enunciating or laying down any principles as to the law covering awards of exemplary damages; and 40

(ii) in holding that the law as stated in **Rookes v. Barnard** was not applicable to the statutory Code in New South Wales, which appreciably differed from the (English) Defamation Act, 1952.

22. In elaboration of paragraph 21, it is respectfully contended that Wallace, J. was in error for the following reasons:—

(i) His Honour treated as an enunciation of a principle the mere acceptance by the High Court of the existence of an exemplary principle. 66 S.R. 223 at 266

Submissions

10 (a) This is an erroneous approach for the reasons stated in paragraph 16 (i) (c) of this Case.

(b) The passages cited by his Honour from the second edition of Professor Fleming's Law of Torts (1961) do not support the proposition that the High Court had "enunciated" any exemplary principle.

The learned author in that edition, at page 560 (the page cited), does say: "Exemplary or punitive damages may be awarded because of malice, wantonness, high-handedness, insult or other aggravating circumstances 20 surrounding the publication", but he goes on to say that "those elements of damage are hard to justify on principle, if the true basis of liability is merely compensation for injury to reputation. They have, however, been sanctioned by usage, and as an indulgence to what is called the practical common-sense of juries": **Judd v. Sun Newspapers Ltd.** (1930) 30 S.R. 294 at 299.

The learned author further comments that "this produces the apparently paradoxical result that, while the law discourages the admission of evidence bearing upon the 30 'damages-worthiness' of the plaintiff, the defendant's blame-worthiness is recognised as a material element in the assessment of damages."

In the third edition (1965), it is, perhaps, significant that the learned author (at page 565) does not treat the decision in **Rookes v. Barnard** as having come into collision with any rule that had been settled by the High Court, but rather as pointing up how "in the past, little used to be made of any distinction between aggravated damages (to compensate a plaintiff for affront to his 40 feelings) and exemplary damages (to punish a defendant)".

Fleming goes on to observe that "damages being at large, and on any view 'aggravating circumstances surrounding the publication' clearly relevant, the two criteria are rarely unscrambled, and often enough could not be." (ibid).

66 S.R. 223 at 267, 270.

(ii) His Honour held that the law as stated in **Rookes v. Barnard** was not applicable to the statutory Code in New South Wales, which appreciably differed from the (English) Defamation Act, 1952.

Submission

To whatever extent the law of defamation in New South Wales is codified by the Act of 1958, Wallace, J. himself concedes that, although matters in mitigation of damages are mentioned at three places (Sections 21, 22 and 24), neither punitive nor aggravated damages are expressly mentioned and that the Code therefore seems to assume that such matters will derive from the general law. 10

There is no warrant for reading into the 1958 enactment an intention that the ascertainment of any part of the general law not intended to be codified must be derived only from the general law as it stood at the time of the passing of the Act.

In any event, as has elsewhere been submitted, what the decision in **Rookes v. Barnard** achieved was no more than the removal of confusion from the law as it stood at the time of the passing of the 1958 Act. 20

R. 161 (34-41).

The Appellant respectfully adopts the opinion of Taylor J. that there is no distinction between English legislation and that in force in New South Wales which would make the observations in **Rookes v. Barnard** inapplicable in that State.

23. There is no evidence in this case to bring it within the second exception to the rule laid down by the House of Lords in **Rookes v. Barnard,** and it was unanimously so held by the Full Court: Herron, C.J. at pages 73-74, Walsh, J. at pages 97-98 and Wallace, J. at page 112 of the Record. In view of their decision not to follow **Rookes v. Barnard,** this question was not considered by the High Court. 30

24. The Appellant therefore respectfully submits for the foregoing (amongst other) reasons:—

(i) that so much of the Decision of the High Court of Australia as determined that it was competent to award exemplary damages in this case should be reversed;

(ii) that this Appeal should be allowed; and

(iii) that the Order of the High Court directing a new trial on all issues should be confirmed. 40

ANTONY LARKINS
DAVID HUNT
Counsel for the Appellant.

SCHEDULE TO THE APPELLANT'S CASE

In The Privy Council

No. of 1966.

ON APPEAL from the High Court of Australia

BETWEEN

AUSTRALIAN CONSOLIDATED PRESS LIMITED
(Defendant) **Appellant**

AND

THOMAS UREN
10 (Plaintiff) **Respondent**

TO: THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

THE HUMBLE PETITION

OF

AUSTRALIAN CONSOLIDATED PRESS LIMITED

SHEWETH:

1. Thomas Uren, a Labor Member of the Federal Parliament of Australia, by Writ of Summons issued out of the Supreme Court of New South Wales on the 14th February, 1963, commenced an action 20 for damages for defamation against your Petitioner, the publisher of, inter alia, the "Daily Telegraph" (a morning newspaper) and the "Sunday Telegraph" distributed mainly in New South Wales, and the "Bulletin" (a weekly magazine) distributed throughout Australia and to some extent overseas.

