1967/19

IN THE PRIVY COUNCIL No. 4 of 1967

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

AUSTRALIAN CONSOLIDATED PRESS LIMITED — Appellants (Defendants)

- and -

THOMAS UREN — Respondent (Plaintiff)

CASE FOR THE RESPONDENT

Record

1. This is an Appeal brought by virtue of an Order in Council dated 28th day of July, 1966 granting Special Leave to Appeal to Her Majesty in Council from so much of the decision of the High Court of Australia delivered on the 2nd day of June, 1966 as determined that it was competent to award punitive damages in this case.

2. The action in which this Appeal is brought was heard by His Honour Mr. Justice Collins and a jury of twelve persons on the 24th, 25th, 26th, 27th and 28th days of February and the 2nd, 3rd, 4th, 5th, 6th, 9th, 10th and 11th days of March, 1964. On the last said date the jury returned a verdict in favour of the Respondent on each of the four counts the subject of his claim, the third and fourth counts being taken together.

3. In the said action the Respondent, a Labour

Record p.1. Member of the Federal Parliament of Australia, by writ issued the 14th February, 1963, claimed to recover damages from the Appellants in respect of defamation of him in three newspapers of wide circulation published by them namely (1) in an issue of the "Daily Telegraph" (a morning newspaper) dated 8th December 1961, (2) in an issue of "The Bulletin" (a weekly magazine) dated 3rd November, 1962, (3) in an issue of the "Sunday Telegraph" dated 10th February 1963 and (4) in a further edition of the "Sunday Telegraph" dated 10th February, 1963. The libels complained of are set forth in the p.1-4 Respondents declaration dated 26th April, 1963.

4. By their pleas the Appellants denied inter alia that the matters complained of bore or were capable of bearing the meanings alleged and p.4-5 further relied on a defence of qualified protection under Section 17(h) of the New South Wales Defamation Act 1958, that the matters complained of were published in the course of the public discussion of subjects of public interest, the public discussion of which was for the public benefit and that insofar as the matters complained of consisted of comment, the comment was fair.

In amended replication to the said pleas made at the trial on 25th February, 1964 by leave of the judge, the Respondent alleged that the matters complained of were not published in good faith.

A very substantial question in the course of the thirteen days of the trial was that of the conduct of the Appellants from the time of p.28-31 the publication of the alleged libels down to p.36-45 the end of the trial and whether there was p.53-57 evidence from that conduct showing that they were actuated by ill-will towards the Respondent.

In his summing up to the jury the learned judge directed them that it was open to them in this case to award punitive or exemplary p.45-46 damages.

On 11th March, 1964 the jury returned

verdicts for the Plaintiff on the First count for £5000 on the Second for £10,000 and on the Third and Fourth Counts together for £15,000. Record p.59

5. By Notice of Motion dated 4th April, 1964 the Appellants applied to the Supreme Court of New South Wales for an order that the verdict should be set aside and that a new trial should be granted. By rule dated 4th May, 1965 the Full Court of New South Wales by a majority ordered a new trial limited to damages. p.121

From that order the Appellants appealed by leave of the High Court of Australia dated the 26th May 1965 asking in their Notice of Appeal dated 2nd June, 1965 for a general new trial of the action. p.122 p.123

By notice of Cross-Appeal dated 23rd June, 1965 the Respondent applied for an order that the appeal to the Supreme Court of New South Wales from the verdict should be dismissed and the said verdict restored. On the hearing of the appeal the Appellants were successful, the Court by a majority allowing their appeal, directing a new trial on all issues and dismissing the Respondent's Cross-Appeal. p.125 p.153

6. In the course of the hearings before the Full Court of New South Wales and before the High Court in this case and before the same judges in the Case of Uren v. John Fairfax & Son Pty Ltd the question of exemplary damages and of the case of Rookes v. Barnard (1964) A.C. 1129 was argued and considered.

7. The Appellants now appeal against "so much of the Decision of the High Court of Australia delivered on the 2nd day of June, 1966 as determined that it was competent to award punitive damages in this case". p.190

The questions of importance to be decided in this Appeal are :-

1. Whether the Appeal herein is within the jurisdiction of the Judicial Committee

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Committee under S.3 of the Judicial Committee Act, 1833.

2. Whether the opinions with regard to exemplary damages of the House of Lords in Rookes v. Barnard (1964) A.C. 1129 should be extended to Australia.