2. The Plaintiff sued upon:

(a) portion of an election eve editorial in the "Daily Telegraph" of the 8th December, 1961; R. 192.

(b) portion of a commentary on a parliamentary debate on defence estimates, in the "Bulletin" of the 3rd November, 1962; and R. 193.

30 (c) portions of articles in successive editions of the "Sunday Telegraph" of the 10th February, 1963, suggesting that allegations would be made in the Federal Parliament that some Labor M.P.s had been the unsuspecting dupes of a recently expelled official of the Soviet Embassy. R. 194-5.

3. After various interlocutory proceedings, the Action was tried in February and March, 1964, by Collins, J. and a jury of twelve persons.

R. 4 (25-29).

4. At the trial your Petitioner relied mainly upon a defence of qualified protection under Section 17(h) of the Defamation Act, 1958, that the publications were made in the course of the public discussion of subjects of public interest, the public discussion of which was for the public benefit, and that insofar as they consisted of comment, the comment was fair.

R. 6.

5. By amendment allowed at the trial, the Plaintiff replied that the publications were not made in good faith.

R. 46 (1-30).

6. In his charge, the trial Judge left it open to the jury to award exemplary damages. 10

R. 59.

7. On the 11th March, 1964, the thirteenth day of the trial, the jury returned verdicts for the Plaintiff totalling £30,000: £5,000 in respect of the "Daily Telegraph" editorial, £10,000 in respect of the "Bulletin" commentary and £15,000 in respect of the "Sunday Telegraph" articles.

8. No objection was taken to the direction on exemplary damages, your Petitioner's advisers being unaware of the decision of the House of Lords in **Rookes v. Barnard** (delivered on the 21st January, 1964, first reported in England in the Weekly Law Reports on the 14th February, 1964, and later reported at (1964) 20 A.C. 1129), no report of it having then been distributed in Australia.

R. 60-66.

9. Your Petitioner by Notice of Motion to the Full Court of the Supreme Court of New South Wales filed on the 1st April, 1964, sought a general new trial of the action primarily on the ground that the trial had miscarried by reason of, interalia, the prejudicial conduct of Counsel for the Plaintiff.

R. 66 (20-21).
R. 96 and 113.

10. A report of the decision of the House of Lords in **Rookes v. Barnard** (supra) having come to hand prior to the 1st April, 1964, misdirection on damages was also taken as a ground of appeal and was, by leave of the Full Court, allowed to be argued. 30

11. Your Petitioner's Appeal was heard in February and March, 1965, by the Full Court (Herron, C.J., Walsh and Wallace, JJ.).

12. Immediately preceding the hearing of your Petitioner's Appeal, John Fairfax & Sons Pty. Ltd., the publisher of another Sunday newspaper, the "Sun Herald", had applied to an identically constituted Full Court to set aside verdicts against it totalling £13,000 awarded on the 6th May, 1964, to the Plaintiff in another defamation action. In that action (hereinafter called the **Fairfax Case**) the Plaintiff sued upon articles also published on the 10th February, 1963, of a very similar character to those in respect of which the jury had already 40 awarded him £15,000 in his action against your Petitioner.

13. It was submitted to the Full Court on your Petitioner's behalf, as well as by the Appellant in the **Fairfax Case,** that, as the decision of the House of Lords in **Rookes v. Barnard** enunciating the principles governing awards of exemplary damages should be followed by all Australian Courts and there being no evidence to bring either case within any of the exceptions therein mentioned, the trial Judges had misdirected the juries on exemplary damages. (In the **Fairfax Case** the trial Judge had refused the Defendant's request to follow **Rookes v. Barnard**).

10 14. In your Petitioner's Appeal and in the Appeal in the **Fairfax Case,** it was submitted on behalf of the Plaintiff that the principles enunciated in **Rookes v. Barnard** should not be applied as they were in conflict with principles previously laid down by the High Court of Australia.

15. On the 9th April, 1965, the Full Court allowed the Appeal in the **Fairfax Case** (66 S.R. (N.S.W.) 223). Herron, C.J. and Walsh, J. were of opinion that **Rookes v. Barnard** should be followed in preference to conflicting decisions of the High Court unless and until that Court should otherwise decide.

20 16. On the 4th May, 1965, the Full Court delivered Judgment in your Petitioner's Appeal unanimously setting aside the verdict, the majority (Herron, C.J. and Wallace, J.), however, limiting the new trial to the issue of damages. R. 121.

17. Herron, C.J. based his Order on the ground of the prejudicial conduct of Counsel for the Plaintiff and on the ground that there was no evidence justifying an award of exemplary damages upon the basis of the principles laid down by the House of Lords in **Rookes v. Barnard.** R. 71-74.