3. Whether the said opinions are correct in regard to damages for defamation.

THE RESPONDENT'S CONTENTIONS

8. By S.3. of the Judicial Committee Act, 1833 the jurisdiction of the Judicial Committee is defined as follows :-

> "All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law statute or custom, may be brought before His Majesty or His Majesty in Council, from or in respect of the determination, sentence rule or order of any Court, judge or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of his, Privy Council, and that such appeals causes and matters shall be heard by the said Judicial Committee ...."

The Respondent was unrepresented on the hearing of the Petition herein owing to personal considerations and in the expectation that the Board would rule that the Petition raised an "academic question" outside the purview of section 3 of the Judicial Committee Act, 1833. The petition as originally drafted sought an order that, in effect, Rookes v. Barnard (1964) A.C. 1129 was rightly decided. However on the hearing of the Petition and without notice to the Respondent, the Petition was amended so as to call in question the High Court's determination (so described) "that as a matter of law it was competent to award punitive damages in this case"

9. It is respectfully submitted that the High Court made no such determination and that

consequently there is nothing before the Board within its juridiction under section 3 of the Judicial Committee Act, 1833. Record

In support of his contention the Respondent will refer to the Order of the High Court of Australia dated 2nd June, 1966 which ordered inter alia: p.153

> "that this appeal be and the same is hereby allowed AND THIS COURT DOTH FURTHER ORDER that so much of the Order of the Supreme Court of New South Wales as directed a new trial limited to damages be and the same is hereby varied by directing a new trial on all issues AND THIS COURT DOTH FURTHER ORDER that this Cross-appeal be and the same is hereby dismissed ...."

and to the judgments of the High Court of Australia p.127-152

10. The Respondent will further refer to the definition of "determination" in this sense appearing in the Oxford English Dictionary (1897) Edition as being :

> "The ending of a controversy or suit by the decision of a judge or arbitrator; judicial or authoritative decision or settlement (of a matter in issue)".

and to Stroud's Judicial Dictionary 3rd Ed.p. 802 under "Determination".

Reference will also be made to the judgment of Vaisey J. in In Re: 56 Denton Road, Twickenham (1953) C.H.D. 51, where when dealing with a "determination" under the War Damage Act, 1943 he said at page 56:-

> "Now, first of all, there is no magic in the word "determination". That I think is obvious. For if any two words in such a context as this are synonymous, that is in my judgment true of the words 'decide' and "determine"."

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Some assistance as to the meaning to be attributed to "determination" of an action, or complaint may also be derived from, The Diss Urban Sanitary Authority v. Aldrich 2 Q.B.D. 179; Burnaby v. Robert Earle L.R. 9 Q.B. 490 and The Queen v. The Keepers of the Peace and Justices of the County of London 25 Q.B.D. p.357.

p.127-152

11. It is respectfully submitted that on an examination of the judgments of the High Court of Australia in this case there was no determination or decision, "that as a matter of law it was competent to award punitive damages in this case", and that, if an attempt is now made by the Appellants herein to make any further amendment, leave to do so should be refused, or alternatively only granted upon the most stringent terms

12. It is further submitted that the High Court's ruling as to libel damages should not be disturbed as it adheres to long established principles of unquestioned and undiminished authority. The High Court reflects local sentiment on matters pertinent to Australian needs and circumstances. The Respondent adopts

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Taylor J.'s view that:-

> "the measure of research disclosed by the observations in Rookes V. Barnard takes no account of the development of the law of this country where frequently this Court has recognised that an award of exemplary damages may be made in a much wider category of cases than that case postulates."

p.176

and that of Menzies J.

> "In Australia, as in England prior to Rookes v. Barnard such a limitation upon the power to award exemplary damages has 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

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not merely that in the authorities there is nothing to support the limiation adopted by the House of Lords but the law has from time to time been stated in different terms".

13. In Rookes v. Barnard Lord Devlin, after a review of the previous English cases, and a reference to the Law Reform (Miscellaneous Provisions) Act 1934 S.1. 2(a) and the Reserve and Auxilary Forces (Protection of Civil Interests) Act 1951 section 13(2) went on to say (1964 A.C. at page 1225 :

> "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 recognise the exemplary principle."

The only authority on exemplary damages in cases of defamation which appears to have been extensively relied on by Lord Devlin is Ley v. Hamilton 153 L.T. 384. It is submitted that in that case, both in the House of Lords and in the Court of Appeal, Ley v. Hamilton 57 ~~109~~ L.T. 360, the principle of punishment as a possible element in damages for defamation was accepted.

14. In Australia the concept of punishment or example as an element in damages has stood for many years and it is submitted that the precedent there established and, it is submitted, even more firmly established than in this country, should not be lightly disregarded. The Respondent will refer to The Herald and Weekly Times Limited v. McGregor (1928) 41 C.L.R. 254: Triggell v. Pheeney (1951) 82 C.L.R. 497: Williams v. Hursey (1959) 103 C.L.R. 30 and Fontin v. Katapodis (1962) 108 C.L.R. 177 and the cases cited therein. As far as is known none of these cases were cited to or considered by the House of Lords in Rookes v. Barnard

It is respectfully submitted that while paying the utmost respect to the views of the

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House of Lords in Rookes v. Barnard it is open to the Judicial Committee to consider whether these views should be extended with a complete disregard of established precedent to Australia.

15. The Respondents will further refer to Vane v. Yiannopoullos 1964 A.C. 486. There Lord Reid, dealing with the question of knowledge in licencing offences at p.497, -said this:-

> "If this were a new distinction recently introduced by the Courts, I would think it necessary to consider whether a provision that the licence holder shall not knowingly sell can ever make him vicariously liable by reason of the knowledge of some other person. But this distinction has now been recognised and acted on by the Courts for over half a century. It may have been unwarranted in the first instance but I think it now too late to upset so long standing a practice."

It is submitted that this approach should be followed here.

16. Should the question arise directly in this case it will be submitted on behalf of the Respondent that in so far as the views expressed in the House of Lords in Rookes v. Barnard related to damages for libel they were (a) obiter (b) in error and (c) that in any event they should not be extended to Australia.

With regard to (a) the Respondent will respectfully submit that Lord Devlin was clearly recognising that his views as expressed in Rookes v. Barnard went far beyond what was necessary to decide the issue as to the measure of damages in that case. Thus at p.1226 he says:

> "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

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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, although not compelling, authority for allowing them a wider range."

It is submitted that Lord Devlin is quite clearly recognising that the principles which he is laying down are of general application and obiter to the decision in that case.

17. If it be submitted on behalf of the Appellants that the views expressed by Lord Devlin on damages for libel do form one of the rationes decidendi of Rookes v. Barnard the Respondent will submit that they fall within the second or third categories expressed by Lord Reid in Midland Silicones Limited v. Scruttons Limited (1962) A.C. 446 at 476.

"I would not lightly disregard or depart from any ratio decidendi of this House. But there are at least three classes of case where I think we are entitled to question or limit it. First where it is obscure, secondly where the decision itself is out of line with other authorities or established principles, and thirdly, where it is much wider than was necessary for the decision so that it becomes a question of how far it is proper to distinguish the earlier decision."

Reference is also made to the opinion of Lord Denning in Close v. Steel Company of Wales Ltd (1962) A.C. 367 at p.388:

"The doctrine that your Lordships are bound by a previous decision of your own is, as I have always understood it, limited to the decision itself and to what is necessarily involved in it. It

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does not mean that you are bound by the various reasons given in support of it, especially when they contain 'propositions wider than the case itself required ."

18. The Judicial Committee has not regarded itself as bound by its own decisions, Bentwich Privy Council Practice 3rd Ed. p. 237; The Dominion of Canada v. The Province of Ontario (1910) A.C.64, the House of Lords has now stated that it also is no longer necessarily to be bound by its previous decisions. In the course of his statement reported (1966) 1 W.L.R. p.1234 the Lord Chancellor said:-

"Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of law. They propose therefore to modify their present practice and, when treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

In the past difficult problems have arisen where there have been conflicts of opinion between the Judicial Committee and the House of Lords or between decisions of the Court of Appeal and the High Court of Australia.

One example is in the matter of Crown privilege in relation to the production of documents between Duncan v. Cammell Laird & Co., Ltd. (1942) A.C. 624 in the House of Lords and Robinson v. State of South Australia (1931) A.C. 704 in the Judicial Committee. In New Zealand, Victoria and New South Wales, judges have taken different views as to which decision should be followed by them. Reference may be made to Corbett v. Social Security Commission 1962 N.Z.L.R. 878, Bruce v. Waldron 1963 V.R.3. Commissioner for Railways v. Nash 1963 N.S.W.R. 30. Ex Parte Black, Re Morony 1965: N.S.W.R. 1934.