18. Wallace, J. based his Order on the sole ground that there was no evidence to justify an award of exemplary damages upon the basis 30 of the principles laid down by the High Court, which His Honour, for the reasons given in his Judgment in the **Fairfax Case,** was of opinion should be followed in preference to those laid down by the House of Lords in **Rookes v. Barnard** unless and until those principles be overruled by the Judicial Committee of Your Majesty's Privy Council. R. 111-120. 66 S.R. 223 at 264-271

19. Walsh, J. based his Order that your Petitioner should have a general new trial on a combination of the extravagant nature of the jury's verdicts, the effect of the prejudicial conduct of Counsel for the Plaintiff on both the issues of damages and of liability and of the absence of any evidence justifying an award of exemplary damages 40 upon the basis of the principles laid down by the House of Lords in **Rookes v. Barnard.** R. 83-102.

20. Your Petitioner applied ex parte to the High Court for leave to appeal from the refusal of the majority of the Supreme Court to order a general new trial.

21. The Plaintiff by Notices of Motion also applied to the High Court for leave to appeal from the Orders of the Supreme Court setting aside his verdicts and granting new trials limited to damages to your Petitioner and to the Defendant in the **Fairfax Case.**

R. 122.

22. The High Court (Barwick, C.J., Taylor and Windeyer, JJ.) on the 26th May, 1965, granted the leave sought by your Petitioner as well as the leave sought by the Plaintiff in the **Fairfax Case.**

R. 123-4.

23. Pursuant to its leave, your Petitioner appealed to the High Court seeking a general new trial of the action.

R. 125-6.

24. The Plaintiff cross-appealed and, pursuant to his leave, appealed in the **Fairfax Case,** seeking the restoration of his verdicts: a ground of appeal common to both his Cross-Appeal and his Appeal being that the Supreme Court was in error in following the decision of the House of Lords in **Rookes v. Barnard.** 10

25. During the hearing in November, 1965, of your Petitioner's Appeal to the High Court, Counsel for the Respondent publisher in the **Fairfax Case,** who were in attendance, were invited to appear and to treat as part of the argument in chief in the Plaintiff's Appeal in the **Fairfax Case** the submissions then about to be made by Counsel for the Plaintiff in support of the ground in his Cross-Appeal that **Rookes v. Barnard** should not be followed. 20

26. This course was followed, Counsel for the Respondent on the subsequent hearing of the Appeal in the **Fairfax Case** adopting your Petitioner's submissions as part of his Address in reply.

27. The High Court was constituted in both Appeals by McTiernan, Taylor, Menzies, Windeyer and Owen, JJ.

R. 153.

28. Judgment in both Appeals was delivered by the High Court on the 2nd June, 1966. Your Petitioner's Appeal was allowed with costs by majority (McTiernan, J. dissenting). The Order of the Supreme Court was varied by directing a new trial on all issues and, by majority (McTiernan, J. dissenting as to the verdict on the third and fourth counts), the Plaintiff's Cross-Appeal was dismissed with costs. Costs of the first trial were ordered to abide the event of the second trial. 30

29. Although both the Cross-Appeal in your Petitioner's Case and, by majority (McTiernan and Menzies, JJ. dissenting), the Appeal in the **Fairfax Case** were dismissed with costs, the submissions of Counsel for the Plaintiff as to the principles which should govern damages at the new trials prevailed: a majority of the Court holding that those principles had been wrongly decided by the House of Lords in **Rookes v. Barnard.** 40

30. The reasons of the majority of the High Court for refusing to follow **Rookes v. Barnard** were given in the Judgments dismissing the Appeal in the **Fairfax Case** and incorporated by reference in the Judgments of their Honours dismissing the Plaintiff's Cross-Appeal for the restoration of his verdicts against your Petitioner.

31. The Court was, however, divided as to the application to the evidence in the case against your Petitioner of the principles they had enunciated: McTiernan and Menzies, JJ. being of opinion that there was evidence which would justify an award of exemplary 10 damages; Taylor and Windeyer, JJ. being disposed to the view that there was not; and Owen, J. expressing no concluded opinion.

32. By the Order of Your Majesty in Council dated the 20th July, 1966, your Petitioner was granted, upon conditions which have since been complied with, special leave to appeal against so much of the said Decision of the High Court of Australia on the Plaintiff's Cross-Appeal as determined that it was competent to award exemplary damages in this case.

R. 189-190.

AND YOUR PETITIONER THEREFORE HUMBLY PRAYS

(1) that Your Majesty in Council may be graciously pleased to
20 take the Appeal into consideration;

(2) that the said Decision of the High Court of Australia may be reversed, altered or varied;

(3) that, pending disposal of such Appeal, further proceedings under so much of the Order of the High Court which directed a new trial of Action No. 1185 of 1963 in the Supreme Court of New South Wales between the Respondent as plaintiff and your Petitioner as defendant be stayed; and

(4) that your Petitioner may have such further and other relief in the premises as to Your Majesty in Council may seem just.

30 **AND YOUR PETITIONER WILL EVER PRAY, ETC.**