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Further problems were encountered in relation to the standard of proof in adultery when the High Court of Australia in Wright v. Wright (1948) 77 C.L.R. 191 preferred to follow its previous decision in Briginshaw v. Briginshaw (1938) 60 C.L.R. 336 to the subsequent decision of the Court of Appeal in Genisi v. Genisi (1948) P.179. In the House of Lords in Blyth v. Blyth (1966) 2 W.L.R. 634 at p. 650 Lord Denning, one of the majority said:

> "Sitting in this House, I feel at liberty to say that I prefer Wright v. Wright to Genisi v. Genisi"
>
> Lord Pearce at page 653 - 654 concurred with this view.

19. In recent times the High Court of Australia has three times refused to follow a decision of the House of Lords. First in Parker v. The Queen (1963) 111 C.L.R. 610, refusing to follow certain propositions as to criminal intent in D.P.P. v. Smith 1961 A.C. 290 secondly Shelton v. Collins 39 A.L.J.R. 480 refusing to follow H. West & Sons Ltd. v. Shephard (1964) A.C. 326 and thirdly in the present case. In Shelton v. Collins it was said by four of the five judges that the High Court:

> "is not bound by decisions of the House of Lords, but it recognises their high persuasive value. Other Courts in Australia should follow the High Court where there is a clear conflict between a decision of the House of Lords and the High Court upon a matter of legal principle".

It is submitted that there is now no reason why in some future case the House of Lords might not prefer, in accordance with the Lord Chancellors statement, "when it appears right to do so", to follow a line of decisions in Commonwealth Courts rather than to abide by an earlier decision of its own.

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20. If that is now the position it is clearly, it is submitted, open to the Judicial Committee while giving great weight to the opinions expressed by the House of Lords in Rookes v. Barnard to consider the question of exemplary damages for defamation on its merits and in the light of both English and Commonwealth decisions.

21. It is further submitted that the High Court were correct in refusing to follow Rookes v. Barnard for the reasons set forth in the judg- 10
p.154-188 ments in Uren v. John Fairfax & Sons Pty.

In particular it is submitted that the two categories of cases in which exemplary damages may be awarded, according to Lord Devlin, are too narrow or alternatively not exhaustive. With regard to the first category, "oppressive, arbitrary or unconstitutional action by servants of the government", the Respondent adopts the reasoning of Taylor J. (a) as to the fact that the said limitation is 20
p.164-166 not justified in the reasoning of the earlier decisions and, (b) that considerable difficulties arise in determining what is and what is not a
p.164 servant of the government, and in following why any distinction should be drawn between the servant of a nationalised undertaking and the servant of a public company carrying on business in competition with it in the same field.

With regard to the second category, those cases "in which the Defendant's conduct has been 30
calculated by him to make a profit for himself" the Respondent adopts the reasoning of Taylor
p.166-169 J, (a) that the conclusion is not justified on the reasoning of the previous cases and, (b)that the category, as a category, is not justifiable in that an unjustified distinction is drawn between wrongs committed with a profit-making motive and wrongs committed with:-

> "the utmost degree of malice or vindicti- 40
> vely, arrogantly or high handedly with a contumelious disregard for the Plaintiffs
p.168-169 rights"

Reference may be made to Bell v. Midland

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Railway Co. (1861) 10 C.B.N.S. 287, Williams v. Currie (1845) I.C.B. 841, Crouch v. The Great Northern Railway Company (1856) 11 Ex. 742, Sharpe v. Brice (1774) 2 Bl.M.942, Leigh v. Pope (1779) 2 Bl.W. 1327 It is further submitted that the application of the principle creates considerable difficulty particularly where a judge is called upon to sum up to a jury. Reference will be made to Manson v. Associated Newspapers Ltd. (1965) 1 W.L.R. 1038: McCarey v. Associated Newspapers Ltd. (No. 2) (1965) 2 W.L.R. 45: Broadway Approvals Ltd. v. Odhams Press Limited (No. 2) (1965) 1W.L.R. 805. The Respondent will also refer to Rook v. Farrie (1941) 1 K.B. 507, Bull v. Vasquez and Another (1941) 1 A.E.R. 334: Praed v. Graham 24. Q.B.D. 53 and Watt v. Watt (1905) A.C. ~~105~~ 115

22. It will further be submitted that it is open to the Judicial Committee, in deciding whether or not the view that exemplary damages for defamation should be limited as proposed in Rookes v. Barnard should be extended to Australia, to consider the position in other Common Law systems. Decisions or authorities in this respect were not cited to or considered by the House of Lords in Rookes v. Barnard

Reference will be made to the United States where the position is summarised in Sedgwick on Damages 9th Ed. at page 734:

> "In actions for libel or slander exemplary damages may be given in the proper case. The evil intent that justifies exemplary damages in these cases is usually express malice of which the falsity of the defamation is evidence but it is enough if the defamation was uttered with wilful indifference to the consequences that is, in mere wantonness."

Reference is also made to the dictum of Mr. Justice Grier in the Supreme Court in Day v. Woodworth 13 How. 363 (Sedgwick p.679): and to the Restatement of the Law (Torts) Sections 621, 908 and 921.

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23. Exemplary damages for libel are also firmly established in the law of Canada, reference may be made to Knott v. The Telegram Printing Co.,Ltd. (1917) 3 W.W.R. p.335 in the Supreme Court.

The Court was not in agreement on whether a new trial should or should not be granted but all seem to have taken the view that the jury at the trial were clearly entitled to award exemplary damages.

Thus Duff J. (dissenting) at p.339:

> "I think it not only right but necessary however to add that the course of those responsible for the publication of the statements complained of deserves the severest condemnation, not only on account of the publication itself but on account of their conduct in maintaining until the last moment before the trial a plea of justification upon the record, and in the easy cynicism with which they treated the grave wrong they had done to the Plaintiff. It is emphatically a case for the exercise of the punitive jurisdiction with which the primary tribunal is endowed in cases of defamation."

and Anglin J. (one of the majority) at p.341:

> "The damages are large and were, no doubt awarded upon a punitive or exemplary rather than on a purely compensatory basis. It is, however, within the province of the jury so to deal with this case".

In a later decision of the Ontario Court of Appeal, Ross v. Lamport 1957 D.L.R.Vol. 585 a wide exemplary principle was again applied.

24. For these reasons and for the reasons set forth in the judgments of the High Court in this case and in the case of Thomas Uren v. John Fairfax & Sons Pty Limited it is submitted that at least in respect of damages for defamation the views expressed in Rookes v. Barnard should not be extended to Australia.

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p.154-188

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25. It is further submitted that the controversy over the case of Rookes v. Barnard has overshadowed the grave injustice that has been occasioned to the Respondent in earlier appellate proceedings.

After a fair trial he obtained a verdict with substantial, but by no means excessive damages.

Now, four years after writ issued and three years after the trial the Respondent is confronted with a general new trial and is heavily burdened with appeal costs.

Yet the libels were of a serious nature and gratuitously offensive. The trial revealed no repentance on the part of the defence.

Fanciful grounds of appeal unfortunately distracted certain of the appellate Judges from the principals properly applicable. p.60-66

It is submitted that a verdict for the Appellants on the trial of this action would have been perverse.

Any application further to amend the Petition, if made, or any amendment granted or permitted should it is submitted, be wide enough to allow the Respondent to contend for restoration of the Jury's verdict.

The Respondent will refer to Toronto Railway Co.v. King (1908) A.C. 260

26. It is finally submitted that it is reasonable to assume that the real purpose of the Appeal is to ingraft Rookes v. Barnard on the Australian "corpus juris" for the benefit of the Press. If this assumption is correct, then the instant case is being used as the vehicle for a unilateral test case. Consequently the Appellants should meet the costs of these proceedings whatever the outcome.

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CONCLUSIONS AND REASONS

27. The Respondent, therefore, respectfully submits that the Appeal herein should be dismissed with costs for the following among other,

REASONS

(1) BECAUSE the Appeal herein is not within the jurisdiction of the Judicial Committee under S. 3. of the Judicial Committee Act, 1833.

(2) BECAUSE the dicta in Rookes v. Barnard should not be extended to Australia.

(3) BECAUSE the views therein expressed as to exemplary damages in defamation were obiter and should not be permitted to overrule established authority.

(4) BECAUSE the categories of exemplary damages therein propounded are too narrow.

(5) BECAUSE the categories of exemplary damages therein propounded were arrived at without consideration of either Commonwealth or other Common Law decisions.

(6) BECAUSE as far as exemplary damages for defamation are concerned those views are incorrect.

(7) BECAUSE of the reasons in the judgments in this case and in the case of Thomas Uren v. John Fairfax & Son Pty Limited given by the learned Judges of the High Court and in the judgments of the Supreme Court of New South Wales.

CLIVE EVATT

R. J. SOUTHAN.

IN THE PRIVY COUNCIL No. 4 of 1967

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N:

AUSTRALIAN CONSOLIDATED PRESS LIMITED (Appellants) Defendants

- and -

THOMAS UREN (Respondent) Plaintiff

CASE FOR THE RESPONDENT

COWARD, CHANCE & CO.,
St. Swithin's House,
Walbrook,
London E.C.4.